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U.S. Supreme Court Update

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U.S. SUPREME COURT UPDATE

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W.V. Law Unlawfully Discriminates in Violation of Intergovernmental Tax Immunity Doctrine

***39** At the time of this writing, the U.S. Supreme Court had recently issued its decision in *Dawson v. Steager* (Docket No. 17-419). Justice Gorsuch delivered the opinion for a unanimous Court, holding that the West Virginia statute exempting fromstate taxation the pension benefits of certain state and local law enforcement officers, but not the federal pension benefits of a retired federal marshal, violates the intergovernmental tax immunity doctrine, as codified by federal statute. We plan to coverthe Court's decision in the next issue of the JOURNAL.

Court Hears Arguments in Long-Running Calif. Sovereign Immunity Case; Receives New SALT Petitions

The Justices were busy with oral arguments yet again, this time in *Franchise Tax Bd. of Cal. v. Hyatt* (Docket No. 17-1299). As summarized in the lower courts' decisions (407 P.3d 717 (Nev. 2017)), the case involves a long-running dispute between a former California resident, Gilbert P. Hyatt, and the California Franchise Tax Board (the 'FTB'), in which the Nevada Supreme Court held the FTB was notentitled to immunity from intentional and bad-faith tort claims brought by Hyatt. Mr. Hyatt's dispute with the FTB stems from the agency's attempt to collect approximately $10 million in taxes on patent licensing fees earned by Hyatt in the 1990s.

Following an audit, in which the FTB determined Hyatt to be a California resident, Hyatt sued the FTB in Nevada state court, claiming that the FTB's abusive investigation techniques cost him business opportunities and inflicted emotional distress. The NevadaSupreme Court eventually largely reversed a substantial jury award of tort damages and punitive damages to Hyatt. Citing *Nevada v. Hall*, 440 U.S. 410 (1979), however, which held that the U.S. Constitution does not grant states sovereign immunity from suit in the courts of other states, the Nevada Supreme Court rejected the FTB's claim of complete immunity. Ultimately, the U.S.Supreme Court affirmed Nevada's decision in *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt I)*, 538 U.S. 488 (2003).

After another round at the Nevada Supreme Court, which held that the FTB was liable for fraud and intentional infliction of emotional distress only, the FTB appealed once again to the U.S. Supreme Court. The High Court granted certiorari for the second time,agreeing to consider two questions: (1) whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and (2) whether the U.S. Supreme Court's prior decision in *Nevada v. Hall*,

440U.S. 410 (1979), should be overruled. In its second decision, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, 136 S. Ct. 1277 (2016), the Court held that, with regard to California's first claim, the Full Faith and Credit Clause does not ‘permit[] Nevada to award damages against California agencies under Nevada law that are greater thanit could award against Nevada agencies in similar circumstances.‘ As to California's second question, however, the Court, in the wake of Justice Antonin Scalia's death, spilt 4-4 on whether *Hall* should be overruled.

****2** On remand from *Hyatt II*, the Nevada Supreme Court followed the High Court's instructions and held that the FTB was entitled to the benefit of Nevada's statutory damages cap and instructed the trial court to enter a damages award for fraud withinthe cap of $50,000. The FTB again requested the U.S. Supreme Court to grant certiorari, arguing that ‘under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State.‘ Specifically, the FTB askedthe Court to answer the question it had agreed to decide in *Hyatt II:* ‘whether *Nevada v. Hall* should be overruled.‘ Oral arguments occurred on January 9, 2019. Seth P. Waxman, Esq., argued on behalf of the FTB and Erwin Chemerinsky,Esq., argued on behalf of Mr. Hyatt.

Mr. Waxman argued on behalf of the FTB that the ‘participants in the [U.S. Constitution's] ratification debates . . . were unanimous in their understanding that states could not be sued in the courts of other states.‘ The Justices, thoughnot disagreeing that the participants may have felt states could not be sued in the courts of other states, focused on the explicit text of the U.S. Constitution. Speaking on the issue, Justice Sotomayor stated: ‘What we ***40** know is they didn't put it in the Constitution. And so we talk a lot now about not relying on legislative history, but relying on the plain text of the Constitution.‘ Justice Samuel Alito followed Justice Sotomayor's argument by questioning the FTB's attorney with respect to where theConstitution provides that states have immunity from suit in other states: ‘We are all always very vigilant not to read things into the Constitution that can't be found in the text . . . . I'm waiting for the answerto Justice Sotomayor's question about what provisions of the Constitution you would point to.‘

The FTB's attorney, Mr. Waxman, responded by arguing that the very act of ratifying the Constitution meant that states ‘surrendered their powers to treat each other as legal strangers.‘ It appeared, like Justice Sotomayor and Justice Alito, thatJustice Kavanaugh may not have agreed with such an argument. ‘Why is it not in the text of the Constitution in your view, given that the Constitution is a document in my view of majestic specificity?‘ he asked Mr. Waxman. ‘It's got a lot of specificdetails on very minute issues, and this issue . . . somehow was not mentioned in the text of the Constitution.‘ In reference to an amicus brief filed by more than 40 states urging the Justices to overturn *Hall*, the Justices suggested thatif the states wanted such protection, then the states should act to amend the Constitution.

Mr. Hyatt's attorney, Mr. Chemerinsky, argued that ‘40 years ago in *Nevada v. Hall*, this Court held that states may exercise their sovereign power under the Tenth Amendment to define the jurisdiction of the courts to protect their citizenswhen they're injured, including by other states. There's no compelling reason for overruling this precedent, discarding stare decisis.‘ Next, he framed the issue for the Court: ‘[u]nder the Tenth Amendment, the question for this Court is,is there anything that keeps states from exercising this jurisdiction? I'd suggest this Court could look to three sources: the text of the Constitution itself, the Constitutional Convention, and the pre-ratification history.‘ Specifically, he argued that‘[w]here the text of the Constitution wanted to limit state power, it did so explicitly.‘ In addition, he noted the matter of states suing one another ‘wasn't discussed at the Constitutional Convention.‘Mr. Chemerinsky concluded by arguing that ‘the law of the case doctrine is controlling in this case.‘

****3** In addition to hearing oral arguments in *Franchise Tax Bd. of Cal. v. Hyatt,* the Court received several new petitions for certiorari in matters involving state and local taxes: *Baskins v. Okla. Tax Comm'n* (Docket No. 18-807); *IllinoisCentral Railroad Co. v. Tenn. Dep't of Rev.* (Docket No. 18-866); and *Mitchell v. Tulalip Tribes of Wash.* (Docket No. 18-970). The Court also denied another recently filed petition: *Perry, et al. v. Coles County* (Docket No. 18-903).Previously reported petitions remain outstanding in cases involving state and local taxes: *Ala. Dep't of Rev. v. CSX Transp. Inc.* (Docket No. 18-447 and No. 18-612) and *Fielding, et. al. v. Comm'r of Rev., Minn.* (Docket No. 18-664).Also, at the time of this writing, we await a decision in

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Washington State Dep't of Licensing v. Cougar Den, Inc., Docket No. 16-1498, and arguments in *N.C. Dep'tof Rev. v. The Kimberly Rice Kaestner 1992 Family Trust*, Docket No. 18-457.

Finally, the Court also continues its review of a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram 'official checks.' The MoneyGram cases set for review are *Delawarev. Pennsylvania et. al.*, Case No. 220145, and *Arkansas et. al. v. Delaware*, Case No. 220146. As previously reported, the Court has assigned the Honorable Pierre N. Leval, of the U.S. Court of Appeals for the Second Circuit, as Special Masterin these cases, tasked with coordinating the taking of evidence and making reports. We will continue to update readers as more details become available.

Commerce Clause Challenge to 'Oklahoma Headquarters' Requirement

On December 19, 2018, the U.S. Supreme Court received a new petition for certiorari in *Baskins v. Okla. Tax Comm'n*, Docket No. 18-807, ruling below at OK Ct. App., Case No. 115,947 (May 9, 2018). The U.S. Supreme Court is asked to review anOklahoma Court of Civil Appeals decision affirming an Oklahoma Tax Commission decision that held the 'Oklahoma Headquarters' requirement of Okla. Stat. tit. 68, §2358(F) does not violate the dormant Commerce Clause of the U.S. Constitution.

Tax Commission denies capital gains deduction.

***41** Approximately five years after acquiring shares of stock in Primus International Holding Co. ('Primus'), Randolph and Beverly Baskins sold their shares and reported a long-term capital gain deduction on their amended 2011 Oklahoma tax return. BecausePrimus had its primary headquarters in Washington State, and not Oklahoma, the Oklahoma Tax Commission ('OTC') denied the Baskins' capital gains deduction. Under Okla. Stat. tit. 68, §2358(F), to qualify for the Oklahoma capital gains deduction,the capital gains must be from a company whose primary headquarters were located in Oklahoma for at least three uninterrupted years prior to the sale. This is known as the 'Oklahoma Headquarters' requirement. The Baskins filed suit claiming that the'Oklahoma Headquarters' requirement violates the Commerce Clause of the U.S. Constitution.

Oklahoma courts uphold denial of capital gains deduction.

****4** After a hearing, an Oklahoma Tax Commission Administrative Law Judge determined that because the Oklahoma Supreme Court, in *CDR Systems Corp. v. Okla. Tax Comm'n*, 2014 OK 31,339 ('*CDR*'), held that an identical Oklahoma headquartersrequirement did not violate the Commerce Clause when applied to corporations, estates, or trusts, Okla. Stat. tit. 68, §2358(F) would not violate the Commerce Clause as applied to individuals.

On appeal, the Baskins argued the Oklahoma Supreme Court improperly decided *CDR* by finding 'that the statute was not facially discriminatory' and that 'the dormant commerce clause does not apply.' The Baskins assert that 'thedenial of Capital Gains Deduction to them for the sale of stock in a non-Oklahoma headquartered company discriminates against interstate commerce and is therefore unconstitutional.'

The Oklahoma Court of Civil Appeals determined that *CDR* was dispositive and that the 'Oklahoma Headquarters' requirement did not violate the dormant Commerce Clause. Citing *CDR*, the appellate court determined that therewas no discrimination against interstate commerce to which the dormant Commerce Clause could apply. However, even if the dormant Commerce Clause did apply, the Oklahoma Court of Civil Appeals continued, the deduction does not facially discriminate againstinterstate commerce, it does not have a discriminatory purpose, and the deduction has no discriminatory effect on interstate commerce.

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Question presented.

In their petition to the U.S. Supreme Court, the Baskins ask: ‘Does the Oklahoma Capital Gains Deduction tax scheme as set forth in 68 O.S. 2011, §2358(F) as applied to Randolph S. Baskins and Beverly J. Baskins violate the Commerce Clause of theUnited States Constitution?‘

Tenn. Sales and Use Tax on Diesel Purchases by Railroads Challenged

On January 2, 2019, the U.S. Supreme Court received a petition in *Illinois Central Railroad Co. v. Tenn. Dep't of Rev.,* Docket No. 18-866, ruling below at 748 Fed. Appx. 26 (6th Cir. 2018). The High Court has been asked to review a decision by the U.S. Court of Appeals for the Sixth Circuit holding that Tennessee did not violate the U.S. Constitution by imposing a sales tax on the fuel purchasesof railroad carriers while exempting the fuel purchases of motor carriers.

Tennessee's tax scheme.

Federal law, 49 U.S.C. §11501(b)(4), prohibits states from imposing a tax ‘that discriminates against a rail carrier.‘ From 2006 through mid-2014, Tennesseetaxed railroads' purchase or use of diesel fuel at 7% of the retail price. Because railroads paid 7% sales tax on every purchase, their effective tax rate per gallon of diesel fuel fluctuated ***42** depending on its price. In contrast, motor carriers competing with railroads are exempt from sales and use taxes on diesel fuels; instead, they pay a fixed diesel tax of 17-cents-per-gallon on fuel they consume in Tennessee. In July 2014, Tennessee enacted a new tax scheme that effectively repealed the sales and use tax onrailroads' diesel fuel purchases and now subjects railroads to the same per-gallon diesel fuel that the state levies on motor carriers.

Sixth Circuit follows Eleventh Circuit lead.

****5** Illinois Central Railroad sued the Tennessee Department of Revenue in 2010, claiming that Tennessee's sales and use taxes discriminated against railroads under the Railroad Revitalization and Regulatory Reform Act, 49U.S.C. §11501(b) (the ‘4-R Act‘) because the state exempted motor carriers from certain taxes. While the case was on appeal, after the federal district court ruled in favor of Illinois Central, the U.S. Supreme Court issued a rulingon a similar tax scheme in *Ala. Dep't of Rev. v. CSX Transp., Inc.* (‘*CSX II*‘), 135 S. Ct. 1136 (2015) (as reported elsewhere in this column, a request for a further review in this matter is currently pending before the U.S. Supreme Court). In *CSX II*, the High Court held that ‘an alternative, roughlyequivalent tax is one possible justification that renders a tax disparity nondiscriminatory.‘ Following the Supreme Court's decision, the Sixth Circuit remanded the Tennessee case back to the district court to determine whether Tennessee's tax on motorcarriers was ‘roughly equivalent‘ to its tax on railroads.

The district court granted summary judgment in favor of Tennessee, finding, among other reasons, that the state sufficiently justified its tax on railroad diesel fuel because Illinois Central and motor carriers paid alternative, roughly equivalent taxes.*See Illinois Central Railroad v. Tenn. Dep't of Rev.*, 2017 WL 1347269 (M.D. Tenn. Apr. 12, 2017). Appealing to the Sixth Circuit, Illinois Central argued that, rather than comparing the two tax rates, courts ‘should apply the compensatorytax doctrine—which is a negative commerce clause test for scrutinizing in-state and out-of-state taxes.‘

The Sixth Circuit disagreed with Illinois Central's argument. Instead, the Sixth Circuit followed the Eleventh Circuit's lead. That is, ‘agree[ing] with the Eleventh Circuit that taxes are roughly equivalent if they impose similar rates.‘*See CSX Transp., Inc. v. Ala. Dep't of Rev.*, 888 F.3d 1163 (11th Cir. 2018). To that end, the Sixth Circuit determined that between 2007 and June 2014, the railroads' and motor carriers' tax rates differed by between less-than-half-of-one cent and approximately five cents per gallon.The railroads paid a higher rate in 2008 and again from 2011 through June 2014, but the motor carriers paid a higher rate in every other year. Therefore, the Sixth Circuit held, the taxes were roughly equivalent and did not violate the 4-R Act.

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Question presented.

Illinois Central asks the U.S. Supreme Court to consider 'whether Tennessee's tax on railroad fuel discriminates against railroads under 49 U.S.C. §11501(b)(4)?'

Non-Indian Landowners Challenge Tulalip Reservation Excise Tax

On January 23, 2019, the U.S. Supreme Court received a petition in *Mitchell v. Tulalip Tribes of Wash.*, Docket No. 18-970, memorandum below at 740 Fed. Appx. 600 (9th Cir. 2018). The High Court has been asked to review a Ninth Circuit decision that affirmed the dismissal of Petitioners complaint under the doctrine of tribal sovereign immunity. The Petitioners, who reside within theboundaries of the Tulalip Indian Reservation in Snohomish County, Washington, challenged a 1% tax imposed on the transfer of real property within the boundaries of the Indian Reservation, asserting that the tax created a cloud upon their title which renderedthe title unmarketable.

Imposition of 1% excise tax.

****6** Thomas Mitchell, his wife, and two other married couples (the 'Petitioners') are non-tribal property owners in fee simple of residences within the historical boundaries of the Tulalip Indian Reservation in Snohomish County, Washington. The TulalipTribes of Washington recorded a Memoranda of Ordinances in Snohomish County to exercise land use regulatory authority over the land and impose a 1% ***43** excise tax on the transfer of property owned by non-Indians located within the Tulalip Reservation. The ordinanceprovides that the tax 'may be enforced in a manner prescribed for foreclosure of mortgages as provided under state law.' Petitioners argue that the ordinance and excise tax create a cloud on title on properties held in fee. The cloud on title, Petitionersassert, has caused lenders to refuse to make loans on fee properties owned by non-Indians within the boundary of the Tulalip Reservation.

Lower courts rule suit cannot be brought against the Tulalip Tribes.

Petitioners brought suit against the Tulalip Tribes, seeking a declaration that the Tribes lacked authority to exercise regulatory or taxing authority over Petitioners or their properties held in fee. The district court dismissed the case under Federal Rulesof Civil Procedure 12(b)(6) on the grounds that the action was not 'ripe' because there was no pending or imminent tribal regulatory or taxation actions. On appeal, the Ninth Circuit affirmed, although on different grounds. The Ninth Circuit, by wayof memorandum, dismissed Petitioners' case under the doctrine of tribal sovereign immunity. Tribal sovereign immunity protects Indian tribes from suit absent congressional abrogation or explicit waiver. Here, the Ninth Circuit reasoned, the tribes could notbe sued in federal court because Petitioners' claims were 'not brought under any federal law that abrogates tribal immunity and the Tribes have not waived their immunity.'

Question presented.

Petitioners' now ask the U.S. Supreme Court to decide the following question: 'Does sovereign immunity bar the federal courts' consideration of a declaratory judgment action to determine whether Respondent Tribes can exercise regulatory/taxing authorityover real property owned in fee by Petitioners non-Indians, pursuant to allotments that were authorized by the Tribes' treaty with the United States?'

Petitions Previously Granted

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In addition to the petition in *Franchise Tax Bd. of Cal. v. Hyatt* (Docket No. 17-1299) (discussed above), the Court has granted petitions in two other state and local tax matters in which decisions have not been issued at the time of this writing.

Yakama Nation 'right to travel' without taxation.

As previously reported, the Court heard oral arguments on October 30, 2018, in *Washington State Dep't of Licensing v. Cougar Den, Inc.* The question before the Court is, 'Whether the Yakama Treaty of 1855 creates a right for tribal membersto avoid state taxes on off-reservation commercial activities that make use of public highways.'

****7** As summarized in the decisions below, Article II of the Yakama Nation Treaty of 1855 provides in relevant part that 'if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, withfree access from the same to the nearest public highway, is secured them; as also the right, in common with citizens of the United States, to travel upon all public highways.' (Treaty with the Yakamas, 12 Stat. 951, 952-953 (1855)).

Cougar Den, a Confederated Tribes and Bands of the Yakama Nation corporation, traditionally transported fuel over a 27-mile route from Oregon to the Yakama Indian Reservation without paying Washington's fuel tax, which is imposed on the importation and transportationof fuel. The Washington Department of Licensing, however, issued tax assessments on the imported fuel ($3.6 million of taxes, penalties, and fees for hauling the fuel across state lines) in 2013. Cougar Den refused to pay the assessment, arguing that the impositionof the tax violated its right to travel under the Yakama Nation Treaty of 1855. The Washington Supreme Court, in *Washington State Dep't of Licensing v. Cougar Den, Inc.,* 188 Wash. 2d 55 (2017), ***44** agreed with Cougar Den, holding that the Yakama Nation 'tribe[] w[as] entitled under [the Yakama Nation] [T]reaty to import fuel without holding [an] importer'slicense and without paying state fuel taxes.'

N.C. challenges application of Due Process Clause to trust taxation.

In *N.C. Dep't of Rev. v. The Kimberly Rice Kaestner 1992 Family Trust*, Docket No. 18-457, ruling below at 814 S.E.2d 43 (2018), the North Carolina Supreme Court held that the North Carolina Department of Revenue did not establish the minimum contacts necessary to satisfy the principles of due process required to tax an out-of-state trust.

North Carolina now asks the Supreme Court whether 'the Due Process Clause prohibit[s] states from taxing trusts based on trust beneficiaries' in-state residency.' Oral arguments in this matter are scheduled for April 16, 2019.

[Ed. note: For another take on this matter see elsewhere in this issue Shop Talk, 'The Supreme Court Trust Nexus Case: A Look at the Arguments,' 29 JMT 37 (May2019).]

Petitions Pending

In addition to the previously granted petitions, the following petitions remain pending before the Court: *Ala. Dep't of Rev. v. CSX Transp., Inc.* (Docket No. 18-447 and 18-612) and *Fielding et. al. v. Comm'r of Rev. Minn.*, (DocketNo. 18-664).

Alabama seeks to end decades-old dispute over railroad fuel taxes.

In *Ala. Dep't of Rev. v. CSX Transportation, Inc.,* Docket No. 18-447, ruling below at *CSX Transp., Inc. v. Ala. Dep't of Rev.,* 888 F.3d 1163 (11th Cir. 2018), the U.S. Supreme Court has been asked to review the Eleventh Circuit's holding that the Alabama sales tax, which applies to diesel fuel purchases by rail carriers but not diesel fuel purchases by motor or watercarriers, constituted a tax that impermissibly discriminates against rail carriers under §11501(b)(4) of the Railroad Revitalization and

Regulatory Reform Act of 1976 (the '4-R Act'). A conditional cross-petition also has been filed with the Courtin this matter (Docket No. 18-612).

****8** The 4-R Act prohibits states from imposing a tax 'that discriminates against a rail carrier.' CSX Transportation, Inc. ('CSX') is an interstate rail carrier that, according to the Eleventh Circuit, competes against trucking transport companies(motor carriers) and commercial ships, vessels, and barges (water carriers). In Alabama, the state's 4% sales and use tax applies to the purchase of diesel fuel, unless otherwise exempt. No exemption applies for rail carriers; however, motor carriers and watercarriers are both exempt from the state sales and use tax. Motor carriers, however, are required to pay a Motor Fuels Excise Tax of $0.19 per gallon of diesel to Alabama, and water carriers are subject to a federal (but not state) excise tax of $0.291 pergallon of fuel.

In 2008, CSX first sued the Alabama Department of Revenue (the 'Department '), seeking a declaratory judgment that the imposition of the state's sales and use tax violated the 4-R Act. CSX argued that the imposition of the tax against rail carriers,but not motor or water carriers, violated the language of the 4-R Act, which provides that a state may not '[i]mpose another tax that discriminates against a rail carrier.' After CSX's complaint was dismissed by the district court and theEleventh Circuit, the U.S. Supreme Court reversed and held that denying rail carriers exemptions provided to other carriers can be a form of discrimination under the 4-R Act. *CSX Transp., Inc. v. Ala. Dep't of Rev.* ('*CSX I*'),562 U.S. 277 (2011).

On remand, the district court ruled that Alabama's sales and use tax scheme does not discriminate against CSX. The Eleventh Circuit reversed, however, after deciding to apply a 'competitive approach,' which compares rail carriers only to their directcompetitors when addressing claims of discrimination under the 4-R Act. On review, the U.S. Supreme Court agreed with the Eleventh Circuit's use of a 'competitive approach' comparison, but disagreed with the circuit court's refusal to examine Alabama'salternate-tax based justifications for its disparate treatment of rail carriers. Instead, the Court held that 'an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory.' *Ala. Dep'tof Rev. v. CSX Transp., Inc.* ('*CSX II*'), 135 S. Ct. 1136 (2015). Therefore, the Court determined that the lower courts should have allowed Alabama to ***45** 'justify its decision to exempt motor carriers from its sales and use tax,' and the High Court remanded the case back to thedistrict court, setting the stage for CSX-round three.

On remand (again), the district court agreed with Alabama that neither the motor carrier nor the water carrier exemption violates the 4-R Act. On appeal, the Eleventh Circuit partially agreed, at least regarding the motor carrier exemption. According tothe Eleventh Circuit, the motor carrier exemption was justified because the state's sales and use tax is 'roughly equivalent' to the excise tax imposed on motor carriers. The Eleventh Circuit disagreed, however, with the district court's ruling asto the exemption for water carriers, holding that, in order to remedy the discrimination, Alabama must either (1) stop collecting sales and use taxes from railroads, or (2) revoke the water carriers' exemption.

****9** Alabama now asks the U.S. Supreme Court to consider the following question in what could be the third round of the state's dispute with CSX: 'Under 49 U.S.C. §11501(b)(4),when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers?' In its conditional cross-petition, CSX asks the Court, should it grant Alabama'spetition, to decide: 'Whether, as the Eleventh Circuit held, Alabama's imposition of a motor fuels tax used by the interstate motor carriers sufficiently justifies Alabama's imposition of a facially discriminatory sales and use tax on railroad diesel fuel,notwithstanding decisions of the Court and at least one state supreme court.'

Minn. seeks review of resident trust provision deemed unconstitutional.

In *Fielding et. al. v. Comm'r of Rev., Minn.*, Docket No. 18-664, ruling below at 916 N.W.2d 323 (Minn. 2018), the U.S. Supreme Court is asked to review a Minnesota Supreme Court decision that Minnesota's resident trust classification violated both the federal and Minnesota Due Process Clauses, as applied to four Minnesotatrusts, because (1) the state lacks sufficient contacts

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with the trusts, and (2) there is no rational relationship between the income the state seeks to tax and the protections and benefits conferred by the state.

Grantor Reid MacDonald, a Minnesota domiciliary, created four separate trusts, one to benefit each of his four children. The trusts were funded with nonvoting common stock of Faribault Foods, Inc. ('FFI'), a Minnesota S corporation, and the originaltrustee was a California domiciliary. Initially, MacDonald retained control over the trust assets; thus, for Minnesota income tax purposes, the trusts were treated as 'grantor type trusts' and only MacDonald was required to file income tax returns.On December 31, 2011, MacDonald relinquished his power to substitute the trust assets, making the trusts irrevocable. At that time, MacDonald remained a Minnesota domiciliary and, therefore, the trusts were classified as 'resident trusts' under Minn.Stat. §290.01, subd. 7b(a)(2). The trusts each filed Minnesota income tax returns as resident trusts, without protest, in 2012 and 2013.

On July 24, 2014, William Fielding, a domiciliary of Texas, became trustee for the trusts. Shortly thereafter, all shareholders of FFI stock, including the trusts, sold their shares. Because the trusts were defined to be Minnesota residents at the time ofsale—as a result of MacDonald being a Minnesota domiciliary in 2011—each trust was subject to tax on the full amount of the gain from the sale of FFI stock. Had the trusts not been deemed residents of Minnesota under Minnesota law, their incomewould have been assigned to the domicile of the trustee, which, in this case, was Texas. The trusts filed their 2014 Minnesota income tax returns under protest, asserting that the statute classifying them as resident trusts, Minn. Stat. §290.01, subd.7b(a)(2), was unconstitutional as applied to them. The trusts then filed amended tax returns claiming refunds for the difference between the taxes owed as resident trusts and the taxes owed as nonresident trusts—atax savings of more than $250,000 for each trust. ***46** The Minnesota Commissioner of Revenue denied the trusts' refund claims. The trusts appealed the Commissioner's ruling to the Minnesota Tax Court, which granted the trusts' motion for summary judgment on due process grounds. Ultimately, the Tax Court heldthat 'Minnesota did not have a sufficient basis to tax the trusts as 'residents'' because the grantor's domicile at the time the trust becomes irrevocable was not 'a connection of sufficient substance' to support the exercise of taxingjurisdiction.

****10** The Minnesota Supreme Court affirmed, holding that the trusts' contacts with Minnesota were either 'irrelevant or too attenuated' for due process purposes. Both the Minnesota Tax Court and Minnesota Supreme Court focused on the limited definitionof 'resident trust' as provided by Minn. Stat. §290.01, subd. 7b(a)(2): 'a trust, except a grantor type trust, which . . . is an irrevocable trust, the grantor of which was domiciled in this state at the time the trust became irrevocable.'However, the Minnesota Supreme Court held that under a due process challenge, all relevant contacts between the taxpayer and the state must be examined to determine whether the taxpayer may be taxed as a resident.

To that end, the Commissioner argued that the trusts had several contacts with Minnesota. Specifically, MacDonald was a Minnesota resident when the trusts were created, was domiciled in Minnesota when the trusts became irrevocable, the trusts were createdby a Minnesota law firm, and the trusts held stock in a Minnesota S corporation. However, the Minnesota Supreme Court determined that only contacts during the year at issue—2014—were relevant because that was the year the relevant income was generated.The Minnesota Supreme Court determined that in 2014, the trusts, and the trustee, had virtually no contacts with Minnesota and, therefore, taxation by Minnesota violated due process.

Minnesota now asks the U.S. Supreme Court to consider the following question: 'Does the Due Process Clause prohibit states from imposing incomes taxes on statutory 'resident trusts' that have significant additional contacts with the state, butare administered by an out-of-state trustee?' Minnesota has asked the U.S. Supreme Court to combine the case with the previously granted petition in the *Kimberly Rice Kaestner 1992 Family Trust* case (discussed above).

Petition Denied

On January 9, 2019, the U.S. Supreme Court received a new petition for certiorari in *Perry, et al. v. Coles County*, Docket No. 18-903, ruling below at 906 F.3d 583 (7th Cir. 2018). The petition was denied on February 19, 2019.

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In the case below, the Seventh Circuit affirmed the dismissal of a class action lawsuit against an Illinois county for disproportionate tax on industrial and commercial properties under the comity doctrine because, as the court noted, the taxpayers couldfile property tax assessment complaints with a county board of review and subsequently appeal decisions with either the property tax appeal board or the circuit court.

As explained by the Seventh Circuit, 'out of respect for state functions, the comity doctrine 'restrains federal courts from entertaining claims for relief that risk disrupting state tax administration.'' More specifically, the circuit courtstated '[s]pecifically, as is relevant here, the comity doctrine bars taxpayer from asserting §1983 claims against 'the validity of state tax systems' via federal lawsuits . . . . Taxpayers seeking such relief must instead 'seekprotection of their federal rights by state remedies, provided those remedies are plain, adequate and complete.''

****11** In their complaint, the plaintiffs asserted not that the assessments were unauthorized by law or levied on tax-exempt property. Instead, their Equal Protection Clause claims, in which equitable injunctive relief was sought, were based on 'the irregularityof the Coles County assessment process,' which refused to follow Illinois law when it only reassessed Mattoon Township commercial and industrial properties for the 2016 tax year. '[A]ccording to the Plaintiffs, the Illinois Supreme Courthas stated that equitable relief is not available to remedy such 'procedural errors or irregularities in the taxing process' and, since they seek such relief, the comity doctrine should not bar their suit.' Essentially, the plaintiffs argued that,because there is no state court that can grant them prospective declaratory relief on their Equal Protection Clause claims, comity should not be applied. Or, stated differently, they argued that 'state courtsdo not provide them with a *complete* remedy; ' therefore, the comity doctrine should not bar their suit.

The Justices suggested that if the states wanted protection [from suit in other states], then the states should act to amend the Constitution.

The Oklahoma Court of Civil Appeals determined . . . that the 'Oklahoma Headquarters' requirement did not violate the dormant Commerce Clause.

Illinois Central asks the U.S. Supreme Court to consider 'whether Tennessee's tax on railroad fuel discriminates against railroads under [the 4-R Act]?'

The Petitioners challenged a 1% tax imposed on the transfer of real property [by non-Indians] within the boundaries of the Tulalip Indian Reservation in Washington State.

Minnesota has asked the U.S. Supreme Court to combine [*Fielding et. al. v. Comm'r of Rev., Minn.*, Docket No. 18-664] with the previously granted petition in the *Kimberly Rice Kaestner 1992 Family Trust* case.

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