

No. 09-520

In the Supreme Court of the United States

CSX TRANSPORTATION INC.,
Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE, et al.,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit*

**BRIEF OF ALABAMA EDUCATION ASSOCIATION,
SCHOOL SUPERINTENDENTS OF ALABAMA, COUNCIL
FOR LEADERS IN ALABAMA SCHOOLS, ALABAMA
ASSOCIATION OF SCHOOL BOARDS, ALABAMA STATE
UNIVERSITY, AUBURN UNIVERSITY, THE BOARD OF
TRUSTEES OF THE UNIVERSITY OF ALABAMA,
JACKSONVILLE STATE UNIVERSITY, TROY
UNIVERSITY, UNIVERSITY OF MONTEVALLO,
UNIVERSITY OF NORTH ALABAMA, UNIVERSITY
OF SOUTH ALABAMA AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

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ISSUES PRESENTED

Whether the State may grant exemptions from a generally applicable tax as long as the State taxes railroads proportionately to other taxpayers without subjecting the State and its tax structure to a challenge under 49 U.S.C. § 11501(b)(4).

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INTEREST OF AMICI

This case involves the proper administration of Alabama’s general sales tax on fuel sold to the rail industry. Pursuant to Alabama Code Section 40-23-35(f), virtually all of the sales tax collected in Alabama is earmarked for education and segregated along with certain other taxes into the Education Trust Fund (“ETF”), which is budgeted every year separately from the general funds of the state. Ala. Code § 40-23-35(f); 2010 Ala. Acts 610. These Amici represent various entities that rely directly on funds from the ETF. Should this Court find for the Petitioner, education funding upon which the Amici rely would be reduced, endangering their mission for education.¹

SUMMARY OF ARGUMENT

When § 11501 passed, the rail industry made the States a promise. “Our industry’s just tax contributions have been an important cornerstone of State and local tax programs, and we expect to continue to pay our way and contribute our fair share in assisting the States to meet their responsibilities to their residents.”² The Amici undertake this filing and

¹ Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

² *State Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of*

seek to make good the promise made by the rail industry. In furtherance of the promise, the Amici ask that this Court consider what is at stake in this case for Alabama schools, children, and public colleges and universities. Should this Court find in favor of the rail industry, Alabama will lose funding for more than 250 teachers, resulting in not only the unemployment of those teachers, but also a dramatic increase in class size, a problem Alabama has worked so hard to reduce. 2010 Ala. Acts 610. This case could end funding for almost 1,400 of 25,000 support employees, including bus drivers and maintenance employees integral to the safety of our children and our schools. *Id.* This case could eliminate funding for two thirds of Alabama's school nurses, or four years of funding for Alabama's Reading Initiative ("ARI") and Alabama Math/Science/Technology Initiative ("AMSTI"). *Id.* The ARI and AMSTI programs have earned Alabama national praise, a circumstance that is all too rare for poorly funded public education in Alabama.³ Alabama's public colleges and universities will suffer mightily along with K-12, and could cease to be the powerful economic development engines that Alabama has counted on for many years. It is in this context that the education community asks this Court to uphold the opinion of the lower court and to uphold the Department's interpretation of its sales tax statutes.

the S. Comm. on Commerce, 91st Cong. 51 (1969 statement of AAR President Thomas M. Goodfellow).

³ In 2002, Alabama's ARI received the Frank Newman Award for State Innovation from the Education commission of the States. www.ecs.org. In 2010, AMSTI was recognized as an "exemplary program of best practices in laboratory education" by the Center for Excellence in Education. www.cee.org; www.amsti.org.

ARGUMENT

Railroads, particularly large ones with millions or billions in revenue, are expected to attempt to reduce their taxes when they can . . . legally. Accounting firms and tax lawyers are paid handsomely to be creative and innovative in advising their clients about ways to avoid taxes and retain revenues . . . under the law. But sometimes those strategies serve to entirely vitiate properly enacted tax statutes. Sometimes a state and its education community must respond to stem the tide of revenue losses if it is to be fiscally responsible to its citizens.

THE INSTANT CASE IS HIGH STAKES FOR EDUCATION FUNDING IN ALABAMA

The Petitioner's Assistant Vice President for Tax Compliance testified that the Petitioner paid sales taxes on fuel of \$3.3 million in 2005, \$4 million in 2006, and \$3 million in 2007. See Aff. Of Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. For Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue*, No. 2:08-cv-655-UWC (N.D. Ala. May 29, 2008).⁴ Respecting the annual sales tax obligations for

⁴In addition to the claims for refunds against the Respondent, the Petitioner has also filed numerous claims for refunds of local sales tax, much of which also is dedicated to local schools. *CSX Transportation, Inc. v. City of Mobile, et al.*, No. CV-2010-901129.00 (Mobile County Ala. Cir. Ct. filed May 20, 2010) (\$83,963.42); *CSX Transportation, Inc. v. Shelby County, Ala., et al.*, No. CV-2010-900461.00 (Shelby County Ala. Cir. Ct. filed May 19, 2010) (\$531,695.68); *CSX Transportation, Inc. v. Jefferson County, Ala., et al.*, No. CV-2010-01490, (Jefferson County Ala. Cir. Ct. filed May 20, 2010) (\$1,029,515.22); *CSX Transportation,*

the Petitioner, it is clear that annual sales tax claims for the remainder of the rail industry could easily push the total of the annual sales taxes at risk in excess of \$20 million. Apart from the annual loss to Alabama's schools, the vast majority of the rail industry has filed for refunds of sales taxes paid in years past. Leaving alone the issue that these sales taxes have been collected, budgeted and spent for Alabama public schools years ago, the amount of refund claims that could be resurrected by this case is potentially devastating to Alabama's public schools.

Consider just one rail company, Burlington Northern, which has filed a refund petition for \$3.5 million for three tax years. Joint Refund Pet., *W.C. Rice Oil Co. & Burlington N. & Santa Fe Ry. Co.*, (Ala. Dep't of Revenue filed March 19, 2008). For the balance of the large multi-state rail companies subject to Alabama's sales tax on fuel, it could mean more than \$60 million in aggregate refunds. To the extent the rail industry continues to pay Alabama's sales tax on fuel, a scenario that is less likely every day considering the Petitioner ceased to pay the tax after 2007, refunds will continue to accumulate during this litigation for each subsequent tax year. See Aff. Of

Inc. v. City of Birmingham, et al., No. CV-2010-901772.00 (Jefferson County Ala. Cir. Ct. filed May 20, 2010) (\$3,124,475.20); *CSX Transportation, Inc. v. Montgomery County, et al.*, No. CV-2010-900648.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) (\$445,876.35); *CSX Transportation Inc. v. City of Montgomery, et al.*, No. CV-2010-900652.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) (\$624,100.21); *CSX Transportation, Inc. v. Ala. Dep't of Revenue*, No. CV-2010-900645.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) (\$5,260,607.58).

Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. For Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue*, No. 2:08-cv-655-UWC (N.D. Ala. May 29, 2008). In other words, this appeal is the figurative dam that is preventing a significant and direct loss of education revenue that could all but end adequate public education in many Alabama counties.

**ALABAMA IS CONSTITUTIONALLY
REQUIRED TO BALANCE ITS BUDGET
WITH ANNUAL REDUCTIONS IN
EDUCATION FUNDING**

Unlike some other states, Alabama is constitutionally required to balance its budget each year and is prohibited from operating with a deficit. Ala. Const. Amend. XXVI. In other words, Alabama may not borrow to meet the obligation to provide public services. By statute Alabama has a procedure to automatically cut spending to comply with the constitutional obligation to balance the budget. Ala. Code § 41-4-90. That procedure is referred to as proration, and imposes cuts on funding across the board as a percentage of the shortfall. *Id.* For instance, if a school system, public college or university has an annual budgeted appropriation of ten million dollars and actual revenues are anticipated to be ten percent short of budgeted revenues, the appropriation for the school system, public college or university will be reduced by one million dollars during the budget year. Proration makes immediate and drastic cuts in times of recession, and Alabama has experienced the deepest and most drastic seen in decades during this most recent recession. With a high water mark for the ETF of \$6.7 billion in 2008, the ETF state budgeted revenues in 2011 are just \$5.1 billion. 2007 Ala. Acts

361, 2010 Acts 610. In the three most recent budget years, proration has reduced the ETF's total appropriation by nearly one quarter. This immediate and constant loss of funding pushes historically underfunded public schools ever closer to an inability to provide even a basic education to its students. This case may well present the straw that broke the camel's back.

**ALABAMA HAS EXPERIENCED DRASTIC
CUTS IN EDUCATION FUNDING
DURING THE RECESSION**

The education community recognizes that Alabama is not alone in its budget struggles. Across the country up to 300,000 education employees will lose their jobs due to budget shortfalls, and thousands more will receive pay cuts through furloughs and shortened school years.⁵ But make no mistake; the current recession has hit Alabama's schools extremely hard, much more so than other states that rely heavily on local property tax for funding. The majority of funding for Alabama's education programs comes from sales and income taxes, and these taxes are hypersensitive to recession and the economic cycles that inevitably occur. To date, Alabama has exhausted over \$400,000,000 of savings that accrued during the early part of the most recent decade. Alabama temporarily borrowed, through constitutional amendment, over \$436,000,000 from the oil and gas royalty trust fund that has yet to be repaid. Finally, both K-12 and

⁵ "Investing in Education: Secretary Arne Duncan's Remarks to the National School Boards Association," U.S. Dep't of Edu., www.ed.gov, February 1, 2010.

higher education received \$1,000,000,000 over the last two years in onetime federal funding. Even after the infusion of these temporary outside resources to augment the ETF, Alabama schools still experienced over 20% proration.

There is little doubt Alabama is seeing the worst school-funding crisis in decades affect every school system in the state. As a clear sign of its severity, one in five Alabama school systems borrowed money to meet payroll and other expenses during the 2010 budget year. For the upcoming year, many Alabama schools systems will be relying on lines of credit to keep school doors open. The Alabama State Department of Education (ALSDE) identified five county systems, Choctaw, Coosa, Marengo, Perry, and Tuscaloosa that have continually borrowed money to make monthly payroll.⁶ An additional 25 school systems reported anticipated borrowing during 2010.⁷ In July, the ALSDE voted to financially intervene in Coosa and Sumter county schools because no lenders found those systems creditworthy enough to obtain needed loans. ALSDE officials note that the financial problems of these systems were not caused by mismanagement, but rather a lack of tax revenue and recent cuts implemented in the budgeting and proration process.⁸

⁶ Leech, Marie, "Alabama Board of Education Votes to Take Over School Systems," *The Birmingham News*, July 13, 2010.

⁷ Id.

⁸ Id.

In one county in particular, the school system does not have funding to hire a twelfth grade English teacher. Students in that county are taught senior English remotely, gathered around a computer monitor. Superintendents of systems regularly sell candy, firewood, and magazines and even install “slushie” machines in the schools to generate a little extra revenue for paper products, chalk or other basics. Textbook purchases have been eliminated in multiple budget years, technology is aging and is not being replaced or updated, classroom supply funds are non-existent, buses are not being replaced or even maintained in some instances. 2010 Acts 610. In preparation for an increase in program costs of \$255 million, the Public Education Employee Health Insurance Program (PEEHIP) Board approved the only increase in premiums since 1983. For the first time in nearly three decades PEEHIP was not fully funded by the legislature because there simply was not enough revenue to fund a quarter-billion dollars in health care increases. Id. And most importantly, Alabama is losing ground on the greatest predictor of outcomes in education—class size, as thousands of teachers and support professional positions have been eliminated.

**ALABAMA SCHOOLS ARE CHRONICALLY
UNDERFUNDED AND YET PRODUCE
HOPEFUL RESULTS**

Alabama has a history of consistently underfunding schools in a state with a student population that is struggling with all manner of societal ills. One quarter of all children in Alabama live in poverty; thirty percent have no working parent in the home; thirty percent come from single parent households. Alabama ranks 47th overall in indicators that predict

the well being of children. Alabama is fortieth nationally in teen pregnancy and more than 35% of students in Alabama's public schools drop out before they graduate.⁹

Despite these great challenges, Alabama is succeeding in small ways and precariously. When compared nationally, Alabama funds K-12 at a D level and produces B- level results.¹⁰ Alabama has the highest graduation requirements in the United States. Public high school students are required to pass a minimum of 24 credits.¹¹ This includes four years of mandatory English, mathematics, social studies, and science—known as four-by-four curriculum. Students are tested on fundamental concepts of core courses using the Alabama High School Graduation Exam. It is designed to measure students' ability in core course work, including logic, and other problem solving skills. Since the four-by-four curriculum was introduced to Alabama high school classrooms in 1996, average student achievement has increased every year.¹²

It cannot be overstated that these tender shoots of progress must be guarded with great care. Alabama's tax system is one of the most regressive in the nation, and produces unstable and inefficient results for school

⁹ <http://datacenter/kidscount.org>

¹⁰ National Education Association Ranking of States and Stanford Achievement Test data.

¹¹ Alabama State Department of Education, "Education Facts" www.alsde.org.

¹² Id.

funding. Alabama has the lowest taxes in the nation, but Alabama also taxes its poor at regrettable levels.¹³ Only Alabama and Mississippi tax food for home consumption.¹⁴ Alabama's lowest-income residents pay more than twice as much of their income in state and local taxes as the highest-income residents do.¹⁵ Alabama's income tax on a family of four at the federal poverty line is the nations highest.¹⁶ This system is flawed in its design and consistently produces inadequate levels of revenue to fund schools. The sales tax, while regressive by nature, is a major component of Alabama's existing education funding. Alabama relies too heavily on this unstable and unpredictable tax in funding its education system. To erode the sales tax by creating exemptions or preventing the collection of the sales tax on certain transactions only increases the instability of the sales tax, and drives Alabama's education funding further downward.

Each year, the education community works together to prevent the erosion of the income and sales taxes that are dedicated to education funding. In 2010, the Alabama Education Association objected to hundreds of bills introduced in the legislature that

¹³ White, David. "Alabama Boasts Lowest Taxes in Nation," *The Birmingham News*, November 1, 2009.

¹⁴ www.cbpp.org "Which States Tax the Sale of Food for Home Consumption in 2009?," November 4, 2009.

¹⁵ "Who Pays? A Distributional Analysis of the Tax Systems in all 50 States.," *Institute on Taxation and Economic Policy*, www.itepnet.org/state_reports/whopays.php.

¹⁶ *Id.*

would have reduced funding for education. Many of those bills dealt with exemptions from the state sales tax. No exemption is too insignificant to draw objection considering the razor thin margins under which the education community operates. In 2009, objections were raised against a bill that exempted baseball equipment purchased by a club for children with physical disabilities. H.B. 116, *2008 Leg., Reg. Sess.* (Al. 2008). The exemption could have reduced education funding by \$1000 per year, but consistent with the mission to protect funding for education, the education community opposed the bill and it was defeated. *Public Hearing on H.B. 116, 2008 Leg., Reg. Sess. Committee on Education Appropriations* (Al. 2008). By filing this brief with this Court, the education community in Alabama intends to communicate its commitment to adequate funding of education in Alabama, and a vision that one day a lack of resources will not deter our progress. The education community fights daily and diligently to procure additional funding for education and to make the most of every dollar appropriated to the schools. It is with that same diligence and urgency that the community seeks redress from this Court.

CONCLUSION

The education community asks this Honorable Court to uphold the Department's interpretation of the sales tax on fuel, and specifically, it asks this court to uphold the lower court's opinion.

Respectfully submitted,

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