No. 18-447

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND VERNON BARNETT, COMMISSIONER, DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONERS

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June 3, 2019

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SUPPLEMENTAL BRIEF OF PETITIONERS

As it did in *CSX II*, the United States recommends the Court deny review of the State's petition. As it did in *CSX II*, the Court should grant review anyway.

In Parts II-III, Alabama explains why the United States' recommendation against review of the Eleventh Circuit's water carrier ruling is wrong about Rule 10 and wrong on the merits. But, first, we demonstrate how the United States' position that CSX is entitled to a court-ordered tax exemption based solely on the water carriers' exemption leads to an absurd result that mocks Congress' intent for the 4R Act.

I. Granting relief based on a marginal competitor's exemption defies the 4R Act's goal of competitive balance.

1. Compared to trucks and trains, barges ship a trifling share of cargo in or through Alabama:

	Percentage Share By Tons Shipped	Percentage Share By Dollar Value
Truck	56.1%	71.6%
Pipeline	26.3%	7.4%
Rail	12.1%	7.0%
Multimodal	2.7%	10.7%
Water	2.4%	1.5%
Air	0.02%	1.5%

United States Department of Transportation, Freight Analysis Framework Version 4.5, State Profile Tables (Alabama 2017), https://faf.ornl.gov/fafweb/FUT.aspx

(last visited June 3, 2019).[1] Notably, trucks shipped 23 times the tonnage that water carriers shipped in 2017, and the value of the trucks' shipments was 46 times greater than the value of the water carriers' shipments. *Id.*

In other words, trucks are the rail carriers' true competitors. Water carrier competition is marginal, and CSX has cherry-picked that marginal competition to game the system *vis-à-vis* trucks—a fact not lost on the Chief Justice in *CSX II*:

> CHIEF JUSTICE ROBERTS: Well, just on the comparison class, can't you just let the water carriers go? I mean, it's a very tiny percentage that's at issue.
>
> * * *
>
> CHIEF JUSTICE ROBERTS: So if there's one water carrier, you win? Or if there's one odd method of transportation, you win?
>
> MR. PHILLIPS: I -- I --
>
> CHIEF JUSTICE ROBERTS: That sounds like most-favored nation to me.

Transcript of Oral Argument at 37-38, *Alabama Dep't of Revenue v. CSX Transp.*, 135 S.Ct. 1136 (2015) ("*CSX II*").

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[1] Alabama cites here the most updated statistics from 2017. The parties have cited the Freight Analysis Framework ("FAF") statistics to establish competitive levels throughout this case. For example, the 2002 FAF statistics are the basis of Pretrial Stipulation #17, and Alabama introduced the 2015 FAF statistics as Trial Exhibit #40 during the trial on remand from *CSX II*.

The Chief Justice is right. If CSX is entitled to the same exemption as any marginal carrier, then rail carriers have achieved most-favored-taxpayer status.

2. The United States justifies this result by citing the "4-R Act's stated purpose" to "foster competition among all carriers by railroad and other modes of transportation," US Br. 13 (quoting 45 U.S.C. § 801(b)(2)), and this Court's statement in *CSX II* that "discrimination in favor of competitors to rail carriers most obviously frustrates that purpose." *Id.* (quoting *CSX II*, 135 S.Ct. at 1142). But enjoining Alabama from collecting sales tax from CSX is not necessary to foster competition among the carriers because trains are already Alabama's most-favored taxpayer:

Per gallon fuel tax (on the date of filing)		
	State	State + Local + Federal
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
Trains	9.85¢	23.48¢

See App. 55a-56a (district court's fact findings on per gallon fuel taxes).

The only way to frustrate the competitive balance that presently exists is to *grant* CSX's requested relief. Since Alabama filed its petition, it passed a law that will increase the trucks' excise tax by 6¢ per gallon on August 31, 2019. *See* Ala. Act 2019-2. That law will not alter the sales tax that trains and interstate water carriers pay. So, should the Court fail to grant

review and reverse, the resulting injunction will significantly widen the pre-existing gap among carriers:

If Sales Tax Enjoined During October 2019 Term		
	State tax (per gallon)	State + Local + Federal (per gallon)
Trucks	25.00¢	53.40¢
Barges	0¢	29.1¢
Trains	0¢	0¢

CSX will have gamed the system by relying on a carrier with a 1-2% share of Alabama's shipping market (barges) to double its advantage over the carrier that ships more than half the goods in Alabama (trucks). In other words, the tail will wag the dog.

II. As *CSX II* proved, Rule 10 does not require a circuit split when the viability of a state tax statute is at stake.

1. The United States contends that review is not warranted because the Eleventh Circuit's decision does not conflict with another court's decision. US Br. 18. This argument ignores *CSX II*.

Before *CSX II*, courts had not split on the question of whether courts could look beyond the challenged statute to evaluate a State's justification, *see* Brief for the United States as Amicus Curiae, 10, *CSX II*, and CSX argued that lack of conflict obviated the need for review. *See* Supplemental Brief of Respondent in Response, 5, *CSX II*. The Court rejected CSX's 'lack of

conflict' objection, granted review, and reversed on the conflict-free issue. *CSX II*, 135 S.Ct. at 1143-44.

The Court did so, we believe, because "[d]ecisions invalidating Acts of Congress, or state statutes (particularly where the statutes are representative of those in other states), are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict." Eugene Gressman & Kenneth Geller, Supreme Court Practice, 480 (9th ed. 2007). This case has the same importance now as it did when the Court granted review in *CSX II*—*i.e.* Alabama's Education Trust Fund stands to lose more than $28 million in tax refund litigation, plus more than $5 million in annual tax revenue going forward. *See* Pet. 17-18. Georgia, who CSX sued after the Court decided *CSX II*, stands to lose even more. *See id* at 17.

2. The United States discounts these financial stakes by stating that Alabama will not necessarily lose $28 million in tax refunds because a separate court will determine "the appropriateness of retrospective tax refunds." US Br. 18. That is true; Alabama may get to keep some of that money. It may not. But the United States' point says nothing about the millions of *prospective* tax dollars Alabama, Georgia, and their local governments stand to lose—or that the same argument against review existed in *CSX II*.

The United States also tries to discount the importance of this case by noting that no State filed an

amicus brief.[2] Of course, no State filed a cert-stage brief in *CSX II* either, and the Court granted review.

In short, the United States levies the same arguments against review that this Court rejected when it granted review in *CSX II*. This case has the same Rule 10 importance now as it did then: A federal law is being cited to enjoin state tax statutes, thereby threatening the States' public fisc. And, as demonstrated below, lower courts still need guidance on issues that affect current and future 4R Act litigation, just as they did in *CSX I* and *II*.

III. The United States is wrong on the merits.

Alabama disagrees with several merits-related statements made by the United States and reserves its rebuttal on each point for merits briefing, if any. But there are two points that need to be briefly addressed at the petition stage.

A. The United States creates its own incorrect standard for judging the sufficiency of a State's justification.

The Court needs to clarify the proper standard for judging whether a State's justification for differential treatment is sufficient under subsection (b)(4).

Alabama argues that a justification is sufficient if it is based on a "reasonable distinction" that "has nothing to do with railroads," Pet. 21-28, because that's how the Court defined discrimination in *CSX I*.

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[2] The Multistate Tax Commission, which has 49 participating member States, filed an amicus supporting the petition.

CSX Transp., Inc. v. Alabama Dep't of Revenue, 562 U.S. 277, 286 ("'Discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.' Black's Law Dictionary 534 (9th ed.2009)"); at 288, n.8 ("So if, to use the dissent's example, a railroad challenged a scheme in which 'every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt,' *post,* at 1119, for some reason having nothing to do with railroads, we presume the suit would be promptly dismissed.").

When it comes to Alabama's 'risk of litigation' argument, CSX and the Eleventh Circuit seize on a line from *CSX II* to argue that a higher standard than "reasonable distinction" applies—*i.e.* compulsion by a federal court. *Compare* Pet. App. 31a (CA11 ruling) *and* BIO 14 (CSX argument) *with CSX II*, 135 S.Ct. at 1144 ("The State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law.")

The United States plays the middle. It agrees with Alabama that avoiding litigation is a "valid government interest" for justification purposes, "even if the State views the likelihood of an adverse judgment as remote and simply seeks to avoid nuisance suits." US Br. 14. In other words, court-ordered compulsion is not required. But the United States goes on to say that "under the 4R Act, however, a State must satisfy *a standard higher than minimum rationality*," US Br. 14 (emphasis added), and that, when the comparison class is made up of competitors, "[s]uch taxes require a *more substantial justification* to withstand scrutiny." US Br. 13 (emphasis added).

That means at least four standards have been articulated, from most strict to least restrictive:

- Compulsion by federal court (CA11, CSX)
- More substantial justification (United States)
- Reasonable distinction (Alabama)
- Minimum rationality

Each standard begs questions. For example, regarding "compulsion," why must a State wait until it is successfully sued—thereby exposing the State to time and litigation costs—rather than preemptively avoid the litigation? Or, regarding the United States' standard, why does subsection (b)(4) require a "more substantial justification" when competitors make up the comparison class? *See* US Br. 13. If "all the world, or at least all the world within the taxing jurisdiction, is [the Plaintiffs'] comparison-class oyster," *CSX II*, 135 S.Ct. at 1141, why do exemptions for competitors require "more substantial justification" than other comparators, when the text never mentions competitors?

As Justices Thomas and Ginsburg put it in *CSX II*, the Court needs to "provide guidance concrete enough to ensure that the statute is applied consistently" on recurring questions such as the proper standard for justification. *Id.* at 1149 (Thomas, J. dissenting).

B. The United States ignores Alabama's primary argument regarding litigation risk.

The United States asserts that "Alabama makes no meaningful effort to show that the water-carrier challenges it hypothesizes would even present close or fairly debatable questions." US Br. 15-16. To prove its point, the Government then lightly brushes aside

potential legal challenges based on the Commerce Clause and the 1819 Act that admitted Alabama into the Union. *Id.*

Would that it were so simple.

The United States makes dismissal seem effortless by ignoring Alabama's argument regarding the plain language of the Maritime Securities Act of 2002 ("MTSA"), 33 U.S.C. § 5(b). That argument was hard to miss: the MTSA was the first of three litigation risks cited in our petition, Pet. 25; it was the only one of those risks that we discussed in detail—four pages of detail—Pet. 25-28; and we titled the final section of our reply brief: "Like the Eleventh Circuit, CSX ignores Alabama's MTSA argument." Reply Br. 10-11.

Again, the MTSA provides that "No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew." 33 U.S.C. § 5(d) (emphasis added). Read plainly, this statute prohibits taxes "collected from" the "crew" of a "vessel." CSX and the Eleventh Circuit say this statute does not apply to the crew's purchase of fuel because "the unambiguous language used by Congress in the MTSA deals with taxes levied upon 'any vessel' or 'passengers or crew.'" BIO 17. And, to be clear, Alabama agrees that limiting Section 5(b)'s ban to taxes "levied upon" vessels matches Congress' desire to codify Tonnage Clause precedent, and that would be our argument if litigation comes. *See* Pet. 28; Reply Br. 10-11. But Congress wrote "levied upon *or collected from* any vessel or other water craft, or from its passengers or crew," and until *this* Court says that

Congress' addition of the disjunctive phrase "or collected from" has no separate meaning from the phrase "levied upon," Alabama has sufficient justification to avoid provoking MTSA litigation, *see, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."), particularly when Alabama knows first-hand that the Court values plain text over an expression of Congress' intent to codify the Court's precedent. *See Magwood v. Patterson*, 561 U.S. 320 (2010) (rejecting Alabama's argument that Congress used the phrase "second or successive habeas corpus application" in AEDPA to codify the Court's "abuse of the writ" precedent).

At the very least, it's dodgy for the United States to say that Alabama "makes no meaningful effort" to present a "close or fairly debatable question" on its litigation risk, US Br. 15-16, without mentioning—much less tackling—the MTSA's plain disjunctive language.

* * *

The United States understandably places less importance on this case than Alabama, Georgia, and our local governments do; federal tax dollars are not at stake. Fortunately, the Court understands the importance of this case, having granted review in *CSX II* despite the lack of a circuit conflict and despite the United States' recommendation against review. The Court should grant review a third—and, we believe, final—time to prevent CSX from using a nominal competitor's exemption to achieve competitive imbalance in this case and to provide necessary guidance in pending and future 4R Act cases.

CONCLUSION

The Court should grant the petition for certiorari review.

Respectfully submitted,

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