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

REPLY TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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May 24, 2010

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ARGUMENT

The Acting Solicitor General agrees with CSXT that the Eleventh Circuit erred in holding that the imposition on railroads of a generally applicable non-property tax, and exemption of railroad competitors from the same tax, is immune from scrutiny under 49 U.S.C. § 11501(b)(4). U.S. Br. 11-15. The Acting Solicitor General further agrees that this threshold issue "has continued to arise" in 4-R Act litigation, and that the conflict among the federal circuits and state courts of last resort on the issue is "entrenched" and "worthy of this Court's review." *Id*. at 16. And like CSXT, the Acting Solicitor General urges that certiorari be confined to the threshold question whether CSXT's challenge to the Alabama tax is cognizable under subsection (b)(4) and not encompass whether the tax actually violates that provision. *Id*. at 17-20. For these reasons, the petition plainly should be granted.

The Acting Solicitor General recommends that CSXT's formulation of the question presented be slightly modified to make clear that "the relief in a successful Section 11504(b)(4) challenge is not to" revoke a tax exemption granted to non-railroads, but to enjoin imposing the tax on railroads. *Id*. at 19. The Acting Solicitor General's concern goes to the proper remedy under the 4-R Act, an issue that will not arise if the Court's review is limited to the question presented—whether CSXT's challenge is cognizable under subsection (b)(4). That said, CSXT does not object to the proposed reformulation of the question presented.

Only one other matter warrants mention. While noting that the Court has not been asked to address, and in fact should not address, the "ultimate validity"

of the challenged tax, the Acting Solicitor General states that a court resolving a subsection (b)(4) challenge "should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." *Id.* at 17. Of the five circuits to have expressly considered this issue, all have taken the opposite view and "decline[d] to look past the particular tax at issue to analyze the overall state tax structure." *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, 550 F.3d 1306, 1318 (11th Cir. 2008) (reproduced at Pet. App. 36a); *accord*, *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) ("we 'look only at the sales and use tax with respect to fuel to see if discrimination has occurred'") (quoting *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999)); *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir. 1991) (same); *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991) (same); *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 377-78 (5th Cir. 1987) (same); *Gen. Am. Transp. Corp.* v. *Comm. of Ky.*, 791 F.2d 38, 41-42 (6th Cir. 1986) (same).

There are sound reasons supporting the circuits' unanimous view that 4-R Act tax discrimination cases should focus solely on the particular tax at issue and forgo examination of a State's overall tax structure. One oft-cited reason is workability. As the Seventh Circuit explained, it is "unrealistic to think a court could figure out whether different taxes on other activities might offset the burden on the railroad industry of a tax limited to railroads." *Burlington N. R.R.*, 932 F.2d at 1187-88; *accord*, *Kan. City S. Ry.*, 817 F.2d at 377 ("Determining the intrinsic economic fairness of a [State's overall] tax system to a particular taxpayer is a paradigm of the

kind of polycentric problem for which courts are ill-suited."). The Fifth Circuit pointed to another problem, cautioning that "[a]side from the theoretical difficulty of assessing the basic fairness of a state tax system, an attempt to make the assessment would be extraordinarily costly to both the parties and the judicial system." *Ibid.*; *accord*, *Burlington N., Santa Fe Ry.*, 193 F.3d at 986 (the fairness of "a state's overall tax structure … is too difficult and expensive to evaluate") (internal quotation marks omitted). Moreover, "because the dynamic nature of any state's economy will alter the relative benefits and burdens of its tax system from moment to moment," *Kan. City S. Ry.*, 817 F.2d at 377, evaluating the overall fairness of a state tax system, even assuming the endeavor were feasible, could result in a challenged tax violating the 4-R Act in some years and complying in others. Finally, as a textual matter, "[t]here is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state." *Ibid.*; cf. *Ariz. Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 149-50 (1979) ("To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it.") (interpreting provision of Tax Reform Act of 1976 prohibiting state tax schemes that discriminate against out-of-state producers, sellers, or users of electricity).

The Acting Solicitor General's limited discussion of this issue (U.S. Br. 17 & n.8) does not consider case law from outside the Eighth Circuit, and does not address any of the several grounds articulated by the circuits over the years for focusing solely on the

particular tax at issue. In all events, CSXT agrees with the Acting Solicitor General that this issue need not be resolved at this juncture, and that certiorari should be limited to the threshold question whether CSXT's challenge to the Alabama tax is cognizable under subsection (b)(4).

CONCLUSION

For the foregoing reasons and those stated in the petition, the reply brief, and the *amicus curiae* brief, certiorari should be granted.

Respectfully submitted,

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