No. 09-520

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

SUPPLEMENTAL BRIEF OF RESPONDENTS

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

Misty S. Fairbanks
William G. Parker, Jr.
Assistant Attorneys General

Office of the Alabama Attorney General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300
cmaze@ago.state.al.us

Margaret Johnson McNeill
Assistant Counsel

State of Alabama
Department of Revenue
Post Office Box 320001
Montgomery, AL
36132-0001
(334) 242-9690

May 24, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Code

Other Authorities

SUPPLEMENTAL BRIEF OF RESPONDENTS

In Alabama, railroads pay the same State tax rate as other commercial and industrial businesses that use diesel fuel off-road. Railroads currently pay 36% *less* in State taxes per gallon of diesel fuel than commercial and industrial businesses that use diesel fuel on-road—including the railroads' primary competitor, motor carriers. The United States asks the Court to grant review but then ignore these facts, even though it agrees with Alabama that these facts could be dispositive of CSX's discrimination claim.

The United States identifies three primary questions in this case:

- *Threshold/Cognizability*: Is a State's generally applicable sales-and-use tax subject to invalidation under subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified at 49 U.S.C. § 11501(b)(4), because it exempts one or more of a railroad's competitors?

- *Scope of Review*: Can a federal court review the State's overall tax structure when judging a railroad's discrimination claim under subsection (b)(4)?

- *Ultimate/Discrimination*: If a State's generally applicable sales-and-use tax can violate subsection (b)(4), does Alabama's sales-and-use tax on diesel fuel discriminate against CSX?

U.S. Br. 10, 17-18. The United States recommends the Court grant review and reverse on the threshold cognizability question; it agrees with Alabama on the scope-of-review question; and, it asks the Court to avoid the ultimate question of discrimination. U.S. Br. 17-20.

Above all, the Eleventh Circuit's decision was correct, and certiorari review is unwarranted on the threshold cognizability question. *See infra* Part I. That said, in Part II, we demonstrate why it is imperative that, if the Court grants review and agrees with CSX on the threshold question, the Court explicitly agree with Alabama and the United States that "in resolving a claim of unlawful tax discrimination under Subsection (b)(4), a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers," U.S. Br. 17, before either deciding or remanding the ultimate question.

I. The Court Should Deny Certiorari Review.

Certiorari review is not warranted on the threshold cognizability question for three primary reasons. First, the Ninth and Eleventh Circuits correctly applied the Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), an opinion the Eighth Circuit essentially ignores. BIO 3-8. Second, the two-to-one circuit split is shallow. Third, Alabama is not discriminating against CSX; thus, reversal on the threshold question will not change the ultimate outcome of this case. BIO 8-10. We do not rehash these points here. Instead, Alabama addresses four issues arising from the United States' brief.

1. *The Eleventh Circuit's Opinion*: We do not counter the United States' criticism of the Eleventh Circuit's opinion in detail here. *See* U.S. Br. 11-15. Suffice it to say, we believe the United States is mistaken on several counts.

But we must make one point: The 4-R Act's fundamental inquiry—*i.e.*, whether railroads are placed on equal footing with other commercial and industrial businesses—should not change depending on whether courts are reviewing property or non-property taxes.[1] The 4-R Act expresses no such distinction.

---

[1] Similarly, the proper comparison class for subsection (b)(4) claims against property and non-property taxes is commercial and industrial taxpayers, not a hand-picked competitor.

In *ACF*, the Court held that a State property tax is not subject to "invalidation" under subsection (b)(4) as long as the tax is "generally applicable." *ACF*, 510 U.S. at 340. In other words, when a State *property* tax is at issue, the 4-R Act does not allow the railroads to complain that a State's generally applicable tax discriminates against them simply because a competing interstate carrier (in *ACF*, the motor carriers) received an exemption from the tax.

Yet, like CSX, the United States contends that when a generally applicable *non-property* tax is challenged on the grounds that "competing transportation providers are exempt," the tax "is subject to challenge under 49 U.S.C. 11501(b)(4)." U.S. Br. 14. But neither the United States nor CSX points to the language that transforms subsection (b)(4) from the railroads' shield against being singled out vis-à-vis commercial and industrial businesses with regard to property taxes into a sword that (potentially) bestows most-favored-carrier status upon railroads when reviewing non-property taxes. They cannot do so because nothing in subsection (b)(4)'s language suggests this odd dichotomy.

2. *The Shallow Split*: Like CSX, the United States relies on two State supreme court cases, both from inside the Eighth Circuit, to bolster the two-to-one split among the federal circuits. See U.S. Br. 16.

Atchison, Topeka, & Santa Fe Railway v. Bair, 338 N.W. 2d 338 (Iowa 1983), which predates this Court's opinion in *ACF* by 11 years, sheds no light on

the question of whether a generally applicable sales-and-use tax is subject to challenge under the 4-R Act because some exemptions exist. The Iowa tax in question was not generally applicable; it was a "special excise tax on railroads." *Id.* at 341. Here, the Eleventh Circuit acknowledged that its decision would have been different if the tax in question singled out the railroads. Pet. App. 32a-34a. Accordingly, the *Bair* decision is inapposite.

In *Burlington Northern Railroad Company v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000), the State court did consider the railroad's challenge to Minnesota's generally applicable sales-and-use tax on diesel fuel. But the United States wrongly asserts that the State court "concluded that the taxes in question were invalid." U.S. Br. 9. To the contrary, the Supreme Court of Minnesota rejected the railroad's discrimination claim because "rail carriers and barges pay the same tax on fuel" and "this tax is significantly less than the fuel tax paid by their primary competitors, motor carriers." *BNRR*, *supra*, at 61.

Seven years later, the Eighth Circuit considered the same Minnesota tax structure. *See Union Pacific R.R. Co. v. Minnesota Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007). That court reached the opposite conclusion because binding circuit precedent "precluded the district court from considering the excise tax the motor carriers and airlines pay on fuel in making its determination." *Id.* at 695. In other words, in Minnesota alone, an outcome-determinative split exists between federal and state

courts on the scope-of-review issue upon which the United States and Alabama agree and which CSX seeks to avoid.

3. *Future Vehicle*: If the Court wishes to let this issue percolate, a future vehicle awaits in the Sixth Circuit. *See* U.S. Br. 16, n.16 (citing *Ill. Cent. RR. Co. v. Tenn. Dep't of Rev.*, No. 3:10-cv-197 (M.D. Tenn. filed Feb. 26, 2010)). In line with the railroads' nationwide litigation strategy outlined *infra* at 7-11, ICRR challenges its payment of Tennessee's sales-and-use tax on diesel fuel because motor carriers are exempt from sales-and-use tax; they instead pay Tennessee's motor fuels tax. *See ICRR*, *supra*, Complaint 3-5. In fact, ICRR's complaint was filed by the same attorneys who represented CSX below and is, in many parts, identical to CSX's complaint against Alabama. The ICRR proceedings are currently stayed pending this Court's decision on this petition. *See id.*, Order Granting Joint Motion to Stay Proceedings, Doc. 12.

4. *The Question Presented*: The United States proposes changing the wording of the question presented. *See* U.S. Br. 19-20. While we disagree with the United States' arguments for cabining this Court's review should the petition be granted, *see infra* Part II, we agree that the United States more accurately frames the threshold question than does CSX. As the United States correctly notes, CSX seeks to enjoin Alabama's sales-and-use tax, not its exemptions.

II. If the Court Grants Review and Agrees with CSX on the Threshold Question, It Should Also Agree with Alabama and the United States that Courts Reviewing a Subsection (b)(4) Claim Can Review a "State's Overall Taxing Regime."

Should the Court grant review and agree with CSX on the threshold cognizability issue, the United States (1) agrees with Alabama that courts reviewing a subsection (b)(4) claim can "consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers" but (2) recommends the Court remand the case to determine whether Alabama is discriminating against CSX. U.S. Br. 17-20. We disagree with the United States' contention that this Court cannot presently rule that Alabama is not discriminating against CSX. *See infra* at 12-13. But we begin by explaining why it is imperative that, should the Court rule with CSX on the threshold issue, this Court explicitly agree with Alabama and the United States on the scope of review.

1. *Scope of Review*: In a nutshell, the railroads are attempting to avoid State taxation on diesel fuel by conflating differentiation with discrimination. *See* U.S. Br. 15-16 (citing similar 4-R Act challenges against seven States' taxation of diesel fuel). The railroads' claims are predicated on the dual-nature of diesel fuel taxation, a duality encouraged by federal law.

The United States imposes a 24.3¢ per gallon tax on diesel fuel, 26 U.S.C. §4082(a)(2), but exempts from taxation diesel fuel that is "designated for off-road use under 26 U.S.C. §4082—which is what locomotives burn." U.S. Br. 6. In other words, motor carriers operate on-road and pay the federal motor fuels tax; railroads operate off-road and do not pay the federal motor fuels tax. To enforce this on-road/off-road tax distinction, federal law provides that diesel fuel used for off-road purposes must be "indelibly dyed by mechanical injection in accordance with regulations which the Secretary shall prescribe." 28 U.S.C. §4082(a)(2).

The States have embraced the differentiation between clear (on-road) and dyed (off-road) diesel fuel. Like the federal government, all 50 States charge a motor fuel excise tax for on-road, clear diesel fuel—*i.e.*, the diesel fuel used by the railroads' primary competitors, motor carriers.[2] As far as we have been able to tell, no State charges the same motor fuel tax on the railroads' use of off-road, dyed diesel fuel. Instead, the vast majority of States, including Alabama, tax the sale and/or consumption of dyed diesel fuel under the States' generally applicable "sales-and-use" or "gross receipts" excise taxes.[3]

---

[2] *See* Federation of Tax Administrators, *State Motor Fuel Tax Rates*, *available at* http://www.taxadmin.org/fta/rate/mf.pdf (charting the January 1, 2010 motor fuels tax rates for all 50 States) (last visited May 20, 2010).

[3] *See* Federation of Tax Administrators, *State Sales Tax Rates*, *available at* http://www.taxadmin.org/fta/rate/sales.pdf (charting the January 1, 2010 State sales tax rates, but not the States' gross receipts tax rates) (last visited May 20, 2010).

To prevent double taxation, the States generally exempt the payers of the motor fuel excise tax on clear diesel fuel, including motor carriers and individual citizens, from additionally paying sales-and-use excise tax on the same purchase. And we have been doing so for a very long time. *See*, *e.g.*, John F. Due & John L. Mikesell, *State Taxation*, 77 (1983) ("Gasoline and, in most, but not all, cases, other motor fuels subject to the motor fuel tax are exempt from sales tax in all but seven states").

Alabama, for example, levies a 19¢ per gallon motor fuel excise tax on clear (on-road) diesel fuel and the State's generally applicable 4% sales-and-use excise tax on dyed (off-road) diesel fuel. BIO 1-2. With diesel fuel currently retailing at around $3.00 per gallon, railroads pay 12¢ in State taxes per gallon of diesel fuel—7¢ per gallon *less* than motor carriers and individual citizens pay.[4]

Yet, CSX has seized on this on-road/off-road distinction to support its subsection (b)(4) claim. CSX's claim is nothing new. A quick review of the cases cited by the United States at pp. 15-16, which span lawsuits against seven States, reveals that *every* subsection (b)(4) claim by the railroads has cited the motor carriers' exemption from paying the State's sales-and-use tax on diesel fuel as

[4] Diesel fuel retailed at $3.02 per gallon in the Gulf Coast States in April 2010, the first month this year in which diesel costs exceeded $3.00 per gallon. *See* U.S. Energy Information Administration, *Weekly Retail Gasoline and Diesel Prices, available at* http://www.eia.doe.gov/dnav/pet/pet_pri_gnd_dcus_r30_m.htm (last visited May 20, 2010).

discriminatory. And, in every case, the motor carriers were instead paying the State's motor fuels tax on clear diesel fuel—a tax *not* being paid by the railroads.

The railroads' strategy of attacking the States' sales-and-use taxes in this manner explains CSX's desire to limit the Court's review to the threshold cognizability question. Reply Br. 2-3. What CSX wants—and *all* CSX wants—is for this Court to open the door to these claims nationwide. CSX wants to prevent the Court from addressing whether the motor carriers' payment of the more expensive motor fuels tax on diesel fuel impacts—or, as we believe, destroys—CSX's discrimination claim. And with good reason. Any decision that remands this case without offering the lower courts guidance on how to review the railroads' subsection (b)(4) claims will subject the States to an onslaught of costly 4-R Act litigation like the case currently stayed in Tennessee, in which the motor carriers' sales-and-use tax exemption is not only the primary, but the sole, basis for the railroad's subsection (b)(4) claim. *See ICRR*, *supra*, Complaint 4-5, ¶17-23.

Even worse, if any lower courts follow the Eighth Circuit's "unduly narrow" rule that the States' tax codes must be viewed with blinders when reviewing subsection (b)(4) claims, U.S. Br. 17, n.8, the railroads' claims could strip States of vital tax revenues. To date, neither Minnesota nor Missouri has rewritten its tax code to recapture the millions of dollars in revenue lost due to the Eighth Circuits' 2007 and 1999 opinions. *See UPRR*, 507 F.3d 693

(Minnesota); *Burlington N., Santa Fe Ry.* Co. *v. Lohman*, 193 F.3d 984 (8th Cir. 1999) (Missouri). In Alabama, a similar adverse ruling would remove millions of dollars from our public schools. *See* Ala. Code §§ 40-23-35, -85 (depositing sales-and-use tax proceeds into Alabama's Education Trust Fund).

For these reasons, even if the Court agrees with the United States that remanding the ultimate discrimination question is preferable, the Court should at least address the purely legal, nationally important issue of whether a court can review a State's "overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." U.S. Br. 17. The United States did not ask the Court to avoid this penultimate legal question. In fact, the United States has openly advocated that courts review a State's entire tax structure under subsection (b)(4) since at least 1993. *See* Brief for the United States as *Amicus Curiae* at 21-22, *ACF*, *supra* (No. 92-74) ("[A] State may be able in a particular case to justify a specific tax exemption by showing that the exempt property is subject to alternative [S]tate or local taxes that are not levied against railroads.") (footnote omitted).[5]

[5] Here, the question would be whether, when judging CSX's discrimination claim, the Court may consider (a) both of Alabama's excise taxes on diesel fuel (*i.e.*, motor fuels, *see* Ala. Code § 40-17-1 *et seq.*, and sales-and-use, *see* Ala. Code § 40-23-1 *et seq.*) or (b) just the challenged sale-and-use tax.

2. *The Ultimate Question:* While Alabama and the United States agree on the scope of review for subsection (b)(4) claims, we disagree on whether the Court can and should apply it to the ultimate question here—a question, to be clear, that we believe will be unnecessary to answer because CSX's claim is not cognizable under subsection (b)(4).

This Court can affirm a lower court's decision for any reason, even if not the reason given by the lower court. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason."). We agree with the United States that "the ultimate question of discrimination necessarily entails a factual inquiry." U.S. Br. 18. But, contrary to the United States' implication, *id.*, the facts necessary to reject CSX's claim (the amount of taxes paid on diesel fuel by CSX, their competitors, and other commercial and industrial businesses) are settled. In fact, CSX has acknowledged this agreement to the Court: "The parties stipulated to all relevant facts." Pet. 5 (citing 11th Cir. Expanded Record Excerpts ("ERE") No. 12.).

Accordingly, CSX's claim was ripe to be summarily dismissed as meritless for the reasons outlined in our Brief in Opposition at pp. 8-10, just as the Supreme Court of Minnesota and both panels of the Eighth Circuit reached the ultimate question of discrimination on summary judgment orders because no outstanding material issues of fact

existed in those cases either. *See UPRR,* 507 F.3d at 694-96; *Lohman*, 193 F.3d at 985; *BNRR*, 606 N.W.2d at 55-57.

* * *

In summary, certiorari review is unwarranted because the two-to-one circuit split is shallow and the Eleventh Circuit falls on the correct, majority side of the split. If review is granted, we will argue for affirmance both on the threshold cognizability issue and on the alternative ground that judgment was proper because Alabama is not discriminating against CSX. And regardless of whether the Court addresses the ultimate question of discrimination, the Court should explicitly agree with Alabama and the United States that a States' entire tax structure—not just the provision being challenged—must be considered when judging a discrimination claim under subsection (b)(4).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

Misty S. Fairbanks
William G. Parker, Jr.
Assistant Attorneys General

Office of the Alabama Attorney General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300
cmaze@ago.state.al.us

Margaret Johnson McNeill
Assistant Counsel

State of Alabama
Department of Revenue
Post Office Box 320001
Montgomery, AL 36132-0001
(334) 242-9690

May 24, 2010