No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT IN RESPONSE TO BRIEF OF THE UNITED STATES

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INTRODUCTION

The Government's opposition to certiorari is absolutely correct about how the Court should dispose of this case: Deny the petition. As the Government confirms, the only question petitioners presented in the petition is not worthy of this Court's review and, in any event, was not preserved below. Respondent submits this supplemental brief solely to address the Government's suggestion that "if the petition is granted, the Court should add [an additional] question." U.S. Br. 23. For numerous reasons, the Court should reject the Government's suggestion.

I. THE GOVERNMENT'S OPPOSITION CONFIRMS THAT THE QUESTION PRESENTED BY THE PETITION DOES NOT WARRANT FURTHER REVIEW.

The sole question presented by the petition is whether a State engages in "discriminat[ion]" within the meaning of 49 U.S.C. § 11501(b)(4) when it "generally requires commercial and industrial businesses" to pay a tax, but "grants exemptions from the tax to the railroads' competitors," Pet. i; see also *id.* at 11 (describing the question as "'the proper scope of the comparison class'" for assessing discrimination claims) (quoting *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1118 n.3 (2011) (Thomas, J., dissenting) (*CSXT II*)).

The Government's brief confirms that this question is not worthy of this Court's review. The Government agrees that there is no conflict in the lower courts because, although lower courts have used different comparison classes to resolve different cases, none has "adopted a categorical rule that there is one and

only one proper comparison class for all cases brought under Section 11501(b)(4). Several courts have expressly disclaimed any such holding." U.S. Br. 16.

The Government also agrees that the court of appeals "correctly resolved" the comparison class issue by holding that "the comparison class may vary depending on the type of discrimination alleged and that, in this case, a comparison class consisting of the rail carrier's direct competitors was appropriate." U.S. Br. 11-14; Opp. 17-18. Petitioners emphasize the Government's assertion that the issue appears to be "'important,'" Supp. Br. of Pet. at 5 (quoting U.S. Br. 18), but they ignore the Government's ultimate conclusion that the "prospective impact" of the question presented is "unclear," given petitioners' failure to establish that other States have tax schemes similar to Alabama's. U.S. Br. 19; see Opp. 24 (showing that "very few States would be affected by the issue presented here").

The Government further confirms that this case is not an appropriate vehicle for addressing the comparison class issue in any event, because "that issue was not actively contested below." U.S. Br. 10; *id.* at 19 (respondent's waiver argument "has considerable support in the record"). Petitioners' failure to press the comparison class issue on remand was clearly a deliberate decision. As the Government points out, *id.* at 19-20, this Court in *CSXT II* expressly noted that petitioners had potentially waived *this very issue* on the record before it, 131 S. Ct. at 1107 n.5, yet thereafter on remand, petitioners still did not "actively contest" the issue in either the district court or the court of appeals. It is difficult to imagine a clearer case of a party's failure to preserve an issue, and this waiver should be fatal to the petition.

II. THE COURT SHOULD NOT ENTERTAIN THE GOVERNMENT'S PROPOSED ADDITIONAL QUESTION.

The Government concedes, as it must, that the petition "presents only the comparison-class question" and that petitioners "have abandoned [the issue whether other aspects of the state tax scheme are relevant to the discrimination inquiry] in this Court." U.S. Br. 10, 19. Notwithstanding its acknowledgement that the "other tax" issue is therefore "not properly before the Court," *id.* at 21, the Government suggests that, if the Court does not deny the petition for the reasons stated above, the Court "should add a second question presented" that addresses this very issue. *Id.* at 22; see also *id.* at 1, 23 (setting out proposed additional question). This contradictory suggestion is unsound and should be rejected.

A. The Government is plainly correct that petitioners abandoned the "other tax" issue in this Court. That issue – one of the two questions concerning the meaning of "discriminat[ion]" in § 11501(b)(4) that this Court expressly left open in *CSXT II*, 131 S. Ct. at 1107 n.5 – was plainly presented and litigated below. See U.S. Br. 21 (noting that this issue was "the one issue [petitioners] *did* litigate below") (emphasis in original). Indeed, petitioners' principal legal theory was that "Alabama's overall tax structure results in approximately equal tax treatment of all carriers," when the sales and use taxes that respondent challenged are considered in conjunction with the excise taxes paid by respondent's motor competitors. Pet. App. 81a. And the opinions of both courts below contain extensive discussions of that issue. *Id.* at 12a-17a, 55a-62a. On this record, it is clear beyond

question that petitioners could have presented here the question that the Government proposes, and petitioners chose not to do so.

Given petitioners' deliberate decision to present only the comparison-class issue in the petition – and not the "other tax" issue – that is the sole question that is properly before the Court. This Court's Rule 14.1(a) is unequivocal: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioners attempt to embrace the Government's suggestion by arguing that the "other tax" question is "fairly included" within the question presented, Supp. Br. of Pet. at 3-4, but the Government itself repudiated that argument, U.S. Br. 21. This was for good reason. This Court in *CSXT II* treated the two questions as separate. In addition, the Government's argument is merely that both questions are relevant to determining whether a tax is discriminatory, and that this Court – if it were to take up the meaning of discrimination – should therefore address both questions so that lower courts do not receive "incomplete guidance." *Id.* at. 22. This Court, however, repeatedly has held that "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992)). Thus, because neither of the two questions is "subsidiary to the other," *Yee*, 503 U.S. at 537, the "fairly included" language in Rule 14.1(a) does not apply here.

The Government's suggestion also is contrary to the purposes of Rule 14.1(a). As this Court has explained, a litigant seeking review in this Court "controls the

scope of the question presented" and can "frame the question as broadly or as narrowly as he sees fit." *Yee*, 503 U.S. at 535. Rule 14.1(a), however, provides clear notice that once the petitioner has chosen the issues it seeks to bring before the Court, it will be bound by its selection in order to preserve the integrity and efficiency of the certiorari process and to avoid unfairness to respondents. *Id.* at 535-36. Thus, this Court should not add a new question that petitioners consciously forfeited. Rule 14.1(a) does not allow the Government to rewrite petitions in the guise of expressing its views.

B. The Government's proposed additional question does not warrant review in any event. As the Government concedes, there is no conflict in the lower courts on the "other tax" issue, and no court of appeals has adopted its proposed approach. U.S. Br. 18. In addition, as with the comparison-class issue, the "prospective impact" of this issue is, at best, "unclear." *Id.* at 19.

What the Government and petitioners fail to acknowledge is that this case is not a suitable vehicle for addressing the "other tax" question in any event because that issue would not resolve the case. Respondent also asserted below that Alabama's sales and use taxes violate the 4-R Act because the exemption granted to interstate water carriers – who do not pay the motor fuel excise tax either, see Opp. 5 & n.3 – is discriminatory within the meaning of § 11501(b)(4). The district court did not agree, Pet. App. 62a-66a, but the court of appeals reversed that ruling and held that "no one can seriously dispute that the [interstate] water carriers, who pay not a cent of tax on diesel fuel, are the beneficiaries of a discriminatory tax regime." Pet. App. 17a.

The court of appeals' holding that the challenged tax is discriminatory because of the exemption for interstate water carriers is an independent ground for its determination that the tax is unlawful. And this holding would not be affected by a ruling of this Court on the "other tax" question because interstate water carriers do not pay any "other tax" on their diesel fuel. Accordingly, the court of appeals' invalidation of Alabama's sales and use taxes would stand regardless of this Court's resolution of the additional question that the Government proposes. This Court therefore should not devote its scarce resources to resolving a non-dispositive question in this case.

CONCLUSION

For the foregoing reasons, and those presented in the opposition to the petition, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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