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U.S. SUPREME COURT UPDATE

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Briefs Filed in Three State Tax Cases Set for Oral Argument

***37** Merits briefs were filed in each of the three state tax cases on the Court's docket for the October 2014 Term. In *Comptroller of the Treasury of Maryland v. Wynne*, the taxpayers filed their response brief, asking the court to uphold the Maryland Court of Appeals ruling that invalidated the state's county income tax credit scheme. In *Direct Marketing Association v. Brohl*, the Direct Marketing Association, the plaintiff in the case below, filed its merits brief, arguing that the Tax Injunction Act should not bar federal courts from exercising jurisdiction in a challenge to a Colorado use tax notice and reporting statute. And in *Alabama Department of Revenue v. CSX Transportation*, Alabama filed its initial brief. Alabama claims that its imposition of sales and use tax on rail carriers' diesel purchases while exempting other carriers does not impermissibly discriminate against railroads. The Solicitor General of the U.S. also filed its secondamicus brief in the case in support of neither party.

Two new petitions for certiorari were filed involving state and local taxes. And, at press time, the Court had denied six previously reported petitions for certiorari, while one case remains pending.

Kentucky Real Property Retroactivity Tax Challenge

In *Wilkening v. Board of Education of Oldham County*, Docket No. 14-309, petition for cert. filed 9/9/14, ruling below at No. 2010-CA-002020-MR (Ky. Ct. App. 2013), the Court of Appeals of Kentucky affirmed a lower court's grant of summary judgment in favor of the Oldham County Board of Education and other county officials (the ‘School Board‘) and against a group of Kentucky taxpayers (the ‘taxpayers‘) who filed actions for tax refunds. The taxpayers initially claimed that the imposition of certain property taxes was unlawfully excessive because the taxes were not approved by a prior vote before imposition as required by state law.

While the litigation against the School Board was pending, however, the Kentucky General Assembly enacted legislation that retroactively eliminated the property taxes at issue from the state's general requirement of a prior vote. The court below upheld the validity of that enactment, and the taxpayers now ask the U.S. Supreme Court to review the Kentucky Legislature's decision to retroactively repeal their right to vote.

Kentucky school taxes.

****2** As explained by the Kentucky Court of Appeals, '[s]chool boards are authorized to levy ad valorem taxes to fund education subject to certain statutory limits that trigger elections.' Section 160.470(1) of Kentucky Revised Statutes establishes a general maximum property tax rate that a Kentucky school district cannot, on its own, exceed in any given year. This rate, known as the 'subsection one' tax rate, does not require prior voter approval. But amounts above this rate generally require a prior vote. *Id.*; Ky. Rev. Stat. Ann. § 157.440(2)(a).

At issue in the case are two state-approved taxes meant to help school districts raise revenue—the 'Growth Nickel Tax' and 'Equalized Growth Nickel Tax' (the 'nickel taxes'). Because the nickel taxes increased rates above the subsection one rate, the court acknowledged, 'at the time that the School Board levied taxes for the 2003-2008 school years under the statutes in effect during this period, a prior vote was required.' Despite this requirement, the School Board's nickel taxes were not submitted for prior voter approval.

Legislative changes.

In 2003, the Kentucky General Assembly enacted House Bill ('HB') 269, which, according to the court below, 'was a belated budget bill covering the 2002-2004 period.' HB 269 suspended certain restrictions on the School Board's ability to raise taxes contained in Ky. Rev. Stat. Ann. § 157.621, and the School Board interpreted the bill 'to authorize it to levy the [nickel taxes] without the need to seek prior voter approval of these taxes.' The taxpayers disagreed with this interpretation and initiated the refund litigation.

In 2008, however, while the taxpayers' litigation was pending (and other similar litigation), the General Assembly enacted HB 704. HB 704 amended Ky. Rev. Stat. Ann. § 157.621, the Kentucky statute mandating tax votes, to retroactively exempt the nickel taxes from the voter approval requirement if levied prior to April 24, 2008. In other words, as explained by the Court of Appeals, '[b]y making these changes, HB 704 retroactively established the validity of the Board's determination that it did not need to submit its levies for prior voter approval.'

Thus, as noted above, the taxpayers initially argued in the refund litigation that the School Board's interpretation of HB 269 that eliminated the prior vote requirement for the nickel taxes was incorrect. (They also argued that HB 269 violated the Kentucky Constitution by failing to satisfy its republication, title, and subject-matter requirements.) After the enactment of HB 704, however, the taxpayers also challenged the constitutionality of that legislation, 'claiming that ***38** it violated their right to a prior vote and the separation of powers' doctrine.

Retroactive repeal of requirement for a prior vote.

Before the Kentucky Court of Appeals, the taxpayers argued that HB 704 was unconstitutional because it 'impair[ed] their fundamental right to vote,' and because it violated the separation of powers doctrine (i.e., the Legislature repealing the limitations set forth in Section 157.621 of Kentucky's Revised Statutes in 2003, and then amending the same statute in 2008, to retroactively remove the limitations after the challenged taxes had been levied and the taxpayers filed suit).

****3** As stated by the Kentucky Court of Appeals, '[w]hether a prior election was required depends upon whether HB 704 validly amended KRS 157.621 to retroactively eliminate the [nickel taxes] from the requirement of a prior vote.' Because the court agreed that '[t]he language of HB 704 expresses a clear intent by the General Assembly to retroactively exempt the [nickel taxes] from prior voter approval,' it examined whether the retroactive legislation was permissible.

According to the Kentucky Court of Appeals, 'retroactive legislation is permissible so long as it does not arbitrarily, or without due process, terminate or impair the judicial rights of a litigant. *Louisville Shopping Center, Inc. v. City of St. Matthews,* 635

S.W.2d 307, 310 (Ky. 1982).' The court determined that 'the retroactive amendment of KRS 157.621 is rationally related to the legitimate legislative purpose of addressing shortfalls in public school financing for counties experiencing large increases in student populations. The right to vote on levying taxes for school purposes is not a fundamental right because such a right has been delegated by the legislature and can also be taken away by the legislature. *Christopher v. Robinson,* 164 Ky. 262, 175 S.W. 387, 388 (1915).'

It furthermore found that 'The General Assembly could properly decide that allowing taxpayers to vote upon the [nickel taxes] was an impediment to adequately funding schools and eliminate the right to vote on these taxes.' In their petition to the Supreme Court, the taxpayers argue that the Kentucky court was wrong to use a rational basis review and that because voting is a fundamental right, strict scrutiny is the appropriate standard of review

The Court of Appeals also held that the retroactive application of KRS 157.621 to the taxpayers' case did not violate the separation of powers doctrine. In deciding this issue, the court cited to a Kentucky appellate court decision that relied on the U.S. Supreme Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)—which held that, although Congress is prohibited from 'retroactively commanding the federal courts to reopen final judgments,' it is not barred from 'affecting a pending case by retroactively 'amend[ing] applicable law.'' Applying this rationale to Kentucky's separation-of-powers provisions, the court ruled that '[b]ecause Taxpayers case had not become final, and they did not yet have a right to a tax refund, the retroactive amendment of KRS 157.621 did not violate the separation of powers doctrine.'

Questions presented.

In their petition for certiorari, the taxpayers present two questions for review:

1 'Whether a right to vote in a referendum, once granted by a state legislature, is fundamental and when substantially burdened, is subject to this Court's strict scrutiny analysis under the Due Process Clause.'

2 'Whether a state's interest in preventing tax refunds gives the state an unfettered right to retroactively repeal a right to vote in a compulsory referendum on prior taxes.'

Tribal Claim to Refund of Florida Fuel Taxes

****4** In *Seminole Tribe of Florida v. Florida Department of Revenue*, Docket No. 14-351, petition for cert. filed 9/25/14, ruling below at 750 F.3d 1238 (11th Cir. 2014), the U.S. Court of Appeals for the Eleventh Circuit, with one judge concurring in part and dissenting in part, held that sovereign immunity bars a federal complaint by the Seminole Tribe of Florida ('Tribe'), a federally recognized Indian tribe, against the Florida Department of Revenue and its Executive Director (the 'Department') for a declaratory judgment that the tribe is exempt from paying a Florida tax on motor and diesel fuel and for an injunction requiring a refund of taxes paid. The Tribe argued that the Florida fuel tax on motor and diesel fuel purchased off tribal lands violated the Indian Commerce Clause of the U.S. Constitution (U.S. Const., Art. 1, s. 8, cl 3), the Indian Sovereignty doctrine, and the Equal Protection Clause of the U.S. Constitution.

In its petition for certiorari, the Tribe argues that the Supreme Court in *Ex parte Young*, 209 U.S. 1908 (1908), established a doctrine ('the *Ex parte Young* Doctrine'), whereby a plaintiff may sue state officials for prospective injunctive relief against the enforcement of an unconstitutional state law. The Tribe argues that the Eleventh Circuit improperly departed from the Supreme Court's precedent when 'it held that *Ex Parte Young* does not permit the Seminole Tribe of Florida to seek injunctive or declaratory relief against the future unconstitutional enforcement of Florida's fuel tax scheme.' According to the Tribe, 'the court's holding turned on the fact that Florida precollects this tax from a third party, which means that an order barring future enforcement against the tribes might require the state to issue tribal consumers refunds 'from state coffers,' supposedly in violation of the Eleventh Amendment.'

Florida's fuel tax pre-collection system.

Florida imposes an excise tax on fuel purchased in the State. As stated by the Court of Appeals, '[f]or administrative convenience, the State precollects the tax from suppliers of fuel before the suppliers sell the fuel to consumers. ' Fla. Stat. § 206.41(4)(a). The cost of the tax is then passed on to consumers who purchase the fuel at the pump. But, as provided in the statute, the 'legal incidence of the tax' is 'on the ultimate consumer.' Florida law exempts some consumers, but not the Tribe, from the fuel tax. Fla. Stat. § 206.41(4).

Opinions below.

As explained by the Court of Appeals, '[t]he Tribe argues that, because it maintains its own roadways, it is entitled to a refund for taxes paid for fuel expended on tribal lands by vehicles carrying out essential government services, regardless of where the Tribe purchased the fuel.' And, the Department argues that '[t]he Tribe does not actually use the fuel on tribal lands because Florida law defines the 'use' of fuel as occurring when consumers fill the fuel tanks in their vehicles.'

The Tribe first sued the Department in a Florida court for a refund of its fuel ***39** taxes paid between 2004 and 2006. In its state-court action, the Tribe also sought a declaratory judgment that the fuel it used on its reservations was exempt from tax, regardless of where it was purchased. But a Florida court of appeals held that the tax did not violate the Indian Commerce Clause because, as summarized by the court, 'the State levied the tax at gas stations located off tribal lands.'

****5** The Tribe then brought this federal action for taxes paid between 2009 and 2012. The Tribe sought injunctive relief and various declaratory judgments that it was exempt from the fuel tax under the Indian Commerce Clause and the Indian Sovereignty Doctrine. The Tribe also argued that it was entitled to injunctive relief and a declaratory judgment that it is entitled to a refund under the Equal Protection Clause of the U.S. Constitution. The district court dismissed the Tribe's complaint for lack of subject matter jurisdiction. According to the district court, the Tribe was barred from relitigating its earlier state court complaint, both under federal case law and under the federal Tax Injunction Act ('TIA') (although not at issue in its petition to the Supreme Court, the Tribe argues that the TIA does not apply to Indian tribes—a view expressly adopted by the dissent in the Court of Appeals ruling).

Sovereign immunity and the *Ex parte Young* Doctrine.

The Eleventh Circuit court did not directly address the lower court's rulings, but instead affirmed the dismissal on an alternative ground—sovereign immunity. As explained by the Court of Appeals, the Eleventh Amendment to the U.S. Constitution 'recognizes that states ordinarily enjoy sovereign immunity from suits in federal court.' According to the appellate court, '[a]n Indian tribe can sue a state and its departments in federal court only if Congress has validly abrogated the immunity of the state or if the state has waived its immunity, but neither of those conditions has occurred here.'

The Court of Appeals also found that the Tribe could not 'circumvent the sovereign immunity of Florida by suing the Director of the Department based on the decision in *Ex parte Young*, [209 U.S. 123 (1908)].' The Court explained that 'a federal court has jurisdiction to entertain suits against individual officers of a state 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce . . . an unconstitutional act, violating the Federal Constitution.'' However, it determined that the Tribe's suit was 'not to enjoin an individual officer from committing a violation of federal law; it [was] instead a suit for monetary relief to be financed by the Florida fisc.'

As a result, the Court of Appeals found that 'a judgment 'enjoining the Department and its Executive Director's continued and prospective refusal to refund the Fuel Tax,' as the Tribe demands in its complaint, would amount to a money judgment against Florida.' And, the court concluded that '[w]e cannot declare the Tribe exempt from the fuel tax, nor can we enjoin the

Department and its individual officer to pay the Tribe a refund. Granting either form of relief would be tantamount to a judgment that Florida must pay the Tribe cash from state coffers. State sovereign immunity forecloses that relief.'

The Eleventh Circuit court also determined that it 's[aw] no reason to stretch the bounds of *Ex Parte Young* to allow the Tribe to sue the Department and its individual officers in federal court when, after the passage of the Tax Injunction Act, 28 U.S.C. 1341, non-Indian taxpayers must challenge taxes in state court.'

The dissent.

****6** One judge from the Court of Appeals dissented from the court's dismissal of the counts below that sought a declaratory judgment against Florida officials that the future imposition of certain fuel taxes was unconstitutional as applied to the Tribe. According to the dissent, the counts 'do not ask for refunds, but rather seek only a declaration that fuel purchased by the Tribe for use on tribal land or in the provision of essential governmental services is exempt from the fuel tax under the Indian Commerce Clause,' which it believes is a permissible suit under *Ex parte Young*.

The dissent also noted that there is no 'precollection exception' to the *Ex parte Young* Doctrine and that 'Florida's choice to precollect the challenged fuel tax now and in the future does not somehow transform the Tribe's requested declaratory relief from permissibly prospective to impermissibly retrospective. ' According to the dissent, the court's ruling 'would allow a state to shield the enforcement of any tax, no matter how constitutionally untenable, from challenge in federal court simply by enacting a precollection procedure.' The dissent therefore concludes that, under *Ex parte Young*, the Eleventh Amendment should not bar the Tribe's prospective complaints against the Department and its Executive Director and that the Tribe's complaint should be remanded to the district court for further proceedings.

Question presented.

'Whether sovereign immunity bars an American Indian tribe from seeking *Ex parte Young* relief from the unconstitutional enforcement of a state tax scheme merely because the relief might require refunds for taxes unlawfully collected in the future.'

Update on Docketed State and Local Tax Cases

Merit briefs have been filed in the three state and local tax cases for which the Court has granted review.

Taxpayers' response brief filed in *Wynne*.

On 9/19/14, attorneys for the taxpayers in *Comptroller of the Treasury v. Wynne*, Docket No. 13-485, cert. granted 5/27/14, ruling below at 431 Md. 147, 64 A.3d 453 (2013) filed their reply brief with the Court, arguing that Maryland's income tax credit scheme violates the Commerce Clause of the U.S. Constitution. In this case, the taxpayers are asking the Court to uphold a Maryland Court of Appeals (the state's highest court) decision, which found that the state's credit against Maryland state income taxes for income taxes paid to other states violated the Commerce Clause of the U.S. Constitution because the credit was not available to offset county-level income taxes.

The Maryland court analyzed the taxpayers' challenge to the statute granting the credit under the dormant Commerce Clause test announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), whereby a state tax will pass constitutional ***40** muster if the tax: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. Focusing on the requirements of fair apportionment and no discrimination against interstate commerce, the Maryland court found that the lack of a credit against the county tax resulted in the tax failing both prongs.

****7** In their brief, the taxpayers argue that, '[t]he Commerce Clause forbids taxes, including income taxes, that subject interstate commerce to the risk of multiple taxation.' And, in their view this clause of the U.S. Constitution 'resolves this case.' Namely, they contend that 'Maryland has enacted an income-tax scheme that systematically causes the double taxation of those who earn money across state lines. 'Intrastate commerce,' meanwhile is 'not exposed' to that double taxation.'

The taxpayers also argue that this case is 'indistinguishable from a type of law previously held unconstitutional by t[he] Court' under the Commerce Clause of the U.S. Constitution (citing *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007)). They also underscore that 'since 1938, the Court's Commerce Clause jurisprudence has invalidated state tax laws that subject a State's domiciliaries to multiple taxation, or the risk thereof, as the consequence of engaging in interstate commerce. *See, e.g., J.D. Adams*, 304 U.S. [307] at 311; *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-663 (1948).' And, further argue, '[t]hat is what Maryland's credit scheme does. It therefore is no surprise that the tax flunks the *Complete Auto* test th[e Supreme] Court uses to determine whether a tax violates the Commerce Clause.'

The taxpayers also claim that the Maryland 'Comptroller tries to float above the Commerce Clause jurisprudence and casts about for some exception (i.e., a residency exception) to the rule that interstate commerce may be double taxed. ' They state that 'every theory he advances has been rejected by t[he Supreme] Court.' The taxpayers also maintain that, despite the Comptroller's arguments to the contrary, the Commerce Clause applies when the tax falls on residents of the taxing state. And, furthermore, they argue that 'when two or more States have jurisdiction to tax the same income, the Commerce Clause requires a credit, division of the tax base, or some other mechanism to eliminate that risk.'

The taxpayers also contend that Maryland's partial-credit scheme produces the 'absurd result' of protecting C corporations from double taxation, while offering no similar protection for S corporations or individuals. They explain that Maryland, like most states, applies a formula for apportioning the tax base of C corporations; whereas, Maryland's partial credit system double taxes S corporations, other pass-through entities, and small business people. Since, the 'Commerce Clause, . . . , does not confer greater rights on corporations than individuals' and '[g]iven that t[he] Court does not distinguish between corporations and individuals when it comes to affirmative Commerce Clause, see *Wickard v. Filburn*, 317 U.S. 322, 326 n.2 (1979), there is no basis to make that distinction with respect to the dormant Commerce Clause.' As such, the taxpayers argue that the Court must reject the position that 'individuals should be afforded less protections from multiple taxation because they have a 'unique' relationship with the State where they reside.'

****8** (For more on this case, including a discussion of Maryland's income tax scheme and a dissenting opinion in the case below, see U.S. Supreme Court Update, 23 JMT 40 (February 2014). For a discussion of Maryland's merits brief see U.S. Supreme Court Update 24 JMT 44 (September 2014).)

Direct Marketing Association's merits brief.

On 9/9/14, the Direct Marketing Association ('DMA') filed its merits brief in *Direct Marketing Ass'n v. Brohl*, Docket No. 13-1032, cert. granted 7/1/14, ruling below at 735 F.3d 904 (10th Cir. 2013), *rem'g Direct Marketing Ass'n v. Huber*, DC Colo., No. 10-CV-01546-REB-CBS, 3/30/12, 2012 WL 1079175. In this case, the U.S. Court of Appeals for the Tenth Circuit overturned a district court's ruling that a Colorado law imposing information notice and reporting requirements on remote retailers violated the Commerce Clause of the U.S. Constitution. The circuit court remanded the case to the district court for dismissal on procedural grounds, finding that the Tax Injunction Act ('TIA,' codified at 28 U.S.C. § 1341) precluded federal court jurisdiction over the claims. The TIA provides, in relevant part, that 'the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.'

In its brief, the DMA argues that the Supreme Court should overturn the Court of Appeals decision to dismiss the case for lack of federal subject matter jurisdiction under the TIA. It asserts that the 'prototypical suit over which the TIA bars federal

court jurisdiction is an action brought (1) by a taxpayer, who is (2) contesting the validity of, or liability for, state taxes, by (3) invoking federal equity jurisdiction as a means of circumventing available state administrative procedures for determining such tax liability.' According to the DMA, 'challenges, like the DMA's, brought by non-taxpayers who contest neither their own tax liability, nor anyone else's, and which present none of the elements of the prototypical TIA case, are not barred. *See Levin v. Commerce Energy, Inc.,* 560 U.S. 413, 430 (2010).'

The DMA also argues that the Tenth Circuit 'misinterpreted' the term 'restrain' under the TIA, and 'failed to acknowledge that none of the notice and reporting requirements of the Colorado Act constitute the 'collection' of a tax as that taxing function is properly understood.' Specifically, it argues that the Tenth Circuit 'relied solely upon selected dictionary definitions for its conclusion that the word should be interpreted to mean 'limit, restrict or hold back.' ' The DMA disagrees with this interpretation, explaining that if the term "restrain' encompasses any action that would 'restrict,' 'limit' or 'hold back,' state tax officials from the 'assessment, levy, or collection' of a state tax, the terms 'enjoin' or 'suspend' ***41** would be rendered superfluous' under the statute.

****9** The DMA argues in its brief that the term 'restrain' relates only to specific types of equitable remedies (i.e., injunctive relief) that might prevent state tax officials from carrying out the 'assessment, levy or collection' of a state tax. The DMA asserts that it is only these specific types of remedies that are prohibited under the TIA. That is to say, other court actions are not barred by the statute. Since, as the DMA argues, the notice and reporting obligations of the Colorado statute are not the 'assessment, levy or collection of any tax' the TIA does not bar the DMA from bringing its suit in federal court.

As part of its brief, the DMA also emphasizes the importance of access to federal courts. It argues that 'the value of access to federal courts is an appropriate factor in interpreting and applying the TIA' and that 'access to federal courts is a significant factor in promoting confidence in our nation's judicial system.' According to the DMA, '[t]he already broad scope of the TIA should not lightly be expanded.' It argues that 'Colorado has enacted a law targeted exclusively at companies that are not located in the state' and that 'it is not surprising that an out-of-state company may have concerns about the neutrality and fairness of the forum in which its federal constitutional rights are to be determined.'

The DMA further argues that its members (who are not taxpayers and not protesting any tax liability) 'fall precisely within that category of out-of-state parties who might reasonably lack confidence in the impartiality of a state tribunal, even if that apprehension is not warranted.' Since 'the avoidance of any appearance of discrimination against out-of-state parties is of critical importance' the Court, according to the DMA, should allow it access to the federal judicial system.

Finally, the DMA contends that comity is not a bar to its suit. It states that 'the principle of comity from which the TIA derives is 'a reluctance to interfere by prevention with the fiscal operations of state governments.'' It argues that '[i]n a case challenging non-tax matters, whose stated aim is to encourage a hoped-for increase in voluntary tax reporting, the interests served by comity are not at stake.' It also makes clear that the factors laid out by the Supreme Court in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) are not present in this case. Accordingly, the DMA asks the Supreme Court to reverse the decision of the Tenth Circuit and to remand the case for further proceedings.

In addition to the DMA's brief, several organizations have filed amicus briefs with the Court, including the Institute for Professionals in Taxation, the Tax Foundation, the U.S. Chamber of Commerce, the Council On State Taxation, and the NFIB Small Business Legal Center. Colorado's brief in response was due to the Court on 10/17/14.

(For more on this case, including a detailed discussion of Colorado's notice and reporting requirements, see U.S. Supreme Court Update, 24 JMT 40 (May 2014). For more background, see also Hecht, 'Information Reporting for Out-of-State Vendors Just as Unconstitutional as Tax Collection Responsibility,' 22 JMT 6 (August 2012).)

Alabama and United States briefs in *CSX Transportation.*

****10** On 9/9/14, the Alabama Department of Revenue ('Alabama') filed its initial merits brief with the Supreme Court in *Alabama Department of Revenue v. CSX Transportation, Inc.*, Docket No. 13-553, cert. granted 7/1/14, ruling below as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (11th Cir. 2013). In this case, Alabama asks the Court to review a decision by the U.S. Court of Appeals for the Eleventh Circuit, which held that Alabama's failure to provide rail carriers with a tax exemption from the state's sales and use taxes for their purchases of diesel fuel, while exempting both interstate motor carriers and water carriers, was discriminatory in violation of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the '4R Act,' codified at 49 U.S.C. § 11501). This case is a continuation of litigation that was before the Court three years ago.

Alabama argues in its brief that it has not discriminated against railroads in contravention of the 4R Act. It focuses on the first question presented, 'whether Alabama is treating the railroads dissimilarly as compared to a relevant class of other taxpayers.' Alabama states that '[w]hen this case was last before it, the Court explained that giving a tax exemption to a *favored* 'group' is no different in substance than imposing a higher base tax on a *disfavored* 'group.' *CSX Transp.* 131 S. Ct. at 1108. Accordingly, the Court held that a railroad could challenge a sales tax as discriminatory because of the tax's exemptions. But the Court declined to decide whether interstate competitors are a proper 'group' with which to compare railroads.'

Alabama argues that Justices Thomas and Ginsburg, 'gave the right answer to this question: the 4-R Act subjects to judicial scrutiny the unfavorable treatment of railroads as compared to commercial and industrial taxpayers generally, not one or two exempt businesses.' Alabama specifically argues in this regard that (1) the 'text and structure of section 11501 establish that general commercial and industrial taxpayers are the proper class comparison, ' (2) the 'statute's history and purpose establish that courts should compare the taxation of railroads to the taxation of local businesses,' and (3) 'a comparison of general class commercial and industrial taxpayers is the fairest and most workable standard.'

Alabama states that '[i]f the Court adopts Justice Thomas and Justice Ginsburg's answer to the first question presented, then the second question presented is beside the point.' The second question presented is '[w]hether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.' Alabama contends that the Court of Appeals 'erred by refusing to evaluate the state's justification for treating CSX differently than other taxpayers.' According to Alabama, 'the court of appeals decision on this front was contrary to this Court's decision in *CSX Transportation* and the way discrimination is evaluated in every comparable context. Dissimilar treatment alone is not discrimination.'

****11** According to the state, '[i]f the 4R-Act allows the railroads to compare themselves to a hand-picked class of other taxpayers, then the state must be allowed to justify that different treatment under a relatively deferential rational-basis test.' In its view, the lower court refused to consider the state's justifications for treating the railroads dissimilarly. And, in this regard, the Court of Appeals should have evaluated the state's complementary tax argument. 'Here, our asserted ***42** justification is not that 'the state's tax structure, *as a whole*, treat[s] railroads similarly to every other commercial and industrial taxpayer' . . . [i]t is instead that the state's decision to exempt on-road fuel from the sales and use tax is justified because that fuel carries a separate, and generally higher, motor fuels tax.'

Alabama further argues that CSX Transportation failed to carry its burden to establish discrimination, even as compared to its class of hand-picked competitors. First, it argues that there is a sufficient justification for the on-road diesel fuel tax exemption related to federal highway funding, namely 'on-road fuel carries a separate, and generally higher, excise tax.' Alabama states, 'as the District Court put it, the truckers are exempt '*because* they pay a comparable excise tax on this fuel, a tax not imposed on rail carriers.''

Second, it argues that '[i]nterstate water carriers are exempt from paying the sales and use tax because of deeply rooted historical barriers to the taxation of interstate commerce by water, such as the dormant commerce clause, and the predominant federal influence over navigable waterways.' Alabama contends that '[i]f a railroad claims that the state is discriminating against it by favoring its competitors, the railroad should show that it would benefit if the purported favoritism stopped. CSX never did.'

On 9/16/14, the United States filed its second amicus brief with the Court supporting neither party. The Court had previously invited the Solicitor General to submit an amicus brief at the petition stage of the case. On 5/27/14, the Solicitor General submitted that brief. Despite arguing that the petition should be denied, the Solicitor General noted that, if the petition is granted, the Court should invite the parties to brief the issue of ‘[w]hether, in resolving a claim of unlawful tax discrimination under [the 4R Act], a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.‘ The Court granted certiorari and directed the parties to brief and argue the additional question raised by the Solicitor General.

In its most recent brief, the Solicitor General states that this case now presents two issues for review: [1] ‘whether a court may ‘compare the taxation of [respondent]’ to the taxation of its ‘direct competitors' without including ‘other commercial entities' in the comparison class, and [2] whether a ‘court must consider not only the specific taxes challenged, but also the broader tax scheme.’‘ The Solicitor General argues that ‘[t]he Court should answer both questions in the affirmative.‘

**12 The Solicitor General agrees with the Court of Appeals that ‘the appropriate comparison class in a [4R Act] suit may vary depending on the type of discrimination that a railroad alleges, and a comparison class of competitors was appropriate in this case.‘ However, the Solicitor General argues that ‘[t]he court of appeals erred in restricting its analysis to the challenged sales and use tax and refusing to consider the State's alternative and comparable motor-fuel taxes on diesel fuel.‘ The Solicitor General states that ‘a State can justify differential treatment of railroads with respect to a particular tax by showing that the comparison class is subject to alternative and comparable state taxes that are not levied against railroads.‘ The Solicitor General therefore asks the Court to remand the case to the Court of Appeals to consider that issue.

Several organizations—including the American Trucking Associations, Inc; the Multistate Tax Commission; and the State of Tennessee—have filed amicus briefs with the Court for this case. CSX Transportation's brief was due to the Court on 10/29/14.

(For more background on this request for certiorari, including a discussion of Alabama's tax scheme at issue, the procedural history of the litigation, and a dissenting opinion in the latest case, see U.S. Supreme Court Update, 23 JMT 40 (February 2014).)

Petition Still Pending

The following petition is still pending as the JOURNAL went to press.

Entertainment producers' Takings Clause challenge to Puerto Rico Senior Citizen Ticket Discount Act.

In *Angelo Medina, et. al. v. Commonwealth of Puerto Rico*, et. al., Docket No. 14-156, petition for cert. filed 8/12/14, ruling below at Supreme Court of Puerto Rico (AC-2013-0118) (May 12, 2014), the Puerto Rico high court affirmed the lower court's ruling upholding a motion to dismiss plaintiffs' complaint that sought to declare Law No. 108, known as the ‘Senior Citizen Discount Act‘ (the ‘Act‘) unconstitutional. The Act granted Puerto Rican citizens older than 60 the right to attend, for half price, artistic and athletic activities and shows held in facilities provided by agencies, departments, offices, political subdivisions and any other instrumentality of the Commonwealth of Puerto Rico, and as later amended, the Act provided free admission for all persons aged 75 and older.

The lower court found that ‘the plaintiffs have failed to set forth the violation of a property interest recognized in our legal code.‘ The plaintiffs, a group of entertainment producers, were seeking compensation for the damages they have suffered as a result of the Act—lost income suffered at events or shows where they had to honor the discounts imposed by the Act and payment of local sales and use taxes on the discounted tickets and tickets given away for free. The plaintiffs argued that the Act was unconstitutional as it violated the constitutional rights of equal protection under the law, freedom of speech, taking of private property without due process and just compensation from the state.

****13** (For more on this petition, see U.S. Supreme Court Update, 24 JMT 39 (October 2014).)

Petitions Denied

The Court has denied certiorari in the following cases.

In ***MINACT Inc. v. Missouri Director of Revenue,*** Docket No. 14-228, petition for cert. den. 10/14/14, ruling below at 432 S.W.3d 182 (4/15/14), *rehg den.* 5/27/14, the Supreme Court of Missouri, held that income from a 'rabbi trust' used to fund an executive deferred compensation plan was 'business income,' subject to apportionment to Missouri. The taxpayer, MINACT Inc., a Mississippi-based corporation with operations throughout the United States, including Missouri, contended that the trust income was non-business income allocable to the state of Mississippi and paid taxes to the state of Mississippi on that income. The Missouri Director of Revenue disagreed with MINACT and found that the trust income was apportionable business income. ***43** The Missouri Supreme Court analyzed whether the rabbi trust income met one of the two tests used in Missouri to determine whether income is business or non-business income: the 'transactional test' or the 'functional test.' The Court found that the trust income does not satisfy the 'transactional test,' which 'determined whether the gain is attributable to a type of business transaction in which the taxpayer regularly engages.' (Here the trust's income was from investment activities, rather than business transactions.) The Court agreed with the Missouri Director of Revenue that '[t]he trust income does, however, satisfy the functional test for business income' primarily because MINACT established its deferred compensation plan and funds the rabbi trust to 'attract and retain key employees' who were engaged in MINACT's current regular business operations.

In ***Hector v. City of Fargo***, Docket No. 14-107, petition for cert. den. 10/6/2014, ruling below at 2014 WL 1101491 (Mar. 20, 2014), *reh'g den.* 5/7/14, the Supreme Court of North Dakota affirmed the lower court's judgment dismissing a legal action brought by Fred Hector, a land owner, against the City of Fargo, involving special assessments against his land. The court considered whether his judicial action involved issues that were raised or could have been raised in a prior appeal brought by Hector involving the same special assessments. The appeal matter was considered by the Supreme Court of North Dakota in 2012 and 'culminated in the prior judgment affirming the assessments.'

After reviewing the procedures for challenging special assessments (as this was the first time that the court had to review the propriety of both an appeal of a Special Commission decision and a separate judicial action challenging special assessments or costs for the same improvement project) and the claims raised and ruled upon in the prior appeal, the Supreme Court of North Dakota concluded that 'Hector's claims in this action involve issues that were raised or could have been raised in his prior appeal, and he is precluded from raising those claims in this action.'

****14** In ***India Lynch v. Alabama***, Docket No. 13-1232, petition for cert. den. 10/6/2014, ruling below as *I.L. v. Alabama*, 739 F.3d 1273 (11th Cir. 2014), the U.S. Court of Appeals for the Eleventh Circuit considered a series of allegedly discriminatory property tax restrictions contained in the Alabama Constitution. The petitioners, black and white Alabama public school students, challenged state constitutional provisions dealing with both millage caps and property classifications, and argued that the provisions cripple the ability of certain rural, nearly all-black public schools in Alabama to raise necessary revenues. With regard to the students' challenges to the millage caps, the circuit court remanded the case to the district court with instructions to dismiss the challenges without prejudice for lack of standing. As for the challenges to the property classification provisions, the court affirmed the district court's 804-page order concluding that the students had failed to show that the allegedly discriminatory provisions were unconstitutional.

In ***Jackson v. City of New Orleans***, Docket No. 14-20, petition for cert. den. 10/6/2014, ruling below at 2014 La. LEXIS (January 28, 2013), the Supreme Court of Louisiana, with one dissent, affirmed a lower court's grant of summary judgment, invalidating a New Orleans City Ordinance (Ordinance Number 22207: the 'Ordinance') that authorized the imposition of penalties and collection fees on delinquent ad valorem taxpayers. Both the lower court and the state's high court found that the Ordinance was contrary to Louisiana's constitutional requirements for tax collection. According to the Supreme Court of

Louisiana, ‘any methods of collecting delinquent ad valorem taxes other than by tax sales is constitutionally prohibited‘ under the Louisiana State Constitution.

Despite invalidating the Ordinance's penalty and fee provisions, however, the Louisiana courts held that two of the taxpayers in the case below had no cause of action because they failed to pay the penalties and fees under protest, as mandated by another provision of the Ordinance. Citing to *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the Louisiana court noted that ‘[t]o ensure a state's ability to engage in sound fiscal planning, the U.S. Supreme Court has approved the use of post-deprivation relief in taxation disputes, as long as the post-deprivation relief is meaningful, such as when a refund is provided to a successful taxpayer. ‘ Analyzing New Orleans's payment-under-protest provisions under this principle, the court found the Ordinance to be a valid form of post-deprivation relief.

In ***Masciantonio v. United States***, Docket No. 14-43, petition for cert. den. 10/6/2014, ruling below at 2013 U.S. App. LEXIS 11790 (June 12, 2013), the U.S. Court of Appeals for the Third Circuit affirmed a district court's order granting the government's motion to enforce an Internal Revenue Service (IRS) summons served on a taxpayer's bank.

****15** In ***Missouri Gas Energy v. State of Kansas Division of Property Valuation***, Docket No. 13-1216, petition for cert. den. 10/6/2014, ruling below as *Appeals of Various Applicants From a Decision of Division of Property Valuation of State of Kansas for Tax Year 2009 Pursuant to K.S.A. 74-2438*, 313 P.3d 789 (Kan. 2013), the Kansas Supreme Court affirmed in part and reversed and vacated in part a decision of the Kansas Court of Tax Appeals regarding ad valorem taxes imposed on natural gas stored in facilities located in Kansas and under contract with interstate pipeline companies. The Kansas high court held that at least some of the taxpayers qualified as public utilities (i.e., out-of-state local distribution companies certified as public utilities in their states) and, thus, their gas was not exempt from tax under the Kansas Constitution, Article 11, § 1, which exempts merchants' inventory from ad valorem taxation but does not exempt tangible personal property owned by a public utility. The court remanded the case for further proceedings to decide which of the taxpayers qualify as public utilities. The court also held that Kansas's ad valorem gas tax did not violate the Commerce Clause or Due Process Clause of the U.S. Constitution.

The taxpayers in the *Wilkening* petition ask the U.S. Supreme Court to review the Kentucky Legislature's decision to retroactively repeal their right to vote.

The U.S. Court of Appeals for the Eleventh Circuit held that sovereign immunity bars a federal complaint by the Seminole Tribe of Florida against the Florida Department of Revenue.

The taxpayers in *Wynne* maintain that, despite the Comptroller's arguments to the contrary, the Commerce Clause applies when the tax falls on residents of the taxing state.

The DMA argues that the Tenth Circuit ‘misinterpreted‘ the term ‘restrain‘ under the Tax Injunction Act.

Alabama contends that the Court of Appeals ‘erred by refusing to evaluate the state's justification for treating CSX differently than other taxpayers.‘

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