

The Burger Court Opinion Writing Database

Wardair Canada Inc. v. Florida Department of Revenue

477 U.S. 1 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **The Chief Justice**

Circulated: June 13, 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-902

**WARDAIR CANADA, INC., APPELLANT v.
 FLORIDA DEPARTMENT OF REVENUE**

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

[June —, 1986]

THE CHIEF JUSTICE, concurring in the judgment.

concurring in
part and

The Court acknowledges in its discussion in Part II concerning the scope of the Federal Aviation Act that "not only is there no indication that Congress wished to preclude State sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes." *Ante*, at 4. That being so I see no reason for the discussion in Part III.

While § 1513(a) of the Act describes a number of state taxes which are prohibited, § 1513(b) expressly permits state "sales or use taxes on the sale of goods or services." The fuel tax challenged here is plainly a "sales or use tax[]" on the sale of goods" within the language of § 1513(b).

Remarkably, the Court nevertheless refuses "to rely on the existence of this section to answer the Commerce Clause issue raised here" because it believes it is "plausible that Congress never considered whether States should be permitted to impose sales taxes on *foreign*, as opposed to domestic carriers." *Ante*, at 5 (emphasis added). Accordingly, the Court continues with an extended discussion of "the so-called dormant Commerce Clause," which applies to cases involving areas where "the Federal Government has not affirmatively acted." *Ibid*. The plain language of § 1513(b) demonstrates, however, that there is *nothing* "dormant" here.

The conclusion the Court reaches in Part II is illuminated by the Court's curious failure to even mention any of the extensive legislative history or this Court's recent precedent

To: The Chief Justice
 Justice White
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Brennan**

Circulated: **MAY 30 1986**

Recirculated: _____

WJB
Re: ...
WJB

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-902

WARDAIR CANADA, INC., APPELLANT *v.*
 FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

[June —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant Wardair Canada, Inc., a Canadian airline that operates charter flights to and from the United States, maintains in this action that the Commerce Clause¹ of the Constitution precludes Florida from applying to it a tax on aviation fuel purchased in that State. Wardair also asserts that the Florida tax must fall because it violates a "clear unequivocal directive of Congress," allegedly implicit in the Federal Aviation Act, 49 U. S. C. § 1301 *et seq.*, that the Federal Government has exclusive regulatory power over foreign air commerce. Appellant's Brief at v, 15.

We disagree with appellant's view and analysis of the operation of the Commerce Clause, and find that Congress has not acted to preempt State taxes such as that imposed by Florida. Accordingly, we affirm the judgment of the Supreme Court of Florida upholding the tax.

I

Florida has for many years taxed the sale of fuel to common carriers, including airlines, within the State. Prior to April 1, 1983 the tax was prorated on a mileage basis, so that a carrier was liable for only the portion of the otherwise pay-

¹The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: Justice Brennan

Circulated: _____

Recirculated: JUN 16 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-902

WARDAIR CANADA, INC., APPELLANT *v.*
 FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

[June 18, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant Wardair Canada, Inc., a Canadian airline that operates charter flights to and from the United States, maintains in this action that the Commerce Clause¹ of the Constitution precludes Florida from applying to it a tax on aviation fuel purchased in that State. Wardair also asserts that the Florida tax must fall because it violates a "clear unequivocal directive of Congress," allegedly implicit in the Federal Aviation Act, 49 U. S. C. § 1301 *et seq.* (1982 ed. and Supp. II), that the Federal Government has exclusive regulatory power over foreign air commerce. Brief for Appellant *v.*, 15.

We disagree with appellant's view and analysis of the operation of the Commerce Clause, and find that Congress has not acted to pre-empt state taxes such as that imposed by Florida. Accordingly, we affirm the judgment of the Supreme Court of Florida upholding the tax.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 16, 1986

MEMORANDUM TO THE CONFERENCE

Holds for Wardair Canada, Inc. v. Florida Dep't of Revenue, 84-902.

(1) Lineas Aereas v. Florida Dept. of Revenue, 84-922. This appeal, which is brought by the named appellant and eight other foreign airlines, challenges the Florida sales tax upheld in Wardair on essentially the same Commerce Clause grounds argued in that case. It adds also the additional argument that the Florida scheme violates the Equal Protection Clause because it "discriminate[s] improperly among different modes of transportation," by treating airlines less favorably than, e.g., ocean-going vessels. Since the judgment below was clearly correct in light of Wardair, I recommend a DWSFQ.

(2) Air Jamaica Ltd. v. Florida Dep't of Revenue, 84-1041. This appeal is virtually identical to that brought by Lineas Aereas and eight other carriers in 84-902. It differs only to the degree that the appellants are from different countries, and thus reference different bilateral agreements. In fact, the Florida Supreme Court relied entirely on its decision in Air Jamaica in denying appellants relief in Lineas Aereas. I recommend a DWSFQ.

Sincerely

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1986

84-902 - Wardair Canada v.
Florida Department of Revenue

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

5 15

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF

JUSTICE THURGOOD MARSHALL

June 2, 1986

Re: No. 84-902 - Wardair Canada v. Florida
Department of Revenue

Dear Bill:

Please join me.

Sincerely,

Jm.

T.M.

Justice Brennan

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 3 7 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-902

WARDAIR CANADA, INC., APPELLANT *v.*
 FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

[June —, 1986]

JUSTICE BLACKMUN, dissenting.

In *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434 (1979), this Court recognized that the Commerce Clause commits to the exclusive authority of the Federal Government the regulation of those aspects of foreign commerce that by their very nature "necessitate a uniform national rule." *Id.*, at 449. In regulating commercial relations with foreign governments, "the Federal Government must speak with one voice." *Ibid.*, quoting *Michelin Tire Corp. v. Wages*, 423 U. S. 276, 285 (1976). As a result, the Court in *Japan Line* held that the imposition of California's *ad valorem* property tax on foreign-owned containers used exclusively in foreign commerce was unconstitutional. The tax imposed in this case by Florida on fuel is indistinguishable, for Commerce Clause purposes, from the tax imposed by California on containers in *Japan Line*. Because a State's taxation on fuel used in foreign commerce will prohibit the Federal Government from speaking with one voice, I believe that this application of Florida's tax violates the Constitution.

The Court, however, finds *Japan Line* inapposite, asserting that "we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Ante*, at 7. To the Court, that the Federal Government has acted in the area of foreign aviation taxation, but has not expressly prohibited the imposition of state and local taxes, see *ante*, at 8-9, is a sufficient basis for upholding the tax at issue

STYLISTIC CHANGES

4 pp. 1, 3

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 12 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-902

WARDAIR CANADA, INC., APPELLANT *v.*
 FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

[June —, 1986]

JUSTICE BLACKMUN, dissenting.

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The Court, however, finds *Japan Line* inapposite, asserting that "we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Ante*, at 7. To the Court, that the Federal Government has addressed some aspects of foreign aviation taxation, but has not expressly prohibited the imposition of state and local



CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

June 3, 1986

84-902 Wardair Canada v. Florida Dept. of Revenue

Dear Bill:

Although I voted "the other way" at Conference,
your opinion is persuasive. Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

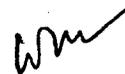
October 31, 1985

Re: No. 84-902) Wardair Canada, Inc. v. Florida
) Dept. of Revenue
84-922) Lineas Aereas Costarricenses, S.A.
) v. Florida Dept. of Revenue
84-1041) Air Jamaica Ltd. v. Florida
) Dept. of Revenue

MEMORANDUM TO THE CONFERENCE

I don't know that I have much to add to what has already been said by the parties and by the Solicitor General in this case. I think that the simplest and best course is to note probable jurisdiction in Wardair to consider the validity of the state tax under the Foreign Commerce Clause and applicable treaties. Although we could note and consolidate those parts of the Lineas Aereas and Air Jamaica appeals which also raise this issue, those appeals also raise issues as to whether discrimination among carriers violates equal protection and due process. I don't think this issue raises any substantial federal question, and I think by merely holding Lineas Aereas and Air Jamaica for Wardair we can dispose of them in accordance with the decision in Wardair.

Sincerely,



W
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1986

Re: 84-902 - Wardair Canada, Inc. v. Florida Department
of Revenue

Dear Bill:

Please join me.

Sincerely,
WR

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543


CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

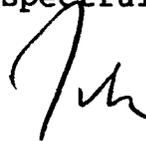
June 2, 1986

Re: 84-902 - Wardair Canada, Inc. v.
Florida Department of Revenue

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 30, 1986

No. 84-902 Wardair Canada, Inc. v. Florida
Department of Revenue

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference