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

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONERS

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioners Alabama Department of Revenue and Julie Magee, Commissioner of the Alabama Department of Revenue. The Commission urges this Court to reverse the decision of the Eleventh Circuit Court of Appeals, which held that Alabama's imposition of a broadly applicable sales and use tax on diesel fuels was unlawful as "another tax that discriminates" against rail carriers under 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 869-70 (11th Cir. 2013). The Eleventh Circuit concluded that Alabama's tax on diesel fuel purchased for use off-road, although imposed equally on railroads and most other industrial and commercial taxpayers, violated the Act because the identical tax was not borne by so-called

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[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. This brief is filed with the consent of the parties.

"competitors" engaged in other types of transportation services, most notably motor carriers who were subject to a different (but substantially equal) highway use tax on their fuel purchases. *Id.* at 871.

Prior to the passage of the 4-R Act in 1976, Congress spent many years studying the problem of discriminatory state and local property tax practices and crafted a measured legislative response that tied property tax rates and assessment ratios to those imposed generally on other industrial and commercial properties. 49 U.S.C. § 11501(b)(1)-(3). Just prior to passage of the Act, Congress added a fourth clause, Subsection (b)(4), to the three property tax anti-discrimination provisions. Subection (b)(4) prohibited "another tax that discriminates." S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 165-166 (1976). The proper scope and application of that fourth clause has been debated in the courts ever since, without a satisfactory resolution.

When this case first came before the Court, in *CSX Transp., Inc. v. Alabama Dep't of Revenue,* 131 S.Ct. 1101 (2011) ("*CSX I*"), the Court held that application of § 11501(b)(4) was not limited to property taxes, and further held that Congress's determination to exclude the effects of state property tax exemptions in defining "discriminatory" property tax practices in § 11501(b)(1)-(3) had no bearing on whether exemptions in other tax systems could constitute a form of discrimination under Subsection (b)(4).

Congress provided no guidance as to how "discrimination" with respect to taxes other than property taxes should be defined or evaluated within the confines of Subsection (b)(4) itself. Some courts have concluded that Subsection (b)(4) should be construed as a mandate to ensure that the railroads pay taxes in a manner identical to "competing" transportation modes. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 869-70 (11th Cir. 2013); *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999); *Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993).

Other courts have concluded that Subsection (b)(4)'s prohibition of "another tax that discriminates" must be read in conjunction with Subsections (b)(1)-(3), which define discrimination by reference to how the railroads are taxed in comparison with in-state taxpayers generally. *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011); *Kan. City S. Ry. Co. v. McNamara*, 871 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996).

This case presents an opportunity for the Court to resolve the controversy in a manner which will reduce the extent of future litigation under the Act, by holding that a tax does not "discriminate" against railroads under Subsection (b)(4) if the tax is generally imposed on the state's taxpayers, even though the state may grant exemptions to that tax for reasons that have nothing to do with disfavoring railroads. This is the approach Congress chose for ensuring that railroads are protected from discriminatory *property tax* assessments, and it should be assumed that Congress intended to apply similar principles when evaluating "discrimination" for other types of taxes. Not only is this approach to evaluating "discrimination" under Subsection (b)(4) consistent with Congressional intent as evidenced in the remainder of the Act, it is the only interpretation that will give state legislatures the certainty they need in enacting tax legislation.

The Eleventh Circuit's alternative to the broad comparison class approach specified in Subsections (b)(1)-(3) would not only grant railroads a "most favored taxpayer" status that no one believes Congress intended, but also would continue to involve federal courts in piecemeal challenges to state tax laws based on a changing subset of "railroad competitors," or potentially other subsets of taxpayers, not set out in the Act itself. The lower court's reasoning could be extended to all sales tax exemptions as well as other taxes, filing methods, credits, incentives, etc., that distinguish between different industries or taxpayers, whether as a result of necessity, administrative convenience, general tax policy or history. Such interference in state tax policy is unnecessary in order to achieve Congress's goal of protecting railroads from unfair tax burdens. That goal can be achieved while still preserving state sovereignty if the Court holds that a tax does not "discriminate" against railroads so long as the state's taxpayers generally bear the burden of that tax as well.

The Commission was established by the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as Compact, Sovereignty or Associate member states. The states are represented in the Commission by the heads of the state agencies charged with administering state taxes.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable 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 (the "Compact"), Art. I. The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d. Sess. (1966)(illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax).

The Commission's interest in this case arises from our goal of preserving the states' sovereign authority to set tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is permitted under the U.S. Constitution and the clear mandate of Congress. The Commission also has a vital interest in seeing that Subsection 11501(b)(4) is interpreted and applied so that it does not create insurmountable administrative burdens. Interpreting Subsection 11501(b)(4) as giving railroads "most favored taxpayer" status would exacerbate the difficulties faced by state lawmakers and tax administrators alike in predicting what taxes might be negated by federal preemption.

SUMMARY OF ARGUMENT

Your *amicus* asserts that Congress did not intend to give the federal courts *carte blanche* authority to define "discrimination" in a manner that allows railroads to avoid generally-imposed and non-targeted tax impositions, as the Eleventh Circuit has done in this case. The structure and stated purpose of the Act, as well as its comprehensive legislative history, demonstrates that a broad-based tax generally imposed on purchases made by all businesses and citizens does not "discriminate" against railroads merely because certain so-called competitors either pay a different tax on their purchases, or are entitled to an exemption that has not been shown to disfavor the railroads.

As this Court previously recognized in *Dep't of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994), the meaning of Subsection 11501(b)(4)'s prohibition against "another tax that discriminates" cannot simply be formulated on an *ad hoc* basis or as a theoretical abstraction, detached from important principles of federalism, and specifically, the fundamental connection between a state's sovereignty and its taxing power. Congress knew that it was not writing on a blank slate when it enacted this provision, but was addressing itself to fully-developed state tax systems, created by sovereign governments to meet the needs of their citizens. Adherence to the principles of federalism, and recognition that state tax systems were well developed by 1976, compels the conclusion that Subsection (b)(4)'s prohibition of "discriminatory" taxes must be applied narrowly to avoid unnecessary intrusion into matters of state policy.

The judicial creation of a class of "railroad competitors" without any textual reference whatsoever is one indication that the lower courts have failed to heed the lessons of *ACF Industries*. The Eleventh Circuit's similarly-arbitrary determination that any difference in the imposition on railroads of a broad-based generally applicable tax is *per se* "discriminatory" and cannot be justified even by a clearly compensatory tax paid by those "competitors," is a second indication that the 4-R Act's "discrimination" jurisprudence has been loosed from its moorings.

Further, the Respondent, CSX Transportation, Inc., failed to show that Alabama's tax structure had the actual discriminatory effect on railroads that Congress intended to prohibit under Subsection 11501(b)(4). The lower court erred not only in overlooking this failure, but also in equating mere differences in tax impositions with impermissible "discrimination" against railroads.

ARGUMENT

In 49 U.S.C. § 11501(b)(1)-(3), Congress instructed the federal courts to resolve the question of "discrimination" for property tax purposes by asking whether the rates and valuation methods imposed on railroad property were roughly equal to the rates and methods imposed on the property of commercial and industrial taxpayers in the taxing jurisdiction. This approach to determining "discriminatory" taxes was not designed to offer protection to railroads vis-à-vis potential competitors in the transportation industry. Rather, this approach offered protection for the railroads, a "nonvoting, often nonresident" industry, *ACF Industries*, 510 U.S. at 336, by linking the taxation of railroads to the taxation of businesses with local political influence. *CSX I*, 131 S. Ct. at 1117 (Thomas, J. *dissenting*). Moreover, this protection was achieved with the least amount of intrusion into state tax policy matters, preserving the ability of states to grant exemptions for policy purposes by excluding exempted property from the comparison class. *ACF Industries*, at 343-344.

A. *ACF Industries* Applied the Correct Analysis of § 11501 (b)(4) in the Context of Property Taxes; That Analysis is Equally Applicable Here.

In *ACF Industries*, this Court held that because the scope of Subsection (b)(4)'s prohibition of "discriminatory" taxes was uncertain, it must be read in context with the remainder of the statute. *Id.* at 339-340. When addressing state property taxes, Congress tied the treatment of railroad property to the rates and valuation ratios generally accorded the property of commercial and industrial taxpayers. Congress was aware that many states had policies favoring particular businesses or types of property, such as pollution control equipment, business inventories, raw materials used in textile manufacturing, manufacturing machinery and allied equipment, and mechanics tools, by granting specific exemptions. *Id.* at 343-344. Congress's decision not to disrupt these existing exemptions in the context of the detailed statutory framework for measuring discriminatory effect in Subsections (b)(1)-(3) precluded a finding that Subsection (b)(4) was intended to provide equivalent application of exemptions to railroads.

The same principles that kept this Court from applying Subsection (b)(4) to grant railroads "most favored taxpayer" status—by forcing states to give railroads the benefit of every property tax exemption—are applicable here. There is no principled reason to construe Subsection (b)(4) as having a more expansive application to state sales and use taxes than to property taxes. As Justice Thomas wrote when this case was last before the Court:

> Subsection (b)(4) should be understood to tackle the issue of systematic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence. Thus, a "tax that discriminates against a rail carrier" is a tax that targets or singles out rail carriers compared to commercial and industrial taxpayers.
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> *CSX I,* at 1117 (Thomas, J. *dissenting*).

1. Alabama's System of Exempting Fuels Subject to the Fuel Tax from the Sales Tax Was Common in 1976, so it is Unreasonable to Expect Congress Simply Failed to Address That System Explicitly if its Intent was to Preempt That System.

Alabama imposes a generally applicable sales and use tax of 4% on most purchases or uses of tangible property, including diesel fuel, [2] with a corresponding exemption for diesel fuel purchased for highway use, as those purchases are subject to two separate state taxes totaling 19 cents per gallon.[3] It is a taxing structure that was common

[2] *See* ALA. CODE §§ 40-23-2(1), 40-23-61(a)

[3] *See* ALA. CODE §§ 40-17-325(a)(exemption); 40-17-2(1); 40-17-220(e).

among the states in 1976 and remains so today. John F. Due & John L. Mikesell, *Sales Taxation: State And Local Structure And Administration* 77 (Urban Inst. Press 2d ed. 1994) (1983).

State taxes on highway fuels are measured by gallons purchased, in contrast to state sales and use taxes on purchases generally, which are imposed on the price paid. The "per gallon" taxing system for highway fuels is necessitated by federal highway tax revenue-sharing programs; the distinction between "dyed" off-highway fuel and undyed fuel used on roadways is a requirement of federal law. 40 C.F.R. §§ 80.520-27. State fuel taxes preceded the adoption of generally-applicable sales and use taxes [4] and, even after the adoption of general sales taxes, continued to provide a primary revenue source for states until surpassed by sales taxes in the middle of the Twentieth Century. Congress was also aware in 1976 that most states then, as now, exempted fuels purchased for highway use from sales and use taxes to avoid duplicative taxation. Due, *supra.* Had Congress intended to upset this long-standing and critically important component of state taxing systems out of some concern that railroads and their "competitors" paid different types of taxes on fuel, it would surely have spoken with "clarity and precision," *ACF* at 344, on the subject.

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[4] All fifty states had a tax on fuel by 1932. Pamela J. Jackson, *The Federal Excise Tax on Gasoline and the Highway Trust Fund: A Short History* CRS-1 (2006). Mississippi enacted the first sales tax in 1932. John Due, *The Nature and Structure of Sales Taxation,* 9 Vand. L. Rev. 123, 127 (1956).

Any concern Congress might have had with unequal state and local tax burdens on competing "transportation providers" presumably would also have been addressed in the property tax context, the only tax specifically addressed in the 4-R Act. But Congress made no effort to prohibit potentially unequal property tax burdens on competitors, electing instead to tie the railroad's treatment to commercial and industrial taxpayers generally.[5]

2. There is No Evidence in the Legislative History of the 4-R Act that Congress Intended Subsection (b)(4) to Require States to Impose the Same Tax on Fuel Purchased by Railroads and Their Competitors.

If Congress intended to impose a mandate on the states to provide identical tax treatment of on-road and off-road fuel, one would expect to find some evidence of this in the "15-year legislative history of the 4-R Act," *ACF* at 346, yet the extensive record is completely silent on the topic. The record regarding the adoption of what became § 11501(b) is addressed almost entirely to state property taxation. Regarding competitive modes of transportation, it can only be said that Congress was aware that railroads bore a proportionally higher state and local property tax burden because of the capital-intensive

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[5] *See also* 49 U.S.C. § 11501(a)(exempting "other transportation property" from the scope of commercial and industrial property subject to comparison with railroad property tax burdens).

nature of their operations, justifying Congress in taking action first in that area. *See* National Transportation Policy, S. Rep. No 87-445, 87th Cong, 1st Sess III–IV (1961) at 449. There is no mention of any differences in how states imposed sales, income, franchise, gross receipts or other general taxes on different industries, let alone how those taxes might be imposed on different business inputs for those industries.

3. Congress Would Have Clearly Expressed its Intent to Preempt the State's Long-Established Systems for Taxing Fuel, and Would Have Provided Guidance for the Courts.

ACF recognized an overarching principle that any statute having preemptive effect on state taxing authority must be interpreted in the context of our federalist system of government. Congress has historically shown restraint in exercising its power to preempt state taxing authority, cognizant that such authority is one of the states' traditional powers and a foundational component of our constitutional system. *See, e.g.,* the Federal Tax Injunction Act, 28 U.S.C. § 1341. Where Congress has acted to preempt state tax laws, it has generally done so in a narrowly-focused and highly specific manner. *See, e.g.*, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. §§ 501-593 (setting forth procedures and limitations on taxing non-resident military personnel and spouses on active duty within state.)

In drafting the anti-discrimination provisions of § 11501, Congress was aware that it must speak clearly if it wished to preempt state law, especially when intruding on areas of traditional state concern. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). It should therefore be presumed that Congress would write its statutes accordingly. "[I]f Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress should make its intentions 'clear and manifest if it intends to preempt the historic powers of the States."); see also *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *De Buono v. NYSA-ILA Medical and Clinical Fund*, 520 U.S. 806, 814-815 (1997).

The meaning of Subsection (b)(4) in the property tax context "is, at best, vague," *ACF* at 433; its potential application to other taxes is even more so. In *ACF*, this Court held that "principles of federalism support, in fact compel" a narrow reading of the application of Subsection (b)(4):

> Principles of federalism support, in fact compel, our view. Subsection (b)(4), like the whole of § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976); *Railroad Co. v. Peniston*, 85 U.S. 5, 29 (1873). When determining the breadth of a federal statute

> that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. See *Cipollone*, 505 U.S. at 533 ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language") (Blackmun, J., concurring); *id.*, at 523 (opinion of Stevens, J.); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. As explained above, neither subsection (b)(4) nor the whole of § 11503 meets this standard with regard to the prohibition of property tax exemptions.
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> *Id.* at 345.

Subsections (b)(1)-(b)(3) of § 11501 follow the established pattern of limited federal interference with state taxing authority by providing narrow and specific definitions of discriminatory tax practices. This Court concluded that in the context of those specific guidelines, it would be illogical to read Subsection (b)(4) as giving federal courts a separate and unlimited power to decide what constitutes discriminatory property tax practices. *ACF*, at 340. It would be just as illogical to conclude that in enacting Subsection (b)(4) Congress abandoned its policy of restraint by empowering federal courts to strike down *all other* state taxes that might apply to a group of taxpayers differently than to railroads, without providing any guidance or limitations whatsoever.

B. Setting up a Comparison Class Comprised of the Railroads' Potential Competitors Intrudes on State Sovereignty in a Manner Congress Could Not Have Intended and that is Unworkable in Practice.

The structure and legislative history of the 4-R Act, as well as principles of federalism support the conclusion that the "comparison class" should be drawn broadly, to include industrial and commercial taxpayers generally. Determining whether a tax paid by railroads is also borne generally by the class of industrial and commercial taxpayers is a simple and straightforward exercise for courts and legislatures. By contrast, virtually every aspect of the "competitors" comparison class model adopted by the Eleventh Circuit would properly require extensive fact-finding and weighing of policy considerations more appropriate to legislatures than courts.

There is no single test for "discrimination" applicable in all tax contexts. *CSX I*, at 1115 (Thomas, J., *dissenting*.) Potential considerations include: (a) who bears the legal or economic incidence of a tax, either directly or indirectly; (b) which aspects of the overall tax structure should be evaluated, including complimentary, compensatory or even unrelated taxes; (c) what is the appropriate comparison class; (d) what constitutes an acceptable justification for differential treatment;[6] (e) the legal standard for evaluating dissimilar treatment, such as rational basis or compelling necessity;[7] and (f) whether the taxpayer must demonstrate discrimination in practical effect.[8] Where impermissible discrimination is ultimately found, a court may still have to grapple with whether the state has offered a sufficient remedy.

The protracted litigation in this case has so far focused on only two of those possible considerations: (a) whether the "comparison class" should be "railroad competitors" or the broader class of state taxpayers generally; and (b) if railroad "competitors" are the appropriate comparison class, whether compensatory taxes paid by those competitors should be considered in determining whether a tax scheme "discriminates."

1. Railroads and their "Competitors" Are Not Similarly-Situated Taxpayers.

Perhaps the most critical inquiry in any "discrimination" case is determining whether there is a comparison class of similarly-situated parties.

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[6] *Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328 (2008)

[7] *Compare, Amerada Hess Corp.* v. *Dir., Div. of Taxation, N. J. Dep't of Treasury,* 490 U.S. 66, 80 (1989)(applying rational basis standard in equal protection clause case); and *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (applying compelling interest standard in dormant commerce clause case).

[8] *Am. Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n,* 545 U.S. 429, 432 (2005) (taxpayer failed to demonstrate discriminatory effect of unapportioned truck registration fees.)

This Court's decision in *General Motors Corp. v. Tracy,* 519 U.S. 278 (1997) is particularly instructive on the question of what constitutes "similarly-situated taxpayers" for purposes of discrimination claims under the dormant Commerce Clause. In that case, out-of-state natural gas wholesalers subject to excise tax on their sales into Ohio challenged the law because "local distribution companies" ("LDC's") doing business in Ohio were exempt from that tax. The LDC's tended to sell natural gas in the regulated market for residences and smaller businesses, although they competed with the wholesalers in some instances. This Court put great emphasis on the long history of federal, state and local regulation of natural gas utilities (and the relative absence of regulation over wholesale sellers) in deciding that Ohio's taxing system did not impermissibly "discriminate" against interstate commerce, writing:

> The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketer's unbundled gas, raises a hurdle for GMC's claim…
>
> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities… [W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional

> purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.
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> 519 U.S. at 297-298.

Railroads, trucking companies, airlines, barge companies and pipeline companies are not similarly-situated taxpayers, any more than are natural gas wholesalers and distributors. They perform different—and sometimes complementary—transportation functions, operate under different regulatory structures, receive different forms of government assistance and subsidies, and impose different societal costs and benefits. Those differences in regulatory history, structure, operation and function have inevitably been reflected in differences in how taxes are imposed. One obvious difference is that, historically and as a federal regulatory matter, fuels intended for highway use are taxed by the states on a per-gallon basis, while state sales and use taxes are imposed on a value basis.

Congress was presumably aware of these differences in taxing systems in 1976 and made no attempt to address them in the 4-R Act. It would not have been an easy task for Congress to do so, as it would have required the balancing of many economic, policy and administrative concerns.[9] Nor did Congress empower a regulatory agency to resolve the many technical and policy issues necessary to implement rules for equalizing tax burdens among the transportation segments.[10]

2. Adoption of the "Railroad Competitors" Comparison Class Approach Would Not Resolve Litigation Over the Meaning of § 11501(b)(4); It Would Increase it.

If the Eleventh Circuit's "competitor" comparison class were accepted by this Court, both legislatures and courts would be forced to speculate as to whether a particular tax imposition affecting dissimilar transportation industries in dissimilar ways constitutes impermissible discrimination. For instance, if the legislatures of neighboring states wished to compete for a new port facility by exempting certain shore-side activities from tax, must they be concerned that analogous activities

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[9] For instance, railroads consume significantly less fuel in moving freight, *see* About CSX: Fuel Efficiency, *available at* http://www.csx.com/index.cfm/about-csx/projects-and-partnerships/fuel-efficiency/ (last visited Sept. 14, 2014), suggesting that truckers would bear a significantly higher tax burden measured on a per-ton-mile basis if the different taxes on a given volume of fuel were roughly equal.

[10] *Compare*, 1972 Education Act (Title IX) and Regulations of the Offices of the Department of Education, 34 CFR Subtitle B.

conducted at railroad facilities continued to be taxed? Should it matter that the port facility will not serve the same export markets as the railroads, or that the new port facility will be exclusively served by the railroads themselves, thus increasing their traffic volume in the state?

It would surely increase the number of such questions and the litigation burden on the states and the courts if the "competitor" comparison class is adopted. For instance, there is no simple and obvious means for defining the "competitive marketplace" on a local, statewide or national basis. A use tax exemption for compressor gas [11] used to move commodities in a pipeline may or may not be "discriminatory" depending on how a court might define "competition" and whether railroads compete in transporting that same commodity to the same locations.

Regarding the different taxes on fuels at issue in this appeal, it should be noted that virtually all major railroads, including CSX, have now established intermodal transportation businesses combining train and truck shipments.[12] According to

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[11] *Mississippi River Transmission Corp. v. Weiss*, 65 S.W.3d 867 (Ark. 2002).

[12] As CSX's intermodal transportation service website explains, "[i]t's not trains replacing trucks. It's trains and trucks, and often cargo ships, working together to deliver goods on time with improved efficiency. *Trip of a Lifetime: Intermodal 101*, *available at* http://www.intermodal.com/share/wwwintermodal/assets/File/Resource%20Center/Information%20Kits/Intermodal_101_One-sheeter.pdf. (last visited sept. 10, 2014)

CSX's 2012 Annual Report, 38% of its traffic volume consisted of intermodal shipping, "combin[ing] the superior economics of train transportation with the short-haul flexibility of trucks…."[13] In the same *Annual Report*, CSX lists among its business concerns: "…the challenges associated with labor, *fuel* and other costs at *trucking companies,* which today are partnering with us for longer-haul movements."[14] State tax policies affecting trucking operations affect railroads, and vice-versa. Whether the two industries compete with or complement each other may vary from region to region and from commodity to commodity, and may vary over time. Each of those variables and others would complicate the task confronting courts and legislatures in conforming existing state law to the preemptive mandates of § 11501(b)(4) under the competitive class approach.

Frequently, this Court has explained its refusal to act in a legislative capacity in discrimination cases by noting that Congress has the ability to study the issue and adopt legislation where appropriate under its affirmative Commerce Clause authority. *General Motors v. Tracy*, at 304; *Moorman v. Bair,* 437 U.S. 267, 279-280 (1978).These same considerations should guide the Court in interpreting Subsection (b)(4). Nothing in the 4-R Act indicates Congress was concerned with relative

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[13] CSX Annual Materials, 2007-2014, *available at* http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Sept. 12, 2014).

[14] *Id,* at 6 (emphasis supplied.)

tax burdens on different transportation modes, but Congress remains in a far better position to study the facts and make the policy choices which would be necessary to adjust those burdens should it see the need to do so.

3. The Same Methodology Used to Evaluate Property Taxes Should Apply to Other Taxes.

The Fifth, Seventh and Ninth Circuits have held that the proper test for any claim of tax discrimination should be whether the tax is generally imposed on commercial and industrial taxpayers.[15] These courts have recognized that the use of the broader class is appropriate because it is the class chosen by Congress for measuring whether state property taxes "discriminate" against railroads.

Comparing the treatment of railroads to taxpayers generally not only implements Congressional intent to place railroads on an equal basis with other taxpayers, but it also allows for a meaningful application of the 4-R Act where it is alleged that a state tax disparately burdens *all* transportation companies, *Kan. City S. Ry. Co. v. McNamara*, 871 F.2d 368 (5th Cir. 1987), or where there are no "competitors" in the taxing jurisdiction.

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[15] *Kan. City S. Ry. Co. v. McNamara* 871 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996); *Burlington B. R.R. v. City of Superior,* 932 F.2d 1185, 1187 (7th Cir. 1991); *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011).

Kan. City S. Ry. Co. v. Koeller, 653 F.3d 496 (7th Cir. 2011).

Just as significantly, the approach adopted by Congress for measuring property tax discrimination will eliminate the necessity to determine many of the "knotty questions," *CSX I* at 1114, inherent in the competitive class approach.

The sole question presented for determination is whether the tax imposition on the railroads is also generally imposed on the bulk of commercial and industrial taxpayers in the state. If so, it should be presumed, absent evidence to the contrary,[16] that the political power of those citizens has protected the railroads from undue economic burdens. This inquiry is far more straightforward and does not involve the federal courts in complex economic analysis or second-guessing the policy decisions of state lawmakers.

C. CSX Has Not Shown it Has Suffered Any Discriminatory Effects from the Different Taxes Imposed by Alabama on Diesel Fuel

When the case was last before the Court, it held that the State should be given an opportunity to justify any differences in taxation between the railroads and the comparison class when a challenge

[16] As the Court noted in *ACF Industries, supra* at 346-7, Congress surely would have been concerned with *any* taxing scheme which imposed a generally applicable tax but then exempted everyone except the railroads from its reach. That scenario is not presented by the facts of this case.

is brought under Subsection (b)(4). 131 S.Ct. at 1108. The Court did not elaborate on what standard should be used to measure that justification, and of course the statute is completely silent on the point.

The Commission agrees with Petitioners that the most appropriate standard would be what is applicable to claims of impermissible "discrimination" under the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). *See* Brief for Petitioners at 45-50.

Alabama has a very rational reason to provide a sales and use tax exemption for fuel subject to its road taxes: to prevent double taxation. Alabama has also amply shown it has rational reasons for allowing an exemption for fuel purchased for use in interstate water transportation: such activity has long been thought to be outside of the state's reach under the dormant Commerce Clause. Additionally, taxing such activity presents unique administrative challenges in tracking where fuel is consumed. *Id.* at 58-59.

But CSX's claims fail as well in the context of the tests used to measure impermissible discrimination under dormant Commerce Clause analysis, U.S. CONST., art. III, § 8, cl. 3. Alabama's policy of subjecting on-road diesel to a fuel tax and off-road diesel, including diesel purchased by railroads, to a sales tax, is not facially discriminatory in that it does not clearly single out railroads for unfavorable treatment. Under this Court's commerce clause "discrimination" jurisprudence, in the absence of a facially discriminatory statute, it is necessary for the complaining party to show that the statute has an actual discriminatory effect on interstate commerce, or in this case, on the commerce carried out by the railroad. *General Motors v. Tracy*, at 311. This CSX has not done.

The case of *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) is directly on point. The taxpayer in that case complained that Michigan's flat fee on intrastate commercial truck operating permits constituted an "un-apportioned tax" that violated the dormant Commerce Clause under the Court's prior decision in *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284 (1987). This Court sustained Michigan's tax because the record failed to reflect how much of an effect the flat tax had in discouraging interstate commerce:

> [T]the record contains little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade. [citation omitted] The record does show, for example, that some interstate trucks "top off" some interstate hauls with intrastate pickups and deliveries. [citations omitted] But it does not tell us the answers to such questions as: How often does "topping off" occur across the industry? Does the $100 charge make a difference by

> significantly discouraging interstate carriers from engaging in "topping off"?
>
> If the fees ($100 and $10) discourage "topping off," does that *local* commercial effect make a significant *interstate* difference? Would a variable fee (of the kind the truckers advocate) eliminate such difference? The minimal facts in the record tell us little about these matters.
>
> 545 U.S. at 438.

As this Court has repeatedly held, "We have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *General Motors v. Tracy* at 311, *Assoc. Indus. of Mo. v. Lohman,* 511 U.S. 641, 654 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

This Court's jurisprudence judging impermissible "discrimination" under the dormant Commerce Clause could also be used as a basis for evaluating the claim of discrimination in the context of "competitor" comparison class asserted by the Respondent. The Respondent's claim of discrimination, however, is problematic in another way. Ironically, for a case based on alleged disparate treatment afforded to so-called competing modes of transportation in Alabama, there is almost nothing in the record demonstrating the degree to which these transportation modes are actually in competition. Trucks, barges and railroads each have unique attributes in the transportation industry, and unique drawbacks. It is entirely speculative on this record to conclude that changes in fuel tax structure or rates would affect the percentages of freight moved by these different transportation modes.

Nothing in the record can be used to show that barges actually compete for the railroads' business in moving freight through Alabama. It may be that Alabama's decision to exempt interstate (but not intrastate) barge traffic from fuel taxes *principally* benefits Alabama railroads, which may supply those barges with commodities that would otherwise by transported by other means. In any case, barge traffic accounts for only 1% of the commodity traffic in the state. *See* J.A. 29-30, cited in Brief of Petitioners at 59, raising the question of whether the alleged "competition" from this transportation mode could ever rise above a *de minimis* threshold.

Finally, evidence of discrimination in actual effect would be particularly difficult to come by in this case, since CSX is not required to pay the very tax it claims is discriminatory. While trucking companies must pay state and federal highway taxes on purchases of the "undyed" diesel fuel used on the state's highways, the railroads are not required to pay sales and use taxes on their diesel purchases. Brief of Petitioners at 57. The railroads can instead elect to pay highway tax on undyed fuel instead, allowing them to take the benefit of the exemption from sales tax, and giving them the choice of paying whichever tax is lower at a given time.[17]

CONCLUSION

This case presents an opportunity for the Court to resolve the split among the circuits as to how discrimination should be measured in the context of taxes, other than property taxes, for purposes of the 4-R Act. The Court should apply the standard Congress applied for ensuring that railroads are protected from discriminatory property tax assessments: that a tax does not "discriminate" against railroads under Subsection (b)(4) if the tax is generally imposed on the state's taxpayers, even though the state may grant exemptions to that tax for reasons unrelated to disfavoring railroads. Not only is this approach to evaluating "discrimination" under Subsection (b)(4) consistent with Congressional intent as established above, it is the only interpretation that will give state lawmakers the certainty they need when enacting tax legislation.

[17] *See* Internal Revenue Service Publication 510, Excise Taxes (Including Fuel Tax Credits and Refunds), and IRS Form 8849, Claim for Refund of Excise Taxes (procedures for claiming for refund of federal highway excise taxes when undyed fuel is used for off-road purposes).

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