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U.S. SUPREME COURT UPDATE

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Court Considers Constitutionality of Maryland's Personal Income Tax

On 11/12/14, the U.S. Supreme Court heard oral arguments on the constitutionality of Maryland's personal income tax in *Comptroller of the Treasury of Maryland v. Wynne.* Maryland's Acting Solicitor General William Brockman, Eric Feigin, Assistant to the U.S. Solicitor General, and Dominic Perella, attorney for the taxpayers, asked the Court to determine whether Maryland's failure to allow residents to take a credit against their state income tax liability for income taxes paid to other states on income earned in those states impermissibly discriminates against interstate commerce.

As this issue of the Journal went to press, it is not known when a decision will be handed down. Oral argument suggests that the Court may be able to sidestep the more general question of whether states are free to tax the worldwide income of their residents when it results in double taxation and narrowly rule on the validity of Maryland's regime that also imposes a complementary county income tax on nonresidents earning income in the state on the theory that the regime is "internally inconsistent" (i.e., a state cannot tax all income earned within the state's border, whether by resident or nonresident, and tax income earned by residents in other states).

Merits briefs filed in the two other state tax cases before the Court this term, *Direct Marketing Association v. Brohl* and *Alabama Department of Revenue v. CSX Transportation*, are reviewed in this issue of the Journal. As this issue goes to press, the Court heard oral argument in these cases, which will be covered in detail in the next issue of the Journal.

A new petition for certiorari was filed by Colorado's Governor, John Hickenlooper, asking the Court to dismiss a challenge brought by state legislators to invalidate the state's Taxpayer Bill of Rights, which amended the state constitution to allow voters to approve or deny any new tax or tax increases. And, two pending petitions for certiorari were denied, while one state tax case remains pending.

As announced in a surprising midweek order, the Court has also decided to rule this Term on whether the federal government can subsidize through tax credits health care insurance for individuals enrolled on federally run exchanges under the Affordable Care Act (also known as "Obamacare"). On 11/7/14, the Court granted the petition for certiorari filed in *King v. Burwell*, where the U.S. Court of Appeals for the Fourth Circuit found that the Internal Revenue Service's interpretation that tax subsidies were meant to be available to individuals in both federal and state-run exchanges was a reasonable one, in line with the goals of the Affordable Care Act, and upheld the Internal Revenue Service's rule to this effect.

As previously reported, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit reached a different conclusion on this issue in *Halbig v. Burwell*, resulting in a circuit split. However, a court order granting a hearing en banc by the entire U.S. Court of Appeals vacated the circuit court's three-judge panel decision. In a previous issue of the Journal, we noted that many believed that the chances of the Supreme Court granting the *King* petition was weakened as a result of the en banc review by the D.C. Circuit, which had the potential to eliminate the split in circuits. The Court, however, has decided, split or no split, it will review this tax aspect of Obamacare.

Colorado Legislators Challenge State's Taxpayer Bill of Rights

In *Hickenlooper v. Kerr*, Docket No. 14-460, petition for cert. filed 10/17/14, ruling below as *Kerr v. Hickenlooper*, 744 F3d 1156 (10th Cir. 2014), *petition for rehearing en banc denied*, 759 F.3d 1186, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's ruling that legislators had standing to challenge Colorado's Taxpayer's Bill of Rights ("TABOR") and that the legislators' challenge was not barred by the political question doctrine.

The plaintiffs seek injunctive and declaratory relief, claiming that TABOR's requirement that new taxes be subject to voter approval "undermines the fundamental nature of the state's Republican Form of Government" in violation of the Guarantee Clause of the U.S. Constitution. (The plaintiffs have also alleged violations of Colorado's Enabling Act, the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment during the litigation.) Under TABOR, Colorado, with certain limited exceptions, "must have voter approval in advance for . . . any new tax, tax rate increase . . . , or a tax policy change directly causing a net tax revenue gain to any district." (Colo. Const. art. X, § 20, cl. 4(a).)

The legislators named Colorado Governor John Hickenlooper as defendant in their suit, and Governor Hickenlooper moved to dismiss the complaint, arguing that the plaintiffs lacked standing and that the political question doctrine required dismissal of all of the legislators' claims. But according to the circuit court, the plaintiffs provided adequate proof that TABOR, by requiring voter referendum on most tax issues, caused them injury. Thus, the plaintiffs had standing to challenge TABOR. Moreover, under the *Baker v. Carr* test, the legislators' suit was not barred by the political question doctrine, as there were judicially discoverable and manageable standards for the litigation, and resolving the case would not require the court to improperly make a policy determination.

The circuit court's decision was strictly jurisdictional. The court stated that "the merits of the case are not before us" and "stress[ed] that [its] decision on plaintiffs' Guarantee Clause claim is quite limited, leaving all issues other than standing, prudential standing, and the political question doctrine to the district court." Thus, the court did not address the merits of the legislators' claims.

The Guarantee Clause. The Guarantee Clause of the U.S. Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." (U.S. Const. art. IV, § 4.)

The Colorado legislators claim that TABOR's requirement of voter approval in advance of most new taxes "undermines the fundamental nature of the state's Republican Form of Government" in violation of this guarantee.

Standing. As stated by the circuit court, in order "[t]o establish Article III standing, a plaintiff must show: (1) that it has suffered a concrete and particular injury in fact that is either actual or imminent; (2) the injury is fairly traceable to the alleged actions of the defendant; and (3) the injury will likely be redressed by a favorable decision."

The court focused its analysis on the injury-in-fact criterion. According to the court, the legislators primary claim is that TABOR "deprives them of their ability to perform the 'legislative core functions of taxation and appropriation.'" And this interference "prevents them from doing their jobs." The court found that the "inhibition on a person's ability to perform work constitutes an injury-in-fact." This includes members of a state legislature, who "may have standing to sue in order to vindicate the 'plain, direct and adequate interest in maintaining the effectiveness of their votes.'"

As restated by the court, the legislators complain that TABOR forces the General Assembly to operate "not as a legislature but as an advisory body, empowered only to recommend changes in the law to the electorate." In other words, the legislators' complaint alleges that "TABOR has stripped the legislature of its rightful power." This nullification of authority, according to the court, constitutes a "concrete and particular injury in fact."

With regard to causation and redressability, the court engaged in a more concise analysis. The court noted that in order "[t]o satisfy causation for standing purposes, plaintiffs must demonstrate that their injury is 'fairly traceable to the challenged action of the defendant' . . . [a]nd an injury is redressable if a court concludes it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"

The court determined that the legislators' alleged injury-i.e., the nullification of their authority to make laws raising taxes or increasing spending-is "directly attributable to TABOR's requirement that any tax increase be approved by Colorado voters." Thus, the legislators' claim satisfied the causation test. Moreover, noting that the legislators sought a declaratory judgment that TABOR is null and void, the court found that "[s]uch a judgment would allow the legislator-plaintiffs to vote directly for increased taxes, thereby redressing their alleged injury."

In addition to Article III standing, the court also considered prudential standing considerations. The court ruled that the legislators had properly asserted more than a "generalized grievance." Thus, the doctrine of prudential standing did not bar the legislators' claims. The court therefore affirmed the district court's ruling that the legislators properly established standing.

Political question doctrine. In addition to claiming that the legislators lacked standing, Governor Hickenlooper also argued that the political question doctrine barred the legislators' claims against TABOR. The court summarized the political question doctrine as a "doctrine that excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."

As a threshold matter, the court ruled that the political question doctrine does not categorically preclude Guarantee Clause challenges against state constitutional amendments adopted by popular vote. Instead the court looked to the test announced in *Baker v. Carr*, 369 US 186, 7 L Ed 2d 663 (1962) as the "exclusive bases for dismissing a case under the political question doctrine."

Baker announced six factors that may render a case non-justiciable under the political question doctrine: "[1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

The court then proceeded with a discussion of each factor, finding that none required dismissal for nonjusticiability. The court therefore affirmed the district court's conclusion that "the specific Guarantee Clause claim asserted in this case is not barred by the political question doctrine."

Questions presented. In his petition for certiorari, the Colorado governor challenges the circuit court's rulings on both the political question doctrine and standing. The governor presents two questions for review:

1. "Whether, after this Court's decision in *New York v. United States,*505 US 144, 120 L Ed 2d 120 (1992), Plaintiffs' claims that Colorado's government is not republican in form remain non-justiciable political questions."

2. "Whether a minority of legislators have standing to challenge a law that allegedly dilutes their power to legislate on a particular subject."

Update on Three Docketed State and Local Tax Cases

The following discussion updates developments in the three docketed state and local tax cases as this issue of the Journal went to press.

***Wynne* oral argument.** On 11/12/14, the Court heard oral arguments in *Comptroller of the Treasury v. Wynne*, Docket No. 13-485, cert. granted 5/27/14, ruling below at 64 A3d 453 (2013). In this case, the Maryland Court of Appeals (the state's highest court) held 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 US 274, 51 L Ed 2d 326 (1977), whereby a state tax will pass constitutional 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.

Maryland defends its personal income tax regime. At oral arguments, Acting Solicitor General of Maryland, William Brockman, defended Maryland's right to tax the entire worldwide income of its residents. According to Brockman, residents receive "special benefits" from the states in which they reside and, thus, those states have the power to tax all of a resident's income, regardless of where it is earned. Furthermore, Mr. Brockman argued that there is no constitutional requirement for a state to provide a credit for taxes paid to other states. Put differently, Maryland's position is that a state need not subordinate its power to tax its own residents' income merely because another state taxes a portion of the same income.

The Justices, however, questioned the fairness of this approach, with Chief Justice John Roberts asking whether Maryland's tax credit scheme satisfies one of the principal inquiries used to determine whether an apportionment system satisfies the Commerce Clause: the internal consistency test. (A state tax violates the internal consistency test if double taxation of income would result if other states imposed an identical tax regime.)

Borrowing a term from the Wynnes' brief, the Chief Justice seemed concerned that Maryland's tax scheme produces a "special nonresident's tax." In other words, Chief Justice Roberts's concern was that Maryland has created a system in which a special tax is imposed "on those who live in one State and work in the other," a tax "that people who live in the State and work in the State do not have to pay." This, to the Chief Justice, "sounds unequal, whether fair or not."

And Chief Justice Roberts questioned whether, if the Court were to uphold Maryland's scheme, there was anything stopping the state from increasing tax burdens on those who work in one state but live in another. Unsurprisingly, Mr. Brockman defended the equality and fairness of Maryland's income tax laws. According to Mr. Brockman, "Life is not fair. Maryland taxes are."

Justices Stephen Breyer and Samuel Alito similarly focused on whether Maryland's tax regime acts similarly to a tariff. Indeed, Justice Alito cited to an amicus brief filed by tax economists and stated "what you've done operates exactly like a tariff because it provides an incentive to earn income in Maryland and not outside of Maryland." And, furthermore, he questioned whether Maryland's tax system shouldn't "meet exactly the same fate as a tariff?" That is, be struck down as in violation of the Commerce Clause. (As noted by the Wynnes' attorney at oral argument, "a tariff is the quintessential unlawful tax under the dormant commerce clause.")

The Justices also pressed Mr. Brockman as to why he believed that states can rightfully tax the full scope of their individual residents' income, and yet those same states are required to apportion the income of all corporations, including those domiciled within their borders.

Justice Ginsburg, in particular, asked "what about a corporation that is domiciled in Maryland? I think Maryland, like all states uses an apportionment formula for both domestic and foreign corporations." Mr. Brockman, however, argued that "[t]he residency principle that we're relying on as a basis for the broad taxing power and the benefits that one receives as residents is unique to individuals." Justice Kennedy questioned this rationale, noting that certain states also offer "significant advantages" to corporations that are domiciled in those states.

U.S. Solicitor General speaks to internal consistency. Arguing in support of Maryland, Assistant U.S. Solicitor General Eric Feigin argued against a finding of internal inconsistency. According to Feigin, "nonresident taxes can peacefully coexist with resident taxes" because the two methods of taxation are based on "distinct jurisdictional rationales." That is, one is a tax based on residency and the other is a tax based on doing business in a state.

Feigin stated "when two taxes are imposed on the same value based on distinct jurisdictional rationales, it's not impermissible double taxation under the Commerce Clause." Mr. Feigin admitted that fair apportionment is required when two taxes are based on the same rationale (e.g., where two states impose a tax based on the amount of business conducted in each state). But, according to Feigin, the same conflict does not exist for taxes with different jurisdictional rationales.

Also, Feigin argued that "to the extent the internal consistency test might suggest that the special nonresident tax that Maryland imposes, which is a special tax imposed only on nonresidents, may be taking too great a portion of nonresidents' income . . . it's kind of backwards for respondents to be able to raise that challenge because they are residents. They pay only the residential income taxes and, in fact, benefit from any overtaxing of nonresidents."

Justice Sotomayor, however, took issue with the Solicitor General's claim that nonresident taxes and resident taxes are based on distinct jurisdictional rationales. According to Justice Sotomayor, "we have previously said that a tax on sleeping, measured by the number of pairs of shoes you have in your closet, is a tax on shoes. So you can call it residency, but if it's still using income as its basis as opposed to property values or whatever else these residency taxes are based on, then why isn't it a tax on income?"

Wynnes' arguments. Dominic F. Perella of Hogan Lovells, the attorney arguing on behalf of the Wynnes, accepted that states do not run afoul of due process when they tax their residents' worldwide income, but he argued that "the Commerce Clause operates to force [states] to structure their taxes in a way that avoids double taxation." And according to Mr. Perella, Maryland systematically exposes its residents to double taxation by denying a credit against the local income tax for taxes paid to other states.

Justices Ginsburg and Kennedy, however, pressed Mr. Perella as to whether invalidating Maryland's income tax scheme would give certain resident taxpayers a "free ride" if they earned all of their income outside of Maryland, and therefore paid no taxes to the state. Mr. Perella agreed that there "will be occasional cases" but argued by and large it "comes out in the wash," because the state would benefit from nonresident taxpayers facing the reverse situation-i.e., nonresident taxpayers earning income in Maryland would remit income taxes to the state.

The Justices further questioned whether there could be some minimum tax imposed on a resident to avoid a free ride. Perella reminded the Court that Maryland is an "outlier," with no other state limiting its credit in the same manner.

The Justices, however, raised the issue of local jurisdictions, most notably Justice Kagan's hometown, New York City, that also fail to provide full credits for income taxes paid to other jurisdictions. It is clear, therefore, that the Court's ruling will have a substantial impact on the state and local tax landscape.

(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).)

Briefs filed in Direct Marketing Association's Tax Injunction Act challenge. On 10/17/14, the Colorado Department of Revenue ("Colorado") filed its merits brief in *Direct Marketing Ass'n v. Brohl*, Docket No. 13-1032, cert. granted 7/1/14, ruling below at 735 F3d 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. (As noted above, as we go to press the Court heard oral arguments in this case, which will be covered in detail in the next issue of the Journal.)

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 (referred to by Colorado as the "Collection Act") 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 USC § 1341) precluded federal court jurisdiction over the claims.

In its merits brief, Colorado argues that the Supreme Court should affirm the circuit court decision to dismiss the case for lack of federal subject matter jurisdiction under the TIA. According to Colorado, "[t]he plain text of the Tax Injunction Act bars DMA's suit." First, it cites to the text of the TIA that 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." Second, it argues "because DMA seeks, and obtained, an injunction, little doubt exists that the TIA's first prong ('enjoin, suspend or restrain') is satisfied." Third, it notes that the "DMA appears to acknowledge as much." Thus, the state focuses on the TIA's second prong ("assessment, levy or collection of any tax under state law"), and maintains that "DMA's challenge also satisfies the TIA's second prong . . . because the Collection Act represents an integral facet of both the 'assessment' and 'collection' of Colorado's sales and use tax."

In particular, Colorado argues that "DMA's lawsuit seeks to deny the State of Colorado the tools it needs to assess and collect its sales and use taxes." Colorado maintains that its information notice and reporting requirements are the state's "chosen method for ensuring reporting and payment of taxes on a growing class of transactions that largely escape assessment and collection." As summarized by Colorado in its brief, states may only collect sales and use taxes from retailers with a physical presence in their state. And with the ever-growing shift to online retail, Colorado claims that this limitation has resulted in "lost tax revenue [and] has caused significant damage to Colorado's fiscal situation."

Colorado contends that it responded to this growing problem by enacting the reporting requirements at issue. Therefore, any attack against its reporting requirements constitutes an attack on Colorado's ability to assess and collect taxes, in violation of the TIA's second prong. "This suit is not," Colorado maintains, "merely a challenge to a 'secondary aspect of tax administration,' as DMA argues."

Colorado's brief also responds to the argument raised by DMA that the TIA does not apply to suits brought by "non-taxpayer" (or "outsider") plaintiffs (an exception to the TIA developed by the U.S. Supreme Court in *Hibbs v. Winn*, 542 US 88, 159 L Ed 2d 172 (2004)). According to Colorado, "third-party reporting requirements on 'non-taxpayers' are every bit as critical to the tax assessment and collection system as a taxpayer's self-assessment. Challenges to such requirements therefore trigger the same jurisdictional bars as challenges to the taxes themselves." Colorado therefore maintains that "[n]o meaningful distinction exists between suits brought by taxpayers and those brought by other persons subject to laws central to a state's tax assessment and collection laws."

Moreover, Colorado contends that DMA is hardly a disinterested party, given that its members make sales to Colorado customers and compete directly with in-state retailers who are required to collect and remit sales and use taxes. According to Colorado, "DMA's members cannot be described as 'outsiders.'" Instead, Colorado argues that "*all* retailers who make sales in Colorado, whether collecting or non-collecting, are 'insiders' to the sales and use tax system." Thus, Colorado argues that the TIA extends to DMA's lawsuit challenging the state's reporting requirements. Colorado also argues that "applying the TIA in this case does not unduly expand its scope but rather furthers Congress's purpose of protecting the primacy of state court review."

Finally, Colorado maintains that "DMA's lawsuit is also barred for a second, independent reason-comity." According to Colorado, the Supreme Court's decision in *Levin v. Commerce Energy, Inc.*, 560 US 413, 176 L Ed 2d 1131 (2010), supports the conclusion that principles of comity offer independent grounds for upholding the circuit court. In *Levin*, the Court analyzed three factors to determine whether comity barred a federal court's interference with state adjudications.

Colorado summarized the three factors as "(1) the State's freedom to make tax classifications (as opposed to the State's inability to make suspect classifications based on protected personal attributes of regulated persons), (2) whether a goal of the suit is to improve a plaintiff's competitive position in the market place, and (3) the State court's relative flexibility to correct any violation." According to Colorado, all three factors "justify the Tenth Circuit's decision to adhere to the policy of federal noninterference."

(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).)

CSX files brief in 4R Act tax discrimination challenge. On 10/29/14, CSX Transportation, Inc. ("CSX") filed its 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 F3d 863 (11th Cir. 2013). In this case, Alabama has asked the Court to review the 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 USC § 11501). This case is a continuation of litigation that was before the Court three years ago ("CSXT I").

CSX argues in its brief that "[t]he Eleventh Circuit correctly held that the exemptions for motor carriers and water carriers are both discriminatory" in violation of the 4R Act. It explains that "[b]y operation of these exemptions, Alabama requires railroads, but not their direct competitors, to pay a substantial sales tax on their purchase of fuel. This differential tax treatment imposes a significant competitive disadvantage on railroads because fuel costs are one of the major operating expenses of interstate carriers."

CSX further argues that "Alabama is imposing an additional tax burden on railroads to contribute to its general fund that its competitors do not bear." Thus, it argues "[a]s the court of appeals properly recognized, Congress found that such extra tax burdens on railroads threaten their financial stability and are precisely the sort of state tax predation that the 4-R Act was designed to prevent."

In particular, CSX argues that the text, structure, purpose and history of the 4R Act supports the Court of Appeals decision and, thus, the judgment should be affirmed. According to CSX, the "plain text of subsection (b)(4) permits challenges to taxes that states impose on rail carriers, but not their competitors." It states, citing to the earlier CSX transportation case decided by the Court three years earlier (CSXT I), that "[s]ubsection (b)(4) is a 'catch-all provision,' 131 S. Ct. at 1105, that prohibits 'another tax that discriminates against a rail carrier'- or, as originally enacted, 'any other tax which results in discriminatory treatment of' a rail carrier."

CSX also argues that the structure of the 4R Act confirms that subsection (b)(4), the section at issue, does not direct the use of a single comparison class. It states, "[a]s this Court has recognized, subsections (b)(1)-(3) of section 11501-the provisions that address property taxes-specify one (and only one) comparison for taxes imposed on railroad property: the taxes imposed on 'commercial and industrial' property." However, "Subsection (b)(4), in stark contrast, does not contain any such restriction or specify any comparison class."

CSX therefore disagrees with Alabama's position that the 4R Act subjects to judicial scrutiny only the unfavorable treatment of railroads as compared to commercial and industrial taxpayers generally, not as compared to one or two exempt businesses. In other words, CSX argues that it was proper for the circuit court to review the treatment of railroads as compared only to other transport carriers in deciding whether there had been a violation of the law.

According to CSX, the statute's purpose and legislative history confirm that Congress intended to prohibit tax discrimination against railroads vis-a-vis their competitors. First, CSX cites to CSXT I for confirmation that the 4R Act was enacted "to restore the financial stability of the railway system in the United States, among other purposes." 131 S. Ct. 1105 (quoting 4R Act, 101(a), 90 Stat. at 33).

Second, CSX cites to the following legislative history: "The 4-R Act is a comprehensive statute aimed at 'promot[ing] the revitalization of the railroad industry in the United States.' S. Rep. No. 94-499, at 1 (1975). Congress recognized that railroads were in need of assistance in part because of their inability, due to a number of factors, 'to respond fully to changing economic trends,' resulting in the dramatic loss of traffic 'to other modes of transportation.'" CSX argues that "Subsection (b)(4) directly advances Congress's intent to foster the railroads' ability to compete against other modes of transportation."

Finally, CSX argues that the Court of Appeals properly declined to consider other aspects of Alabama's tax scheme when assessing the discriminatory tax challenge. CSX maintains that the 4R Act does not permit the consideration of other aspects of a state's tax scheme. According to CSX, the statute "contains no language indicating that courts should assess other taxes." Moreover, CSX argues that the Supreme Court has "repeatedly . . . declined to compare the relative burdens of taxes because of the complexity of that inquiry and the inherent limitations of the judicial process."

Finally, CSX contends that even if the Court considers other aspects of Alabama's tax scheme (i.e., the state's fuel excise taxes), Alabama's tax provisions still violate the 4R Act because water carriers are not subject to the excise tax. Thus, CSX maintains that there is an independent ground for invalidating Alabama's failure to exempt rail carriers' purchases of diesel fuel from the state's sales and use taxes.

On the same date that CSX filed its brief, the U.S. Solicitor General also filed a motion for leave to participate in oral argument as amicus curiae and for divided argument. (As noted above, as we go to press, the Supreme Court heard oral argument in the case; the oral argument will be featured in the next issue of the Journal.)

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

Petitions Still Pending

The following petition remains pending as the Journal went to press.

Tribal claim to refund of Florida fuel taxes. 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 F3d 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, § 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."

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."

In its petition for certiorari, the Tribe presents the following question for review: "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."

(For more background on this case, including a broader discussion of the lower courts' opinions and Florida's fuel tax pre-collection system, see U.S. Supreme Court Update, 24 JMT 38 (January 2015).)

Petitions Denied

The Court has denied certiorari in the following cases.

In ***Angelo Medina, et. al. v. Commonwealth of Puerto Rico, et. al.*** , Docket No. 14-156, petition for cert. den. 11/17/14, 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 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.

In ***Wilkening v. Board of Education of Oldham County*** , Docket No. 14-309, petition for cert. den. 11/17/14, 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 "Board") and against a group of taxpayers who filed actions for tax refunds. The taxpayers initially claimed that the imposition of certain school taxes was unlawfully excessive because the taxes were not approved by a prior vote as required by state law.

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