SUPREME COURT OF LOUISIANA
DOCKET NO. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD SALES & USE DEPARTMENT, ET AL.

Applicant/Plaintiff

VERSUS

NELSON INDUSTRIAL STEAM COMPANY

Respondent/Defendant

CIVIL ACTION

ON THE DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL, DOCKET NO. 2019-CA-315, REVERSING JUDGMENT OF 14TH JUDICIAL DISTRICT COURT DOCKET NO. 2017-1373, JUDGE RONALD F. WARE PRESIDING

MEMORANDUM OF *AMICUS CURIAE* OF TAX COLLECTORS IN SUPPORT OF APPLICANT

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IDENTITY AND INTEREST OF THE COLLECTORS

Amici curiae are the sales and use tax collectors for the parishes of Ascension Parish Sales and Use Tax Authority, the Rapides Parish Police Jury Sales and Use Tax Department, and the St. James Parish School Board ("Collectors").

The Collectors submit this brief in support of Appellant, the Calcasieu Parish School Board Sales and Use Tax Department. This case presents a question of significant practical importance to the Collectors.

In the decision below, the Third Circuit Court of Appeal (the "Third Circuit") held that Act 3 was a "new" tax, was enacted in violation of the Louisiana Construction, and, therefore, was unconstitutional.

If allowed to stand and applied to these Collectors, the Third Circuit's holding may have significant detriment on the Collectors, which have collected the sales and use taxes on similar transactions as those at issue in this case for 40 years, only to have that collection disrupted by *NISCO I.* However, after this Court invited the Legislature to clarify its intent, the Legislature did so by enacting Act 3 which was the result of a lengthy legislative process as evidenced in the public hearing and majority vote—only to have the Third Circuit ignore it all. Accordingly, the Collectors have a substantial interest in the question presented here.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is respectfully submitted by these Collectors that the Third Circuit's decision is deeply flawed because it undermines the legislative intent and decimates the state and local collectors, including amici, that have relied on taxes from these transactions for over 50 years. If not overturned, the Legislature's intent in enacting Act 3 will be ignored because a proper expression of legislative will that only clarifies—but does not raise revenue—will be considered a "new" tax. As the Appellant's brief explains, the Third Circuit's opinion cannot be reconciled with the text, history, or purpose of Act 3.

In reaching its conclusion in *NISCO I*, this Court expressed that it felt, "compelled to note that if the legislature chooses to narrow the 'further processing exclusion' by way of requiring a profit, or writing into law a new test that embodies a 'primary product' or 'primary purpose' factor,

or otherwise adding an economy-based consideration, we will adhere to our constitutionally delineated role of applying that new law."[1]

The Legislature listened and accepted this Court's invitation. Act 3 was the direct response to this Court's invitation to clarify the law. Act 3 is consistent with this Court's invitation and settled jurisprudence. Indeed, it is long recognized that, "remedial legislation shortly following a court's decision that highlights an ambiguity or conflict in a statutory provision" is a proper use of the legislative process. Put differently, "it is the province of the Legislature to clarify the law when the courts indicate the necessity of doing so."[2]

And clarifying the law, at this Court's request, is precisely what Act 3 did. The Legislature sought to clarify its intent regarding the "further processing exclusion" and how it fit into the sale and use tax scheme, including the scope and limits of the further processing exclusion. But the Legislature did not intend to create a "new tax." To the contrary, the Legislature carefully crafted the plain language of Act 3 to be a clarification that would not generate new tax revenue. Relying on the fiscal note and as borne out in the public debate in the House, the legislature sought to avoid the very conclusion of the Third Circuit—that this was a "new tax."

Yet the Third Circuit chose to disregard the legislature's transparent intent. A proper respect for the Legislative Branch should lead this Court, as the state's head of the Judicial Branch, to have the final word ensuring that the correct interpretation and application of this law is consistent with the Legislature's intent. The Legislature amended the law in response to this Court's *NISCO I* invitation and while Appellant's rehearing application in *NISCO I* was still pending, but that is now unjustifiably restrained by the Third Circuit's decision. This Court has options about how best to implement that review. The course Amici recommend is for the Court to hear, vacate, and remand this matter back to the district court with instructions consistent with the plain language of Act 3 and the legislative intent and history.

LAW & ARGUMENT

A. The text of Act 3 does not provide for a "new" tax.

Like all exercises of statutory construction, determining whether Act 3 imposed a "new" tax requires a "fair reading" of the statutory language.[3] As always, the "starting point in

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[1] *Bridges v. Nelson Indus. Steam Co.*, 15-1439 (La. 05/03/2016), 190 So. 3d 276, at p. 16.
[2] *See Unwired Telecom Corp. v. Parish of Calcasieu,* 03–0732, p. 15 (La.1/19/05), 903 So.2d 392 (on rehearing) (internal citations omitted).
[3] *Bond v. United States*, 572 U.S. 844, 861 (2014); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33–41 (2012).

interpreting any statute is the language of the statute itself,"[4] including the words of the provision and its grammar, structure, context, subject matter, and, of course, legislative intent.[5] The Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation."[6] The fairest and best reading is that Act 3 did not create a "new" tax.

Construction of a statute starts with its "key words."[7] Here, those key words reveal that the amendment did not levy a new tax. In enacting Act 3, the Legislature amended La. R.S. 47:301(10)(c)(i)(aa)(III)(aaa) to "clarify and be interpretive of the original intent and application" of the statute. To this end, the amendment did not change the tax rate—the rates stayed the same. The amendment did not increase an existing tax, the fiscal note was neutral—there would be no gain in revenue to State or local coffers; and Act 3 did not repeal an existing tax exemption—this dealt only with application of an exclusion.

The only thing "new" about the text of the amendment is the inclusion of the settled but apparently misunderstood Legislative intent of how the "further processing exclusion" should be applied within the sales and use tax scheme. The tax itself existed for 50 years. By the plain language of the text itself, this is not a "new" tax.

B. The Third Circuit's decision eviscerates the legislative intent.

The Louisiana Constitution mandates that the Legislature is vested with the power of taxation.[8] Under the civil law doctrine, legislation is the superior source of law that custom cannot abrogate.[9] In the exercise of its legislative power, the Legislature may enact any legislation that the state constitution does not prohibit.[10] The Legislature, here, attempted to exercise its constitutional power by amending a sales and use tax statute, and the legislative history proves it was done constitutionally. But The Third Circuit's holding ignored the legislative history and reached a result that is incongruent with the text and purpose of the Act, while also eviscerating the legislative intent.

1. Act 3 was approved by the Legislature after a highly public, open, and deliberative process intent on <u>not</u> enacting a "new" tax.

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[4] *Touchard v. Williams,* 617 So.2d 885, 888 (La.1993); *Theriot v. Midland Risk Insurance Company,* 95–2895 (La.5/20/97), 694 So.2d 184, 186; *State v. Johnson,* 03–2993 (La.10/19/04), 884 So.2d 568, 575.
[5] *See Succession of Boyter,* 99–0761, p. 9 (La.1/7/00), 756 So.2d 1122, 1129.; *Stogner v. Stogner,* 98–3044, p. 5 (La.7/7/99), 739 So.2d 762, 766; *Va. Uranium, Inc. v. Warren,* 139 S. Ct. 1894, 1901–02 (2019); *Burgess v. United States,* 553 U.S. 124, 134 (2008); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993).
[6] *Achilli v. United States,* 353 U.S. 373, 379 (1957).
[7] *NLRB v. SW General, Inc.,* 137 S. Ct. 929, 938 (2017).
[8] La. Const. Ann. art. VII, § 1.
[9] La. Civ.Code Ann. art. 1, comments (a) and (c).
[10] *Board of Com'rs of Orleans Levee Dist. v. Dept. of Natural Resources,* 496 So.2d 281, 286 (La.1986).

The impetus for enacting Act 3 was this Court's decision in *NISCO I.* Representative Broadwater authored what ultimately became Act 3 based on *NISCO I's* invitation to the Legislature to explain how it intended to apply the further processing exclusion; "So that's what I'm seeking to do—file a bill to provide that clarification...."[11]

The legislative record is replete with references to the Legislature's intent that this was not a "new" tax. Representative Broadwater, in his introduction of the Bill, said the intent is not for a new tax or a double tax.[12] In fact, the initial Bill ignited industry concern that the primary purpose of the bill would be to generate "whole lot of new taxes" never paid before. But that was not the intent; it was not intended to be a tax generation instrument.[13] Aware of the double tax and revenue generating concerns, the Legislature amended the Bill to mollify business concerns.

After his introduction, Representative Broadwater was asked if this levied a new tax, to which he answered "No... this provid[es] clarification on the further processing tax...clarifying language.... This is not creating a new tax."[14] Representative after representative asked whether this was a new tax, and Representative Broadwater consistently explained: "This would not be creating a new tax. This is providing clarification on how you apply this portion of the law."[15] After nearly an hour of testimony, Representative Bagley asked again "And there are no new taxes?"; Representative Broadwater replied "No, that's the whole intent."[16] Later during the hearing, Representative Marcelle, in summing up the intent of the Bill, posited "And so, actually what we are doing here is not creating a new tax; however, we are fixing something based upon what the Supreme Court has ruled in their interpretation of the law."[17]

The Legislature was concerned that the Bill would be considered an expansion of the tax that would raise revenue. But the intent, Representative Broadwater explained, was not to increase revenue but was, "...stability. Local government should see stability.... The intent behind the amendment as well is that businesses should not see anything new taxed."[18] The purpose was twofold: (1) provide clarity by defining how the Legislature intended for the provision to be applied; and (2) "to do it in such a way that we do not create an expansion of the new tax."[19] The Legislature accomplished this goal when the fiscal note returned neutral, which proved that it was

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[11] House Floor Debate on June 19, 2016 at 59:07-59:44.
[12] House Floor Debate on June 19, 2016 at 37:36-38:08.
[13] *Id.*
[14] House Floor Debate on June 19, 2016 at 46:50-47:43.
[15] House Floor Debate on June 19, 2016 at 1:04:09-1:06:07.
[16] House Floor Debate on June 19, 2016 at 1:19:30-1:22:30.
[17] House Floor Debate on June 19, 2016 at 1:37:07-1:37:23.
[18] House Floor Debate on June 19, 2016 at 1:14:10-1:14:34.
[19] House Floor Debate on June 19, 2016 at 1:19:30-1:22:30.

"not taxing something new here."[20] Indeed, the Bill was designed to be "revenue neutral," which was the conclusion reached by the fiscal note and Secretary Robinson's interpretation.[21] The Bill was only intended to "provide clarity and would not tax something new." Representative Broadwater believed the Bill accomplished that goal, and the fiscal office concurred.[22] The revised fiscal note unequivocally "says that it will not increase any taxes."[23]

2. The purpose of Act 3 was to clarify the Legislature's intent regarding the law—not to raise revenue—which was done at the request of Louisiana Supreme Court in NISCO I.

The Legislature was attentive to the sensitivity that some thought Act 3 would raise revenue. Representative Broadwater was repeatedly asked whether this Bill raised revenue, and, anticipating this concern, tailored the bill to only stabilize revenue. But the Legislature was confident that the amendment would not raise revenue—supported by the fiscal note—because it knew that if raised revenue or was a new tax, then it would require a different voting threshold. "What is being taxed today," Representative Broadwater recognized, "continues to be taxed with the amendment to credit being applied." And relying on the fiscal note, "which says there is no impact," a simple majority vote in the House and Senate was all that was required.[24]

The Legislature was aware that Act 3 could be challenged in Court. Representative Broadwater admitted that "I can't guarantee that someone's not going to challenge anything that we do," but stressed that the Legislature "tried to be very responsible in the way that we addressed this." To wit, the Legislature stated its intent was, "...to clarify existing law so as the courts evaluate it, they understand what our intent of the existing law is." Further, cognizant of companies that have filed suit, paid taxes under protest, or sought refunds prior to the effective date of Act 3, the Legislature proclaimed that the provisions of Act 3 would not affect those suits or filings. If a suit, payment under protest, or refund claim was filed prior to *NISCO I*, the analysis would remain unchanged. Rather, the amendment to the further processing exclusion would be applied "prospectively."[25]

Every Representative that spoke at the hearing seemingly understood that Act 3 would not raise revenue and it did not require a two-thirds vote.[26] That is because the purpose of Act 3 was

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[20] House Floor Debate on June 19, 2016 at 1:19:30-1:22:30.
[21] House Floor Debate on June 19, 2016 at 1:19:30-1:22:30.
[22] House Floor Debate on June 19, 2016 at 1:19:30-1:22:30.
[23] House Floor Debate on June 19, 2016 at 1:33:11-1:33:22.
[24] House Floor Debate on June 19, 2016 at 1:34:15-1:35:14.
[25] House Floor Debate on June 19, 2016 at 1:40:57-1:41:55.
[26] House Floor Debate on June 19, 2016 at 1:15-1:16:27; 1:16:54-1:17:23.

not to raise revenue; it was part of a clarification of Legislature's intent of the "further process exclusion." Viewed most favorably to NISCO, Act 3 simply added and codified the settled jurisprudential three-part test to determine whether certain raw materials met the exclusion. Pursuant to applicable Louisiana jurisprudence, this means that Act 3 cannot be classified as a "new tax."

As this Court knows, Article VII, §2 of the Louisiana Constitution requires a two-thirds majority to levy a new tax or increase an existing tax. The Louisiana constitution does not define what constitutes a "revenue raising bill."[27] And Louisiana courts have held that not all actions by the Legislature that impact revenue or taxes must follow these Constitutional mandates since not every imposition of a charge by the government constitutes a demand for money under its power to tax.[28] No, to be considered a "tax," a change must have the raising of revenue as its primary purpose.[29]

The enactment of Act 3, as an amendment to the overall sales and use tax statutory framework, is analogous to a situation addressed by this Court in *Palmer, et. al. v. Louisiana Forestry Commission, et. al.*[30] There, plaintiff challenged the Forestry and Tax Commissions' reclassification of "chip and saw" forestry product from "pulp wood" subgroup to "trees and timber" category for purposes of assessing severance tax. This Court considered whether the reclassification resulted in a "new tax," and provided the following guidance:

> **Viewed in light of the surrounding circumstances,** we conclude that the Commissions' action in reclassifying chip and saw did not result in the imposition of a new tax. **Chip and saw had always been a taxable item under La. R.S. 47:633. The purpose of the reclassification was not for raising revenue, but to conform the product to the mandate of section 633** to tax all trees and timber at the 2 ¼% severance tax rate, excepting only pulpwood....[t]hus, placement of chip and saw in the trees and timber tax category **was a fair reflection of the statutory scheme as a whole.** [emphasis added] *Palmer* at 1307.

Here, the primary purpose of Act 3 was not raising revenue, but instead was the codification and clarification of a settled jurisprudential test regarding "further processing exclusion." It was done at the request of this Court in *NISCO I*, not at the Legislature's own idea about increasing revenue through tax policy. The "further processing exclusion" was already a

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[27] 20 La. Civ. L. Treatise, Legis Law & Proc. § 2:2: (2019 ed.).
[28] *Audubon Ins. Co. v. Bernard,* No. 82-CA-2744 (La. 6/27/1983), 434 So. 2d 1072, 1074.
[29] *See Safety Net for Abused Persons v. Segura,* No. 96-CA-1978 (La. 4/8/1997), 692 So. 2d 1038, 1041 (emphasis added); see also *Audubon Ins. Co. v. Bernard,* 434 So. 2d 1072, 1074 (La. 1983) (If an imposition has not for its principal object the raising of revenue, it is not tax.).
[30] No. 97-C-0244 (La. 10/21/1977), 701 So. 2d 1300.

part of the sales and use tax framework, not a "new" addition designed to change the tax structure. The Legislature, by way of Act 3, codified that three-part test and expressed its original intent with respect to "byproducts"—all of which is done by their vested constitutional powers.

To be fair, Representative Broadwater consistently testified that this would stabilize the sales and use tax system, meaning the revenue would stay as it had been for years prior to *NISCO I.* And the fiscal note of neutral supports his testimony. Thus, the primary purpose of the Act 3 was not to raise revenue but to clarify and codify the exclusion as it related to the Legislature's original intent of how the scheme would function. Accordingly, under the analysis provided by the Supreme Court in *Palmer,* Act 3 was not a "new tax" or an "increase to an existing tax."

CONCLUSION

For the above and foregoing reasons, the Collectors pray that this Honorable Court reverse the Third Circuit.

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STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state aforesaid, personally came and appeared Drew M. Talbot, who stated that:

1.

I certify that the allegations set forth in the accompanying *Amicus Curiae* Brief on behalf of the Collectors are true and correct to the best of my knowledge, information and belief.

2.

I certify that a copy of this brief has been delivered to the Third Circuit Court of Appeal, the presiding trial judge for Division H in the 14th Judicial District Court, and to all parties, through their below-named counsel, via email and/or U.S. Mail, postage pre-paid and properly addressed, on this 28th day of June, 2021:

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