No. 09-520

IN THE

Supreme Court of the United States

CSX TRANSPORTATION INC.,

Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

Respondents.

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

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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Multistate Tax Compact, Art. I. 1

BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

INTEREST OF THE AMICUS CURIAE

Amicus curiae Multistate Tax Commission respectfully submits this brief, first, in support of neither party with respect to a threshold question of whether 49 U.S.C. §11501(c) of the Railroad Revitalization and Regulatory Reform Act permits the exercise of federal jurisdiction to review claims brought under §11501(b)(4). Should this Court determine the exercise of federal jurisdiction was improper, this case should be dismissed.

The Commission also writes in support of the State of Alabama that, should this Court determine the exercise of federal jurisdiction was proper, the decision of the Eleventh Circuit should be affirmed.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective

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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. Finally, this brief is filed with the consent of the parties.

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 are members of the Commission.[2]

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*, Art. I. These purposes are central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce. *See, 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 Commission on the*

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[2] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, New Jersey, and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

Judiciary, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax). If the states failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate important aspects of state taxation. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission.

The Commission's interest in this case arises from our purpose of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is clearly mandated by Congress.

SUMMARY OF ARGUMENT

The Commission argues, as a preliminary matter, that 49 U.S.C. §11501(c) does not abrogate the Tax Injunction Act (TIA), 28 U.S.C. §1341, to grant federal district court jurisdiction over alleged violations of §11501(b)(4). In its grant of federal jurisdiction over §11501(b) claims, the plain language of subsection (c) limits relief to discriminatory property tax assessments that exceed a certain threshold. The language does not support broad federal jurisdiction over claims arising under subsection (b)(4) as "another tax that discriminates." The legislative history bears this out. Congress's analysis and findings regarding §11501(c) discussed property taxes only, and focused on procedures that are almost solely related to state property taxation.

Two federal circuit courts addressed the jurisdictional question and mistakenly determined it would be inconsistent to give the §11501(c) limitation its plain meaning in light of the sentence that precedes it, which grants federal jurisdiction "to prevent a violation of subsection (b)." Both courts misapprehended Congress's intent and concluded that depriving federal court jurisdiction to review alleged violations of rights arising under §11501(b)(4) would lead to an "absurd" result. But the result would not be absurd. It is not unusual for Congress to grant a federal right, yet leave the remedy for a violation of that right to state courts. It should not be assumed that because subsection (b)(4) was added late, Congress made a mistake which it would have corrected by expanding subsection (c) to cover the subsection (b)(4) addition. Rather, if any assumption needs to be made, it should be the opposite – that Congress would have clarified that subsection (b)(4) is *not* covered under subsection (c).

If there is any doubt regarding the express limitation of §11501(c) or its legislative history, principles of federalism require the narrow interpretation should control. Allowing federal courts to enjoin state taxes for alleged subsection (b)(4) violations would vastly expand the federal courts' jurisdiction from review of specific and limited challenges to a single type of state tax to challenges of discrimination with respect to all applicable state taxes. This expansive interpretation is not supported by the language of the 4-R Act or its legislative history. The narrow interpretation is not

unreasonable, is supported by legislative history, and is consistent with the statute's plain language. Should this Court determine the exercise of federal jurisdiction was improper, this case should be dismissed.

If this Court finds that the federal district court did have jurisdiction, however, then the reasoning of the Eleventh Circuit in *Norfolk Southern Railway* v. *Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008) should be upheld. It is supported by the plain language of the Act. As this Court found in Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 342 (1994), the Act does not include exemptions in determining whether a property tax "discriminate[s]" under (b)(1)-(3). Rules of statutory construction hold that the same words in different parts of a statute should be given the same meaning, and there is no basis for re-defining the term "discriminate" more broadly for purposes of evaluating whether "another tax … discriminates" under (b)(4).

Including tax exemptions in the evaluation of discrimination for purposes of §11501(b)(4) would not only conflict with the tailored definition of prohibited "discriminate[ion]" that Congress enacted in subsections (b)(1)-(3), but also with Congress's express legislative objective of putting railroads on equal footing with other state taxpayers. Allowing railroads to claim the exemption would serve no state legislative purpose and, contrary to the federal legislative purposes, would put railroads at a distinct advantage over every other state taxpayer, including

competitors. Congress made a balanced policy choice to exclude exemptions and this choice should not be disturbed.

ARGUMENT

In §11501(b) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), Congress listed three carefully and narrowly defined "acts" related to state property taxation that it found — after 15 years of analysis — "unreasonably burden and discriminate against interstate commerce":

> (b)(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property; [3]
>
> (b)(2) levy or collect a tax on an assessment that may not be made under paragraph (b)(1);

[3] "Commercial and industrial property" is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." §11501(a)(4).

> (b)(3) levy or collect an ad valorem tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction;[4]

4-R Act §11501(b)(1)-(3)

Shortly before the 4-R Act was adopted, Congress identified a fourth act that "a state may not do":

> (b)(4) impose another tax that discriminates [against a rail carrier providing transportation in interstate commerce].

4-R Act §11501(b)(4)

Subsection (c) of the Act provides an exception to the Tax Injunction Act, 28 U.S.C. §1341, allowing federal district courts jurisdiction "to prevent a violation of subsection (b)." But the subsection contains a limitation that:

> [r]elief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

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[4] "Assessment jurisdiction" is defined as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation." §11501(a)2).

§11501(c)

CSX Transportation Inc. (CSXT) filed this action in federal district court to enjoin the State of Alabama from collecting its generally-imposed sales and use taxes on CSXT's purchases of diesel fuel for use in its train engines. CSXT contends that these state taxes are each "another tax that discriminates" within the meaning of §11501(b)(4) because motor carriers and water carriers, competitors of CSXT, qualify for sales and use tax exemptions on their purchases of fuel.[5] Alabama, like most states, exempts purchases of diesel fuel if those purchases are also subject to the state's motor fuel excise tax, another generally-imposed transaction tax applicable to purchases of motor fuel for highway use.[6] And Alabama exempts fuel used by vessels engaged in interstate or foreign commerce.[7] The diesel fuel that CSXT purchases for use in its locomotive engines is not used in a vessel and is not subject to the state's motor fuel tax. Thus, CSXT is not exempt from the state's sales or use taxes on those purchases.

This case comes to the U.S. Supreme Court with very little litigation having taken place between the parties beyond the preliminary injunction stage. Within 90 days of filing its action, CSXT moved for a preliminary injunction prohibiting Alabama from

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[5] Brief of Petitioner, p.8.

[6] Ala. Code 1975 §§40-17-2(1), 40-17-220(e). For citations to other states' statutory exemption, see footnote 18.

[7] Ala. Code 1975 §40-23-4(10).

collecting its sales or use taxes on CSXT's diesel fuel purchases.[8] And within another 90 days, the federal district court granted that motion. The district court then stayed further proceedings pending the Eleventh Circuit's decision in a case brought by a different taxpayer challenging the same statutes on the same grounds, *Norfolk Southern Railway* v. *Alabama Department of Revenue,* 550 F.3d 1306 (2008).[9] Within a week after the Eleventh Circuit issued its opinion in *Norfolk Southern* v. *Alabama Department of Revenue* upholding the Alabama sales and use tax, the federal district court vacated its preliminary injunction and dismissed CSXT's complaint.[10] CSXT appealed, seeking an initial hearing *en banc*, which was denied, and the panel soon affirmed the district court's judgment, recognizing that it was "bound" by *Norfolk Southern.* CSXT then petitioned, and was granted, a writ of *certiorari* to this Court.

This Court now asks a threshold question of whether "a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. §11501(b)(4)… " As a preliminary matter, the Commission respectfully requests this Court consider an additional threshold question of whether the federal district court had jurisdiction to review and enjoin

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[8] J.A. 29-31

[9] *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, No. 2:08-cv-0655-UWC (N.D. Ala. July 8, 2008).

[10] *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, No. 2:08-cv-0655-UWC (N.D. Ala. December 16, 2008).

the operation of Alabama's generally-imposed sales and use taxes. The jurisdictional issue was not raised or considered below. Since the issue relates to subject matter jurisdiction, however, it is proper to address it at this time. *Grupo Dataflux* v. *Atlas Global Group, L. P.,* 541 U.S. 567, 571 (2004). If this Court finds that the federal court did not have jurisdiction, then the case should be dismissed. But, if this Court finds that the federal court did have such jurisdiction, then the reasoning of the Eleventh Circuit decision in *Norfolk Southern* should be upheld.

I. Congress Did Not Exempt Claims Brought under §11501(b)(4) from the Tax Injunction Act.

A. The Plain Language of §11501 and Its Legislative History Indicate Congress Did Not Intend to Create an Exception to the Tax Injunction Act for Claims Brought Under §11501(b)(4).

Ordinarily, the Tax Injunction Act (TIA) bars federal court jurisdiction to enjoin the "assessment, levy, or collection" of a state tax, as long as the state provides a "plain, speedy, and efficient" remedy. Even when a state tax is claimed to violate a federal statute, the TIA deprives federal courts of jurisdiction to enjoin the tax so long as state tax refund procedures provide an adequate opportunity for the taxpayer's claim to be raised and considered. *See, Franchise Tax Board* v. *Alcan Aluminum Ltd.,* 493 U.S. 331, 341 (1990); *Rosewell* v. *LaSalle National Bank,* 450 U.S. 503 (1981); *Tully* v. *Griffin,*

429 U.S. 68 (1976). In requesting an injunction of Alabama's generally imposed sales and use tax on CSXT's diesel fuel, CSXT did not assert that the remedies provided by the State of Alabama are inadequate in any way. Rather, CSXT noted that section §11501(c) of the 4-R Act creates an exception to the TIA "allowing railroads to challenge discriminatory taxation in federal district courts."[11]

But the grant of jurisdiction under subsection (c) contains a plain limitation:

> Relief may be granted under this subsection *only* if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

§11501(c) (emphasis added)

This limitation is clear on its face. It restricts federal court jurisdiction to those claims alleging discriminatory state acts that would generally arise under §11501(b)(1) and (2), and then only if the discrimination exceeds a specific threshold.

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[11] Brief for Petitioner, fn 4, p.8, *citing to Burlington Northern. Railroad Co.* v. *Oklahoma Tax Comm'n.,* 481 U.S. at 457-58 (1987), which did not deal with a controversy arising under (b)(4).

The limitation indicates Congress did not intend to grant federal courts broad jurisdiction to enjoin violations under §11501(b)(4), which prohibits states from "imposing another tax that discriminates" against rail carriers. Indeed, in its brief submitted to this Court in *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), The United States' Solicitor General pointed out that "…this provision does not, by its terms, apply to the discrimination proscribed by subsection (b)(4)…", Brief for United States at 23, *ACF Industries, Inc.* (No. 92-74).[12]

The legislative history of §11501(c) supports this plain meaning. Throughout the 4-R Act's legislative history, Congress's analysis and findings regarding §11501(c) discussed property taxes only, and focused on burdens that arose from procedures uniquely present in state property taxation. Regarding a bill that addressed only state property tax discrimination and did not include subsection (b)(4) language, the Senate reported that:

> The testimony before the committee indicated that present State procedures to challenge discriminatory State tax assessments are often difficult, time consuming, and not productive of material relief. For example, the Southern Pacific and its rail affiliates *were required to bring 48 separate suits in 48 separate California superior courts to challenge the level*

[12] The Solicitor General goes on, however, to argue that the language should be interpreted as a limitation on only those claims brought under (b)(1) and (2).

> *of assessments of railroad property by 48 counties and cities in California*. In the State of New Jersey, the testimony indicated that at the time of the hearing there were still pending 167 railroad appeals covering the years 1953-65 which had not reached the trial calendar of the State division of tax appeals…[A railroad executive] explained that the hope of obtaining relief from the State assessing body is often defeated by a sketchy record before that agency…*[I]n many States, the railroads are not able to bring suit against the assessing body, but must instead sue the tax-collecting body, such as a county. This means that a suit must be brought in every county of the State in which the railroad has property, a time-consuming procedure quite the opposite of a plain, speedy, and efficient remedy.*

S. REP. 90-1483, at 6 (1968) (emphasis added).

These concerns supporting federal court jurisdiction were voiced in a bill addressed solely to state property taxation, were supported by testimony focused solely on state property tax cases, and highlighted administrative processes uniquely common to state property taxation, specifically, that valuations may be determined at the state-wide level while assessments may be made and must be protested at the local level. By comparison, there is generally no such procedural burden with respect to state sales and use taxes. In virtually every state, sales and use taxes may be centrally protested at the state level, and there is no equivalent to property tax

valuation or equalization processes at either the state or local levels.[13]

There is no indication that Congress ever considered extending federal jurisdiction to every other state tax type that might come under §11501(b)(4), which is exactly what would be achieved if §11501(c) were applied to subsection (b)(4) violations encompassing "another tax that discriminates." Eight years after the Senate issued S. REP. 90-1483, and shortly after (b)(4) first appeared in an introduced bill,[14] the Senate issued S. REP. 94-595, (1976) (Conf. Rep.) on S. 2718, which was ultimately enacted. This Senate Report states that subsection (c) grants jurisdiction to the federal courts, concurrent with state court jurisdiction, to remedy "any acts in violation of this section [(b)]," but "*in order for relief to be granted under the section, the transportation property must be assessed* …" (emphasis added). S. REP. No. 94-595, at 31 (1976) (Conf. Rep.). From this history it is clear that Congress never intended or even considered broadening §11501(c) to include violations arising under §11501(b)(4).

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[13] Virtually every state requires or allows the aggrieved taxpayer to file its sales or use tax protest or appeal with the state revenue agency. CCH, Sales and Use Tax Guide, ¶61-620. *See, e..g.,* Arizona, A.R.S. 42-1108; Louisiana, L.S.A.-R.S. 47-1576; Missouri, V.A.M.S. 144-700; South Dakota, S.D.C.L. §10-59-9; New Mexico, N.M.S.A. §7-1-24. Alabama is an unusual exception in allowing local election to administer. *See,* Ala. Code 1975 §11-3-11.

[14] H.R. 5385, 93rd Cong. §201 (1974).

B. Contrary to Two Circuit Court Opinions, it is Not "Absurd" to Exclude Claims Brought Under §11501(b)(4) from the Reach of §11501(c)

Federal circuit courts have considered whether it would be inconsistent to give the §11501(c) limitation its plain meaning in light of the sentence that precedes it, which grants federal jurisdiction "to prevent a violation of subsection (b)."

In *Trailer Train Company* v. *State Board of Equalization,* 697 F.2d 860 (9th Cir. 1983), the court addressed this question with respect to subsection §11501(b)(3). The court reviewed the purpose of the Act, "to eliminate…the burden on interstate commerce resulting from discriminatory State and local taxation of [rail carrier] property," 697 F.3d 860, 865, and that Congress recognized discrimination could come in the form of assessments or tax rates. Congress, it said, believed that a federal remedy was called for because the state court remedies were not plain, speedy, and efficient. The court then noted that on first reading, §11501(c) appears to encompass tax rate discrimination, but relief can be had only if it is accompanied by an assessment ratio discrimination of at least five percent. The court said that a statute "should not be interpreted so narrowly as to defeat its obvious intent." *Id.* Given the congressional concerns regarding state discrimination against rail carriers, the court refused to give the subsection (c) limitation its plain meaning, inaccurately concluding that to do so would lead to an "absurd" result.

In *Kansas City Southern Railway Co.* v. *McNamara*, 817 F.2d 368, (5th Cir. 1987) the circuit court had an opportunity to consider federal court jurisdiction over a claim arising under §11501(b)(4). The court noted that subsection (c) appeared limited to assessment discrimination. It then examined the Ninth Circuit court's decision (above) and incorrectly concluded that Congress had made a "mistake" in drafting subsection (c). What Congress meant to say was "[r]elief *from discriminatory assessment* [may be granted under this subsection…"]. 817 F.2d 368, 371 (emphasis in original) instead of "relief may be granted under this subsection …" The Fifth Circuit believed that this Court had "tacitly" affirmed this reading of the statute because it made no mention of this issue when deciding that federal courts must determine whether a state taxing authority has correctly determined fair market value,[15] even though "the relief requested did not come within the literal meaning of the exception in [§11501(c)]." *Id.* It also pointed out that the Eleventh Circuit in *Alabama Great Southern Railroad* v. *Eagerton*, 663 F.2d 1036 (11th Cir. 1981), assumed jurisdiction over a non-property §11501(b)(4) matter without reaching the jurisdictional issue. The Fifth Circuit mistakenly concluded that to read the statute otherwise would lead to "absurd results," and thus §11501(c) must not be read to say "exactly what it means." *Id.*

But the intended limitation of §11501(c) is not at all "absurd." It is not even uncommon. What

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[15] *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission,* 481 U.S. 454 (1987).

Congress did was to simply grant a federal right without a federal remedy for claims brought under §11501(b)(4). It is not unusual for Congress to grant a federal right but leave the remedy for alleged violations of those rights to state courts. 49 U.S.C. §40116, regarding the state taxation of air carriers, contains language similar to that in the 4-R Act with respect to prohibiting burdensome or discriminatory state taxes. Yet, Congress did not grant federal court jurisdiction over alleged violations of its provisions. The legislative history for that Act is devoid of discussion on the whether access to federal courts should be granted. S. REP. 97-494(II) (1982), H. R. REP. 97-760 (1982) (Conf. Rep). Air carriers alleging violations of §40116 must bring action in state court for redress. *See, Western Air Lines* v. *Hughes County,* 372 N.W.2d 106 (S. Dak. 1985), *aff'd Western Air Lines* v. *Board of Equalization of State of S.D.*, 480 U.S. 123 (1987) (flight property "in lieu" tax).

Another example of Congress granting a federal right without a federal remedy is 15 U.S.C. §381 (commonly referred to as P.L. 86-272). This law prohibits a state from taxing income earned within its borders by an out-of-state business whose only contact with the state is through the solicitation of orders which are approved and shipped from outside the taxing state. Yet there is no grant of federal jurisdiction for claims of alleged violations of the statutory terms. Nor is there anything in the legislative history that mentions possible access to federal courts. S. REP. 86-658, (1959) Conf. Rep. 86-1103, (1959). Taxpayers alleging violations of §381 must proceed in state court. *See, William Wrigley,*

Jr. Co. v. *Wisconsin Department of Revenue,* 465 N.W. 2d 800 (Wis. 1991), (taxpayer's activities in state were "solicitation of orders"; state franchise tax did not apply) *rev'd* 505 U.S. 214 (1992).

A third example is 15 U.S.C. §391, which prohibits states from assessing or taxing the generation or transmission of electricity that discriminates against "out-of-State manufacturers, producers, wholesalers, retailers or consumers of that electricity." Again, the statute does not allow a cause of action for alleged violations of this section to be brought in federal court. The legislative history does not show that taxpayer access to federal courts was contemplated. S. REP. 94-938, pt. 1, (1976) H. R. REP. 94-658 (1976), H. R. REP. 94-1515 (1976) (Conf. Rep.) Again, taxpayers alleging violations of §391 must bring the claim in state court. *See, Pacific Power & Light* v. *Montana Department of Revenue,* 773 P.2d 1176 (Mont. 1989) (use tax on power lines).

These few examples, among many, sufficiently illustrate that it is not unusual for Congress to prohibit the states' ability to levy "burdensome or discriminatory" taxes pursuant to its commerce clause authority and yet not abrogate the TIA. The language of §11501(c) contains an explicit limitation that would exclude claims brought under §11501(b)(4) from federal court jurisdiction and that limitation should not be read out of the statute. Nor should words be read into the statute to create a broad exemption when the plain language supports only a narrow one. *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission,* 481 U.S. 454 (1987)

(declining to read an "intent" limitation into the statute).

Legislative history suggests, far from being an oversight, the plain language provides a meaningful response to the specific concerns that were raised. Congress was focused on state procedural obstacles to protesting discriminatory property tax assessments. The plain meaning is clear, and it is reasonable in view of the legislative history. It should not be assumed that because subsection (b)(4) was added later, Congress made a mistake which it would have corrected by expanding subsection (c) to cover the subsection (b)(4) addition. Rather, if any assumption needs to be made, it should be the opposite — given the legislative history expressing the property tax specific concerns that led to subsection (c), if a clarification were needed in light of the subsection (b)(4) addition, Congress would have clarified that subsection (b)(4) is *not* covered under subsection (c).

C. If the Plain Language and Legislative History Leave Any Uncertainty, Principles of Federalism Compel Narrower, Rather than Broader, Federal Court Jurisdiction.

The 4-R Act's plain language and legislative history convey Congress's intent to provide a narrow, limited exception to the TIA. But to the extent any question remains whether the scope of §11501(c) should be interpreted as a narrow or broad grant of federal jurisdiction, principles of federalism compel that it be interpreted narrowly. "[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 Hospital* 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, *Rice* v. *Sante Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991).

In instances where congressional legislation intrudes on the states' traditional powers, courts "should be hesitant to extend the statute beyond its evident scope," *ACF Industries Inc.,* at 345. "This presumption against preemption leads … to the principle that express preemption statutory provisions should be given a narrow interpretation," *Gordon* v. *Virtumundo, Inc.* 575 F.3d 1040, 1060 (9th Cir. 2009), (quoting *Air Conditioning and Refrigeration Inst.* v. *Energy Resource Commission and Development Commission,* 410 F.3d 492, 496 (9th Circuit 2005)). *See, also Cipillone* v. *Liggett Group Inc.,* 505 U.S. 504, (1992), *Maryland* v. *Louisiana,* 451 U.S. 735 (1981), and "[t]he jurisdiction of the federal courts is carefully guarded against by judicial expansion[,] *American Fire and Casualty Co.,* v. *Finn,* 341 U.S. 6, 17-18 (1951).

Allowing federal courts authority to enjoin state taxes of subsection §11501(b)(4) violations would significantly expand federal court jurisdiction from review of specific and limited challenges regarding a single state tax type – property taxes – to review of any state tax that is "another tax that

discriminates." Such an expansion should not be read into the statute when it is not supported in the legislative record by any of the evidence that formed the basis for Congressional adoption of subsection (c). The narrow interpretation, which would not expand federal jurisdiction to claims brought under subsection (b)(4), produces a reasonable result, is supported by legislative history, and is consistent with the plain meaning of the statute. There is no justification for broadly interpreting the 4-R Act to vastly expand the limited conditions under which Congress did provide for federal jurisdiction.

Subject matter jurisdiction should not be presumed, particularly where it has been questioned by two circuit courts. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998); *Trailer Train, Kansas City Southern Railway.* It should be resolved. The party asserting jurisdiction has the burden to prove its existence, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936), and any doubts should be resolved against it. *Turner* v. *Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799).

II. State Sales and Use Tax Exemptions Are Not Subject to Challenge Under §11501(b)(4).

In this case, the Court does *not* ask whether the State of Alabama's sales and use tax exemptions "discriminate" against rail carriers for purposes of §11501(b)(4). Rather, the Court has limited the question to whether the state's exemptions are

subject to challenge at all under §11501(b)(4). The answer is that they are not.

A. Exemptions are Not Included Among Prohibited Acts That "Discriminate" for Evaluating Property Taxes Under (b)(1)-(3) And, Thus, Should Not be Included Among Prohibited Acts That "Discriminate" for Evaluating "Another Tax" Under (b)(4).

In sections §11501(b)(1)-(3), Congress exercised its authority under the commerce clause to prohibit specific state property tax acts that it found — after 15 years of study — "unreasonably burden and discriminate against interstate commerce." This Court has found that the language and legislative history of §11501(b)(1)-(3) do not include property tax exemptions in the measure of discrimination. *ACF Industries, Inc.* at 342. The question in this case is how broadly to interpret the term "discriminate" in the section that follows, §11501(b)(4), which prohibits states from imposing "*another* tax that discriminates."

The term "discriminates" applicable to "another tax" in subsection (b)(4) must be interpreted in the context of §11501 as a whole. The term should not be treated as completely undefined and unmoored from the rest of the section. Rather, prohibited acts that "discriminate" for purposes of "another tax" in (b)(4) can be no more inclusive than the types of acts that "discriminate" for purposes of state property taxes in §11501(b)(1)-(3). "Given the normal rule of statutory construction … identical words used in different

parts of the same act are intended to have the same meaning." *ACF Industries, Inc.* at 342 (internal quotes and citations omitted).

Congress specifically defined "commercial and industrial property" to which railroad property would be compared for purposes of §11501(b)(1)-(3) as only that commercial and industrial property "subject to a property tax levy." §11501(a)(4). And this Court has held that, by including only the property "subject to a property tax levy," Congress excluded property tax exemptions from the measure of discrimination under (b)(1)-(3). *ACF Industries, Inc.* at 342. There is no basis for re-defining the term "discriminate" more broadly to include other types of tax exemptions for purposes of evaluating "another tax" under (b)(4).

B. To Include Exemptions Among Prohibited Acts That "Discriminate" for §11501(b)(4) Would be Contrary to Both Federal and State Legislative Purposes.

Including tax exemptions in the evaluation of discrimination for purposes of §11501(b)(4) would not only conflict with the tailored definition of prohibited "discriminat[ion]" that Congress enacted in subsections (b)(1)-(3), but also with Congress's express legislative objectives. The early legislative history of the 4-R Act explains why Congress ultimately excluded property tax exemptions from the measure of discrimination — it did not wish to grant rail carriers a preferred status over other taxpayers. ("the measure grants no favored status to transportation property nor any windfall to

carriers"), S. REP. 92-1085, at 7 (1972). Rather, Congress simply put a stop to state tax discrimination against rail carrier property ("the purpose of S. 2289 is to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of…transportation property"), S. REP. 91-630, at 1 (1969). The object is to obtain for rail carriers *equivalent* treatment with other taxpayers generally, not to obtain for rail carriers the *most preferential* tax treatment available:

> The test of discrimination as applied to assessments is to show the taxes which are based upon an assessment of the carrier's property at a higher proportion of its true market value than the proportion at which other taxpayers are assessed up their property in the same taxing district. In making this comparison, the bill contemplates the relationship between a common carrier's property and that of the "average" taxpayer in the taxing district. However, the word "average" has a precise arithmetical connotation which makes it unsuitable in this context.
>
> For simplicity, therefore, the phrase "all other property in the taxing district" has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property. *The reason is obvious since, if the latter were the*

> *case, the carrier would be entitled to look for the particular parcel of property in the taxing district which was assessed lowest of all … and demand similar treatment. This is not the purpose of the legislation, for such an interpretation would merely remove discrimination against common carriers and substitute discrimination in their favor.*

Discriminatory Taxation of Common Carriers: Hearings on S. 927, before the Subcomm. On Surface Transportation of the Committee on Commerce, 90th Cong. 29-30 (1967) (statement of Hon. Warren G. Magnuson, Chairman) (emphasis added).

Ultimately, this legislative objective was reflected in the final Act, through the definition of "commercial and industrial property," which includes only property that is "subject to a property tax levy." Congress did not intend to turn around and include sales or use tax exemptions within the scope of "another tax" that "discriminates" for purposes of §11501(b)(4).

The rationale for excluding property tax exemptions applies with equal force to sales and use tax exemptions. States have many exemptions that serve many different legislative policy goals, such as to promote economic development or to alleviate administrative or other burdens for particular taxpayers.[16] For example, of the states in the

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[16] This Court has upheld state authority to effectuate tax policy through exemptions and classifications as non-discriminatory. "[I]n structuring internal taxation schemes 'the States have

Eleventh circuit, Florida has 179 different sales tax exemptions, Georgia has 108, and Alabama has 45. Entitling a railroad to claim each of these state sales or use tax exemptions whenever a competitor (or any other sales or use taxpayer) is entitled to an exemption, and regardless of whether the railroad meets the statutory requirements for the exemption, would go far beyond placing rail carrier on equal footing with other taxpayers. Contrary to state legislative intent, it would entitle a railroad to possibly hundreds of state tax exemptions, even when doing so furthers no legislative policy purpose. And, contrary to Congress's legislative intent, it would essentially grant railroads most favored taxpayer status with respect to every state tax covered under §11501(b)(4).

The state sales and use tax exemptions at issue in this case provide a good example. These exemptions are common among the states.[17] The exemptions

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large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams* v. *Vermont,* 422 U.S. 14 at 22, (1985) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 359). *See Nordlinger* v. *Hahn,* 505 U.S.1 (1992), *Regan* v. *Taxation with Representation,* 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and making distinctions in tax statutes.")

[17] Motor fuels are exempt from sales tax in forty-three States, Br. for Resp. at 13 (quoting John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration (1983). In many states, these exemptions pre-date the 4-R Act, *e.g.:* Arkansas, A.C.A. §25-55-208 (1941); Connecticut, C.G.S. §12-412(15) (1947); Kentucky, KRS §139.470(19) (1960); Massachusetts, G.L. c. 64H §6(g) (1967); Minnesota, Minn. Stat. §279A.68 19(1) (1967); Nebraska, Neb. Rev. Stat. §77-2704.05

reflect the important tax policy goal of preventing the sale of motor fuels purchased for highway use from being subject to more than one transactional tax: sales/use tax and motor fuel tax. Railroad purchases of motor fuel for use in train engines are not subject to the motor fuel tax. Therefore, the state tax policy rationale for exempting these particular railroad purchases of motor fuel from the sales or use tax — avoiding "duplicative" transaction taxes — simply does not apply to the railroad purchases. Allowing railroads to claim the exemption would serve no state legislative purpose and, contrary to the federal legislative purposes, would put railroads at a distinct advantage over motor carriers that are required to pay the motor fuel tax on most of their purchases.

C. This Court Should Not Rebalance Federal Legislative Policy Goals to Include Exemptions Among Prohibited Acts That "Discriminate" Under §11501(b)(4).

CSXT and its *Amici* have argued that excluding exemptions from evaluation under §11501(b)(4) could allow states to discriminate by "targeting" an

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(1967); Nevada, NRS §372.275 (1955); New Mexico, NMSA 1978 7-9-26 (1969); Pennsylvania, 72 P.S. §7204(11) (1953); South Dakota, SDCL §10-45-11 (1939); Utah, UCA §59-12-104(1) (1933); Wisconsin, Wis. Stats. §77.54(5)(b) (1969). *See, also,* .g., Arizona, A.R.S. §28-5606; District of Columbia, DC ST §47-2301; Delaware, 30 Del C. §5110; Florida, FSA §206.41; Iowa, I.C.A. §452A.3; Idaho, I.C. §63-2402; Illinois, 35 ILCS 505/17; Kentucky, K.R.S. §138.220; Louisiana, L.S.A.-R.S. 47:802; Maine, 36 M.S.R.A. §2903.

exemption to all competitors (or all taxpayers) other than railroads. But this potential was a consideration for Congress to balance with other policy considerations as it drafted the Act.[18] And, as we've shown above, Congress did consider the policy implications and ultimately chose to exclude exemptions.[19]

Congress's exclusion of sales and use tax exemptions from the measure of discrimination under (b)(4) does not open the door to the discrimination it sought to prohibit any more than excluding property tax exemptions from evaluation under (b)(1)-(3) does. And by passing the 4-R Act, Congress did not remove railroads from remaining constitutional protections (*e.g.,* the equal protection clause, U.S. CONST. amend. XIV §1) or from protection through further exercise of its affirmative commerce clause authority.

Congress made a balanced policy choice to exclude exemptions and this choice should not be disturbed. We believe the Court's statement in *Burlington Northern. Railroad Co.* v. *Oklahoma Tax Comm'n.,* 481 U.S. 454, 464 (1987), is equally applicable to this case: "These are policy

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[18] We agree with the State of Alabama's analysis that the potential for this type of discrimination is limited to situations not present in this case and that can be addressed without overriding Congressional intent. Brief of Respondent, p. 56; *See*, *ACF Industries*, 510 U.S. at 346-47.

[19] Congress's balance of policy considerations came out differently with respect to property tax classifications, as opposed to exemptions. Cong. Rec. H41401 (daily ed. Dec. 17, 1975).

considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now."

D. Giving Full Recognition to Congress's Policy Choice Regarding Exemptions for §11501 Will Have Little, If Any, Implications for Other Federal Acts That Preempt State Taxation.

Contrary to concerns expressed by Petitioner's *amici*,[20] should the court decide to read subsection (b)(4) narrowly, the decision would have little or no impact on other federal laws governing state taxation. The provisions of 49 U.S.C. 14502 (motor carriers, water carriers) and 49 U.S.C. 40016(d) (air carriers), for example, are almost identical to §11501 in that they list acts that "unreasonably burden and discriminate against interstate commerce." Those acts listed are specific and include overvaluing air and motor carrier property, levying or collecting tax on those overvaluations, and collecting ad valorem taxes at higher rates than those on other commercial and industrial property. They do not, however, include any counterpart to §11501(b)(4) in the list.[21]

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[20] Brief of *Amicus Curiae* Council on State Taxation, pp. 6-12

[21] 49 U.S.C. 40116(b) contains a provision prohibiting states from imposing a tax, fee or charge exclusively on businesses located on, or operating as a permittee at a commercial airport "other than a tax, fee or charge wholly utilized for airport or aeronautical purposes."

Another federal preemption statute, The Internet Tax Freedom Act, 47 U.S.C. §151 (Note), contains specific descriptions of what constitutes a "discriminatory tax." For example, one definition of a discriminatory tax is a tax that is "not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means."[22] The interpretation of "discriminate" for purposes of §11501(b)(4) will not directly impact the specific definition of discrimination in the Internet Tax Freedom Act.

The provisions of 15 U.S.C. §391, concerning the generation and transmission of electricity, prohibit states from discriminating against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. A tax is discriminatory if it "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." Again, because this Act contains its own, more specific definition of the measure of discrimination, it should not be directly affected by the interpretation of "discriminate" for purposes of §11501(b).

Those federal laws that completely preempt state taxation would not be affected at all, because the subject is entirely shielded from the targeted tax. For

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[22] 47 U.S.C. 151 (note, §1105).

example, 43 U.S.C. 1333 (2)(A) concerning state jurisdiction over the subsoil and seabed of the continental shelf, contains a complete preemption of state taxation ("State taxation laws shall not apply to the outer continental shelf.") Other laws that contain an absolute preemption include 49 U.S.C. §40116(b) (air transportation) and 49 U.S.C. §14505 (motor carrier transportation) prohibiting states from taxing transportation charges. Income earned in a state where the only in-state activity is solicitation and any orders are shipped from out of state, 15 U.S.C. §381, prohibiting tax on certain stock transfers, 15 U.S.C. §78bb(d), local (but not state) taxation of satellite services, 47 U.S.C. §152 note, are other examples of state preemptions with their own specifically defined prohibitions.

Other laws construct a precise regulatory structure that has nothing to do with exemptions. The Mobile Telecommunications Sourcing Act, 4 U.S.C. §§116-126, is simply a sourcing rule for identifying the jurisdiction that is eligible to apply a particular tax to wireless communications.

In sum, concerns of widespread implications resulting from a narrow reading of "discriminate" for purposes of §1105(b)(4) are overstated. Reading the 4-R Act in a narrow fashion is more consistent with the purpose of the legislation and, in fact, with the targeted specificity of other pre-emptive Acts.

CONCLUSION

Section 11501(c) of the 4-R Act does not abrogate the Tax Injunction Act, 28 U.S.C. §1341 to grant federal district court jurisdiction over alleged violations of §11501(b)(4). The plain language and legislative history suggests limit relief to discriminatory property tax assessments that exceed a certain threshold. To the extent any doubt remains, principles of federalism compel a narrow interpretation of federal court jurisdiction. If federal court jurisdiction is found, then the reasoning of the Eleventh Circuit in *Norfolk Southern* should be upheld to exclude exemptions from consideration under §11501(b)(4). This result is consistent with the plain language of the Act and its legislative history.

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