No. 18-447

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND VERNON BARNETT, COMMISSIONER, DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF ALABAMA DEPARTMENT OF REVENUE

Gregory S. Matson
Executive Director
Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

Helen Hecht
Counsel of Record
Lila Disque
Bruce Fort
Brian Hamer
Chris Barber

Counsel for *Amicus Curiae* Multistate Tax Commission

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INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission (the Commission) submits this brief as *amicus curiae* to urge the Court to grant the petition for certiorari filed by the Alabama Department of Revenue, et al. (the Department).[1]

The Commission was formed in 1967 by the states that enacted the Multistate Tax Compact.[2] The Compact was, in part, a response to threatened federal preemption of state taxing authority. *See U.S. Steel Corp. v. Multistate Tax Comm'n,* 434 U.S. 452, 455-56 (1978). The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable

[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Alabama. Counsel of record received timely notice of the intent to file the brief under Supreme Court Rule 37(2)(a) and granted consent.

[2] Forty-nine states participate in the Commission's activities. The Commission's compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. The Commission's sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. The Commission's associate members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Multistate Tax Compact, Art. I.

The Commission's members are state agencies tasked with administering tax statutes that are, oftentimes, generally worded. These agencies must endeavor to fairly interpret and consistently apply these generally-worded statutes to a multitude of specific circumstances, and when appropriate, issue rules and regulations to reduce uncertainty. This case involves a very generally-worded federal statute. But here, there are no agency rules on which to rely. Rather, as this Court has recognized, Congress effectively cast the federal courts in the role of administrator. State policymakers and administrators, therefore, rely on the courts, and this Court in particular, to provide necessary guidance.

SUMMARY OF ARGUMENT

In its prior holdings in this case, this Court has determined that the scope of 49 U.S.C. § 11501(b)(4) (subsection (b)(4)) of the so-called 4-R Act[3] is extremely broad—encompassing all manner of taxes and tax issues and potentially diverse comparison classes that may give rise to claims of discrimination. And while the Court has also said a claim under

[3] Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. 94–210, S. 2718, 90 Stat. 31.

subsection (b)(4) may fail if it cannot identify one or more "substantially similar" comparison groups, or if the state shows that the differential treatment is sufficiently justified, those concepts do not appear grounded in any particular established principles. This leaves the states to seek resolution of specific issues through the courts, including this Court, on a case-by-case basis. We agree with the Department that, at a minimum, the Court must answer the narrow question it left open in CSX II—is there sufficient justification for the differential treatment of water carriers in this case? But, we fear this will do little to address the more fundamental problem created by subsection (b)(4); that is, it leaves the states with only two choices—continue to undertake the costs and risks of litigation to resolve all manner of contested taxes, or grant railroads most-favored-taxpayer status.

ARGUMENT

I. Subsection (b)(4), as interpreted, permits railroads to bring a broad range of diverse discrimination claims, but provides no principles for resolving those claims.

A. The Court has said that subsection (b)(4) is not a residual provision, nor is it limited by paragraphs (1)-(3) of that subsection, but instead, permits railroads to bring all manner of discrimination claims.

This Court has previously said: "We will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'" *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332 (1994) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court has also said the scope of subsection (b)(4), which forbids the imposition of *another tax that discriminates against a rail carrier providing transportation*, is not as clear as the remainder of § 11501. *Id.* at 337.

In § 11501(a), Congress declared that certain state tax practices "discriminate against and unreasonably burden interstate commerce." In particular, Congress singled out specific property tax assessment practices that had imposed heavier tax burdens on railroad property than on other commercial and industrial property. § 11501(b)(1)-(3). Congress further specified methods for bringing suit in federal court, establishing a violation, and claiming remedies. § 11501(c). In the context of these very specific provisions, Congress also saw fit to provide, in subsection (b)(4), that states could not "impose another tax that discriminates against a rail carrier . . . ."

Subsection (b)(4) might have been read as a residual provision, signaling that Congress, in declaring that particular state taxes discriminate against interstate commerce, was not implying that others might not also. Alternatively, it might have been read as a "back-stop" to prevent states from imposing taxes that would have the same effect as those prohibited in subsection (b)(1)-(3). Either interpretation would arguably have been consistent with the Court's prior holding, in *Rice,* that to preempt state taxes, Congress must speak clearly, as well as the Court's prior acknowledgment, in *ACF,* that subsection (b)(4) was less than clear.

But this contextual source of meaning was found not to control in *CSX I*. There, this Court concluded that subsection (b)(4) could not be read as a residual or backstop provision. Further, its meaning was not controlled by paragraphs (1)-(3) of the same subsection or by the rest of § 11501. Rather, there was a "sharp line" between subsection (b)(4) and these other provisions. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, at 292-296 (2011)(*CSX I*); *see also Ala. Dep't of Revenue v. CSX Transp., Inc.*, __U.S.__, 135 S. Ct. 1136, 1144-45 (2015)(*CSX II*)(Thomas, J. dissenting)("Subsection (b)(4) is a residual clause, the meaning of which is best understood by reference to the provisions that precede it.")

Therefore, subsection (b)(4) now stands on its own. *See CSX I* at 562; and *CSX II* at 1145 (Thomas, J., dissenting)(*CSX I* relies on a generic dictionary definition of "discriminates" in the face of a statutory context suggesting a more specific definition). And, of the ten operative words of subsection (b)(4), it is the word "discriminates" that must bear all the weight.

In *CSX II,* the Court specified four basic elements for a claim of discrimination under subsection (b)(4): (1) differential (unfavorable) tax treatment of a railroad, (2) with respect to a "comparison class," (3) that consists of one or more "groups [that] are similarly situated," (4) without sufficient justification. *See CSX II* at 1141 (citing *CSX I* at 287). The way the Court has characterized the first two elements will inevitably subject states to a host of subsection (b)(4) discrimination claims.

As for differential treatment, under the Court's reasoning in *CSX I,* what matters is the difference in the effective rate of tax paid by railroads versus the comparison group. *See CSX I* at 286-87 (holding that exemptions effectively lower the tax rate paid by other groups to zero). So any of the various elements that go into a typical tax computation (imposition of tax on particular subjects and exclusion of others, recognition or deferral, valuation, specific exemptions, deductions, related limitations, credits, etc.) alone or in combination may give rise to a claim of differential treatment, even if that specific difference has nothing to do with singling out railroads for tax discrimination. *CSX II* also leaves little doubt that the "comparison class" for a claim brought under subsection (b)(4) is virtually any group (or groups). *CSX II* at 1141 ("all the world, or at least all the world within the taxing jurisdiction, is [the] comparison-class oyster").

Nevertheless, the Court has also suggested that the third and fourth elements—"similarly situated" groups and the lack of sufficient justification—might serve to prevent a claim of discrimination, once brought, from succeeding. But because these standards are not grounded in established principles, states cannot predict their application, and so, cannot predict the outcome of any particular case.

B. The Court's use of the term "similarly situated" is broader than and otherwise unlike the identical term used in other contexts.

While any group might suffice as the comparison class for a claim under subsection (b)(4), the Court has said that, to succeed, the claim must further identify within the class one or more "similarly situated" groups. *Id.* But "similarly situated" in this context does not mean what it might in others. The Court has determined that because all commercial and industrial taxpayers is the comparison class used in the provisions of subsection (b)(1)-(3), this class is also "similarly situated" for purposes of subsection (b)(4). *CSX II* at 1142 (apparently concluding that, for this purpose, the "sharp line" between paragraphs (1)-(3) and paragraph (4) can be ignored).

But, unlike paragraphs (1)-(3), the group of all commercial and industrial taxpayers is not the only "similarly situated" comparison class under paragraph (4). In *CSX II,* the Court also said, "we think the competitors of railroads can be another 'similarly situated' comparison class" and cited, for its reasoning, the fact that discrimination in favor of that class "obviously frustrates the purpose of the 4-R Act . . . ." *Id.*

Are there still other similarly situated groups or subgroups? The Court has specifically declined to answer that question. *CSX II* at 1142 (observing that "sufficient unto the day is the evil thereof"). But because the Court has also found that the general purpose of the 4-R Act includes "restor[ing] the financial stability of the railway system of the United States," *CSX II* at 1142 (internal citations omitted), we expect that purpose is broad enough that it might be "frustrated" by differential tax treatment of railroads vis-à-vis any number of diverse taxpayer groups.

Nor can states look to other potential touchstones for the meaning of the term "similarly situated." The Court has admitted that the term, as used here, does not have the same meaning as the identical term used in the equal protection context. *CSX II* at 1138. Nor does the Court's use of the term "similarly situated" correspond to the way the identical term is used in the dormant commerce clause context. *See, e.g., General Motors Corp. v. Tracy,* 519 U.S. 278, 299 (1997)(holding that regulated natural gas sellers and other natural gas sellers were not "similarly situated," reasoning that even similar sellers may have different markets).

In short, the requirement to identify a "similarly situated" group, as defined by the Court, is unlikely to discourage railroads from asserting discrimination claims under subsection (b)(4). Indeed, in addition to all commercial and industrial taxpayers, many groups or subgroups may be "similarly situated" including airlines, rental car companies, bus companies, charter services, pipelines, taxi services, ride-sharing services, package delivery systems (UPS, FedEx, etc.), warehouses, fulfillment centers, grain elevators, drayage companies, municipal docks and harbors, communications, or online service companies—as well as all commercial and industrial taxpayers. With all these groups to choose from, railroads may identify all sorts of differential tax treatment (exclusions, exemptions, deductions, limitations, credits, etc.) that may serve to support a discrimination claim, even if those differences have nothing to do with disadvantaging (and do not actually disadvantage) railroads.

Consequently, this puts even more pressure on the standard that will govern the fourth element of a subsection (b)(4) discrimination claim—whether a state has sufficiently justified the alleged discriminatory treatment.

C. State justifications for differential treatment are likely to be as diverse as the potential claims themselves, and the Court has established no clear standard for when those justifications will be deemed sufficient.

In ruling in *CSX II* that a differential tax exemption could be sufficiently justified, in part, on the basis of the imposition of a comparable, roughly equivalent, tax, the Court looked to its dormant commerce clause jurisprudence. *CSX II* at 1143. But as the circuit court below concluded, the Court did not invoke the more developed "compensatory tax doctrine," from the dormant commerce clause context. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163, 1176 (11th Cir. 2018). While the dormant commerce clause is intended to shield interstate commerce from discriminatory treatment vis-à-vis local commerce, the Court has specifically rejected the contention that § 11501(b) was designed to protect interstate carriers against discrimination vis-à-vis local businesses. *CSX*

I at 288. Moreover, because a taxpayer bringing a claim of discrimination under the dormant commerce clause must meet a much more stringent standard in identifying a similarly situated comparison class, the standard for when differential treatment is sufficiently justified may be more exacting. *See, e.g. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)(the state must show that the differential treatment "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives"). In contrast, because many, potentially diverse, groups may be "similarly situated" for purposes of subsection (b)(4), the potential justifications for differential tax treatment may run the gamut of state policy considerations—many of which will clearly have nothing to do disadvantaging railroads, or even tax policy, per se. It would be unreasonable to subject these legitimate justifications to the exacting dormant commerce clause standard, requiring states to prove there are no reasonable nondiscriminatory alternatives.

Nor has the Court ever addressed the question of whether, in enacting § 11501, Congress invoked its Commerce Clause authority as opposed to its authority under Section 5 of the Fourteenth Amendment. The lower courts are not in agreement on this question, although CSX has argued that Congress relied on Section 5 authority. *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 96 (2d Cir. 2002)(*N.Y. State Office*). At least in the context of the provisions of subsection (b)(1)-(3), some courts have reasoned that the legislative history shows that Congress was responding to "a substantial history of state discrimination in the taxation of railroad property." *Burlington N. & Santa Fe Ry. v. Burton*, 270 F.3d 942, 946 (10th Cir. 2001).

If Congress relied on its Section 5 authority, this would have a critical bearing on the standard to be applied in determining if a state has shown sufficient justification for differential treatment, and might well affect the application of subsection (b)(4) more generally. While Congress has the power to enforce a constitutional right under Section 5, it does not have the power to say what the right is. *City of Boerne v. Flores*, 521 U.S. 507 (1997). And as the Tenth Circuit points out in *Burlington N.*, it must identify a history and pattern of unconstitutional treatment, and the scope of the claims granted and relief provided must be "congruent and proportional" to the harm. *Id. See also N.Y. State Office* at 97 (citing *Boerne* at 117).

But if Congress determined there was a pattern of specific discrimination to be addressed by subsection (b)(4), as opposed to subsection (b)(1)-(3), it failed to specify exactly what it was. Nor has the Court, so far, determined that subsection (b)(4) requires a railroad, itself, to demonstrate harm or show that the asserted remedy (in this case, a refund of all state taxes paid on fuel) is congruent and proportional to that harm.

The only other hint we have as to when differential tax treatment may be sufficiently justified comes from the Court's determination that Congress's general purpose in enacting the 4-R Act was to "restore the financial stability of the railway system of the United States," while also "*foster[ing] competition among all carriers by railroad and other modes of* *transportation*" *CSX II* at 1142 (internal citations omitted, emphasis added). Assuming that the focus here is on fostering competition among all carriers, granting railroads most-favored-taxpayer status would not accomplish that purpose.

II. If the mandate imposed by subsection (b)(4) defies clarification, so that states are left with one choice—continue to pursue costly litigation or grant railroads most-favored-taxpayer status—then the validity of that mandate must be questioned.

In *CSX II,* this Court acknowledged that determining whether differential treatment is "justified" might be a "Sisyphean" task. *Id.* at 1144. It nevertheless concluded that Congress imposed that task on the courts. *Id.* But this very difficult task is not just imposed on the courts. First and foremost, it is imposed on state lawmakers and administrators.

Congress's purpose in enacting subsection (b)(4), whatever it was, cannot possibly be served if the states are relegated to litigating every fact-specific issue through the courts. Rather, as with all federal mandates, states must attempt to conform their tax systems to the federal statute, out of respect for the law if not simply to conserve state resources. But this can only happen if the states, and the railroads, have a much clearer understanding of what the federal statute requires.

Moreover, this Court has said that when congressional "pressure turns into compulsion," requiring states to legislate, then it runs afoul of the

Tenth Amendment. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (citing *New York v. United States*, 505 U.S. 144, 178 (1992)). Congress may not simply coerce the states to adopt particular legislative policies. *Id.* Recently, in *Murphy*, this Court said that this limitation on Congress serves to promote political accountability, reasoning that: "When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame." *Murphy v. Nat'l Collegiate Athletic Ass'n*, ___ U.S. ___, 138 S. Ct. 1461, 1477 (2018).

As interpreted by this Court, subsection (b)(4) grants railroads the ability to bring all manner of tax-related claims under subsection (b)(4), but fails to specify exactly when such claims might require a remedy, so that case-by-case litigation is the only option. If this is the proper interpretation of subsection (b)(4), then Congress has effectively left the states to face a difficult choice—undertake expensive, lengthy, risky, "Sisyphean" litigation or grant railroads most-favored taxpayer status. If the states choose the latter, the political accountability for that choice will not fall to Congress. After all, who is to say what Congress intended under subsection (b)(4)?

This Court has previously denied that the states may be faced with this choice. In *CSX I,* the Court noted that if a state offers a sufficient justification for the differential tax treatment "we presume the suit would be promptly dismissed." *CSX I* at 297. But, as this case demonstrates, a suit is not *promptly dismissed* when a state *offers* a sufficient justification. Rather, the parties must still litigate whether that justification is sufficient under a standard that is still, largely, uncertain, and seemingly case-specific.

The 4-R Act has been on the books since 1976. In that time, we count approximately 75 separate cases raising its tax provisions brought in the federal courts alone. As the petition points out, other real-world cases involving subsection (b)(4) in particular, and its effects on state tax policy choices, await resolution. Undoubtedly, there will be more.

We do not deny Congress's power to preempt state taxation. Indeed, such power exists and, if unbounded, would constitute the power to destroy state sovereignty. But even when it poses no existential threat to that sovereignty, the power of preemption, when it is wielded like a blunt instrument, can have far-reaching, potentially unintended consequences, causing harm to state tax systems. More critically, states are entitled to protect their sovereign interests from federal statutory preemption through the political process. But they can do so only if the effects of any proposed preemption are reasonably foreseeable. There is no indication that the states foresaw (or could have foreseen) that the "catch-all" provision of 49 U.S.C. § 11501(b)(4), when enacted, would subject their tax systems to such widespread, ongoing judicial scrutiny—let alone the difficult choices that this might pose.

CONCLUSION

Observing that this litigation recently marked its tenth anniversary, the Eleventh Circuit commented that it could not "celebrate" that event other than by "once again" deciding an appeal in the dispute. But the Court expressed the hope that doing so would bring the litigation "one step closer to the end of the line." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163, 1188 (11th Cir. 2018). Likewise, state policymakers and administrators have no reason to celebrate—or to drag out this litigation. But neither do they have any choice but to seek a more defined outline of the federal preemption with which they are expected to comply.

Respectfully submitted,

Gregory S. Matson
Executive Director
Helen Hecht
Counsel of Record

Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

Counsel for *Amicus Curiae*
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