No. 09-520

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,
v.
ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.[1] COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state. While COST's membership includes the major railroad providers—which are directly impacted by an interpretation of the statutory provision at issue—our broader company membership is concerned about the ramification this case will have on the validity and effectiveness of many other federal laws protecting interstate commerce from discriminatory and unduly burdensome state taxation.

SUMMARY OF THE ARGUMENT

The 4-R Act sets forth prohibitions on discrimination and an avenue for relief in federal court that were intended to relieve railroad property from acts of discriminatory taxation by state and local governments. For Congress' words to have meaning, taxpayers must have the ability to challenge state discrimination whether it is accomplished by granting exemptions to favored competitors or by imposing a targeted tax. To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the legitimacy of numerous other federal acts impacting state and local taxation.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

ARGUMENT

I. FAILURE TO READ 49 U.S.C. § 11501(b)(4) TO PROHIBIT TARGETED EXEMPTIONS FOR RAILROAD COMPETITORS WOULD EVISCERATE THE FUNDAMENTAL PURPOSE BEHIND THE STATUTE.

Tiring of complaints of "studied and deliberate"[2] state and local tax discrimination against railroads, Congress passed the Railroad Revitalization and Regulatory Reform Act in 1976 ("4-R Act"), 49 U.S.C. § 11501 (2010). Congress enacted the 4-R Act in part to protect railroads which "'are easy prey for State and local assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Airlines. Inc. v. Board of Equalization*, 480 U.S. 123 (1987) (quoting S. Rep. No. 91630, p. 3 (1969)). The purpose of Section 11501 "was to prevent tax discrimination against railroads in any form whatsoever." *Oqilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert denied*, 454 U.S. 1086 (1981). *See also Department of Revenue. State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("The legislative history and broad language of [§ 306] show Congress possessed a general concern with discrimination in all its guises . . . .") (quoting *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Circ. 1983)).

The 4-R Act specifies four prohibited activities which, if done by a state or local taxing authority, are considered to be discriminatory and an unreasonable

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[2] S. Rep. No. 87-445, at 458 (1961).

burden on interstate commerce. The Act does not allow states or localities to:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b) (2010).

The purpose of these four prohibitions is clear from their language: to prohibit discrimination caused by inflating railroad property assessed values (compared to their true values); to prohibit the levy or collection of tax based on these inflated values; to prohibit discrimination by imposing higher tax rates on railroad property; and to prohibit any other tax that discriminates against railroads. Of these four prohibitions only the last, and Congress' intention in that regard, is relevant to the present case.

Congress sought by § 11501(b)(4) to prohibit sub-national tax jurisdictions from enacting non-property taxes that discriminate against railroads. In crafting a statutory formula to determine whether the taxing authority had engaged in tax discrimination against railroads, Congress chose broad but nonetheless specific language to prohibit "another tax that discriminates" tax. What the Eleventh Circuit held was that when it comes to non-property taxes, Congress never intended to prohibit favorable exemptions to a generally applicable tax—even if the exemptions apply to the core group of railroad competitors. For the discrimination provision in section 11501(b)(4) to have the full meaning and protection Congress intended, tax exemptions must be scrutinized even if the exemption are to a seemingly generally applicable tax. Discrimination through the use of targeted exemptions is no less distasteful than discrimination though the imposition of a targeted tax.

The Eleventh Circuit suggests that this Court's holding in *Department of Rev. v. ACF Industries*, 510 U.S. 332 (1994), somehow supports Alabama's arguments that exemptions can discriminate as long as they are an exemption from a generally applicable tax. However, Alabama has "singled out" railroads from their competitors by imposing a tax which it does not impose on other competing taxpayers in the State of Alabama. In *ACF Industries*, this Court expressly stated that the case before it did not present such facts.

In *ACF Industries*, the Court concluded "that a state may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection [(b)(4)]." *Id.* at 340. In reaching this con-

clusion, the Court focused its analysis on state-granted exemptions from otherwise generally applicable property tax schemes and their relationship to the 4-R Act. The Court first examined Section 11501 as a whole. It found that "[e]xempt property . . . is not part of the comparison class against which discrimination is measured under subsections [(b)(1)-(3)]" and that congress would not have allowed "the States to grant property tax exemptions in subsections [(b)(1)-(3)]" and then "turn around and nullify its own choice in subsection [(b)(4)]." *Id.* at 333.

The Court then cited other considerations, all of which focused on property tax exemption, to reinforce its construction of the statute. The Court then noted:

> Given the prevalence of property tax exemptions when congress enacted the 4-R Act, § 11503's silence on the subject - in light of the explicit prohibition of tax rate and assessment ratio discrimination - reflects a determination to permit the states to leave their exemptions in place.

Id. at 344.

The Court's analysis makes it clear that the *ACF Industries* decision was limited to situations involving state-granted exemptions "from a generally applicable ad valorem property tax." Indeed, the Court distinguished situations like those in the present case where a railroad is "singled out" for the imposition of a discriminatory tax and stated its decision was not intended to deal with such situations.

> [T]his is not a case in which the railroads—either alone or as part as some isolated and targeted group—are the only commercial entities subject to an ad valorem property tax . . . . If such a case

> were to arise, it might be incorrect to say that the state "exempted" the nontaxed property. *Rather, one could say that the state had singled out railroad property for discriminatory treatment*.

Id. at 346-47 (emphasis added).

CSX challenged Alabama's imposition of sales and use tax on its purchases because it, and other railroads, are the only significant taxpayers in a group of competing taxpayers in Alabama who have to pay the tax. Unlike the Oregon tax scheme addressed in *ACF Industries*, the Alabama taxing scheme challenged in this case simply does not involve broad property tax exemptions that cross different industries.

The record in the present action makes it clear that Alabama has, in fact, "singled out railroad property for discriminatory treatment" by imposing the sales tax at issue only upon fuel purchased by railroads, but not competitors. Thus, the logic of *ACF Industries* should not preclude entry of judgment in favor of CSX on its claims in this case under subsection (b)(4).

II. THE ELEVENTH CIRCUIT'S EXTENSION OF THE *ACF INDUSTRIES* EXEMPTION RULE WOULD JEOPARDIZE MANY OTHER FEDERAL STATUTORY PROVISIONS GOVERNING STATE AND LOCAL TAX.

The Eleventh Circuit's aggressive extension of the *ACF Industries* exemption rule where there are targeted exemptions could jeopardize many other federal statutory provisions governing state and local tax. As seen above, the Eleventh Circuit's approach

requires Congress to clearly spell out that discriminatory taxation can occur by granting targeted exemptions or those challenges will be foundto be disallowed by *ACF Industries*. This overlystrict approach, if applied to other federal legislation impacting state and local tax, could undermine the entire purpose behind such legislation. *ACF Industries'* blessing of exemptions in limited circumstances should be applied cautiously lest it destroy the intent of Congressional legislation meant to solve significant problems in the state and local tax arena.

Congress has, serving in its role as the protector of interstate commerce, intervened in the world of state taxation numerous times to protect, clarify, and foster uniformity in state tax treatment of multistate transactions and enterprises. These legislative inroads on state sovereignty are limited to circumstances where Congress has heard repeatedly from national stakeholders that the problems existing in our sub-national tax structure require a federal solution. Often, the Congressional interventions come in the form of a ban on discriminatory taxes. Some of the examples of the nearly 30 federal laws that could be eviscerated by the Eleventh Circuit's interpretation of *ACF Industries* include:

Discriminatory Airline Taxation

This statute prohibits states from levying or collecting a tax on "(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b) (2010). The statute adopts language similar to the prohibition against discrimination found in the 4-R Act. The statute prohibits states from the

following acts based on a conclusion that these acts unreasonably burden and discriminate against interstate commerce.

States are not permitted to:

> (i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.
>
> (iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (iv) levy or collect a tax, fee, or charge, first taking effect after August 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

49 U.S.C. § 40116(2)(A) (2010).

The language of § 40116(2)(A)(iv) is similar to the language at issue in this case under § 11501(b)(4) in that it applies to taxes imposed "exclusively" upon certain businesses operating in airports. A ruling in this case could therefore impact the protections Congress afforded airport businesses under § 40116.

Taxation of Energy Generation

Congress preempted state taxes on or with respect to the generation or transmission of electricity if such tax discriminates against out-of-state manufacturers, producers, wholesalers, retailers or consumers of that electricity. The provision specifies that a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. 15 U.S.C. § 391 (2010).

Taxation of Outer Continental Shelf Activities

Congress adopted a broad protection of oil and gas companies from state taxation of their activity on the Outer Continental Shelf. The statute says simply that "State taxation laws shall not apply to the Outer Continental Shelf." 43 U.S.C. § 1333(a)(2) (2010).

Prohibition of Income Taxes

Congress preempted state income taxes on companies whose sole activity in a state is the solicitation for sales of tangible personal property. 15 U.S.C. § 381 (2010).

Taxation of Stock Transfers

Congress preempted state taxation of change in beneficial or record ownership of securities when such state taxation was asserted based on the physical location of the agent handling the transfer. 15 U.S.C. § 78bb(d) (2010).

Taxation of Satellite Service

Congress prohibited local tax jurisdictions from requiring direct-to-home satellite television service providers to collect or remit "any tax or fee imposed

by any local taxing jurisdiction on direct-to-home satellite service." Pub. L. No. 104-104, Title VI, § 602(a) (reprinted at 47 U.S.C. § 152 (2010), historical and statutory notes).

Taxation of Passengers on Motor Carrier

Congress prohibited states from imposing "a tax, fee, head charge, or other charge on inter-state passenger transportation by motor carrier." 49 U.S.C. § 14505 (2010).

Taxation of Internet Access

Congress prohibited states from imposing any tax on internet access charges or any multiple or discriminatory tax on electronic commerce. Pub. L. 110-108, §§ 2 to 6 (reprinted at 47 U.S.C. § 151 (2010), historical and statutory notes).

Mobile Telecommunications Sourcing

Congress established uniform nationwide sourcing rules for state and local taxation of mobile telecommunications services. 4 U.S.C. §§ 116-126 (2010).

Each of these statutory provisions reflects a Congressional intent to protect interstate commerce from undue burdens and from discriminatory taxation. Unless the Eleventh Circuit's decision is corrected, each of these statutory provisions could be subject to unexpected litigation seeking to limit the impact of Congressional action by applying the Eleventh Circuit's rule allowing discriminatory exemptions as way to make an end run against the Congressional prohibitions.

In addition to the existing laws identified above, numerous bills are pending in Congress which would be subject to the intense scrutiny of the Eleventh Circuit's rule allowing discriminatory exemptions.

These bills have been drafted with the understanding that it is not necessary for Congress to expressly describe every possible means the states could use to circumvent the purpose of the bill. Without relief from the Eleventh Circuit's holding, the drafting of each of these bills would need to be evaluated.

Legislation has been introduced which seeks to prohibit states from imposing business activity taxes on companies that do not have a certain level of physical presence in the state. Business Activity Simplification Act of 2009, H.R. 1083, 11th Cong. (2009).

Legislation has been introduced which seeks to establish standards under which states could require remote sellers to collect sales and use tax on sales into the state and which creates jurisdiction in the Court of Federal Claims to hear certain disputes arising under the legislated standards. Main Street Fairness Act, H.R. 5660 11th Cong. (2010).

Legislation has been introduced which would impose a three-year moratorium on new, discriminatory state or local taxes on cell phone services, property or providers. Cell Tax Fairness Act of 2009, H.R. 1521, 11th Cong. (2009).

Legislation has been introduced which would adopt language similar to that of the 4-R Act forbidding discrimination against the taxation of digital goods. The legislation would also create jurisdiction in the district courts to hear disputes. Digital Goods and Services Tax Fairness Act of 2010, H.R. 5649, 11th Cong. (2010).[3]

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[3] This is list is not intended to be comprehensive, but only representative. Numerous other bills are introduced in each

State discrimination against interstate businesses is a growing problem for businesses struggling to compete in an increasingly competitive global business environment. The result has been an increasing cry for federal legislation establishing uniform rules and protections for commerce among the states. The question raised by the present case is quite simply, how specific does Congress have to be when it legislates to protect interstate commerce from antiquated and discriminatory local tax laws? While that question may not be susceptible to a precise answer, it is perfectly clear that Congress's prohibition against unlawful discrimination applies whether it comes in the form of a targeted imposition or a targeted exemption.

CONCLUSION

The 4-R Act sets forth prohibitions on discrimination and an avenue for relief in federal court that were intended to relieve railroad property from acts of discriminatory taxation by state and local governments. For Congress' words to have meaning, taxpayers must have the ability to challenge state discrimination whether it is accomplished by granting exemptions to favored competitors. To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the legitimacy of numerous other federal Acts impacting state and local taxation.

Congress that sees to limit the way state and local governments tax multistate taxpayers. *See e.g.*, Mobile Workforce State Income Tax Fairness and Simplification Act, H.R. 2110, 11th Cong. (2009); To Prohibit a State from Imposing a Discriminatory Commuter Tax on Nonresidents, and for Other Purposes. H.R. 117, 11th Cong. (2009).

Respectfully submitted,

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