No. 17-11705-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CSX TRANSPORTATION, INC.,
Plaintiff/Appellant

v.

ALABAMA DEPARTMENT OF REVENUE, et al.,
Defendants/Appellees

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:08-cv-00655-AKK

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEES ALABAMA DEPARTMENT OF REVENUE, ET AL.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus certifies that, pursuant to Rule 26.1-1 of the Eleventh Circuit, it has submitted a list of interested persons and has none to add at this time. The Multistate Tax Commission is a nonprofit governmental entity that offers no stock.

STATEMENT PURSUANT TO FRAP 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states that 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.

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEES ALABAMA DEPARTMENT OF REVENUE, ET AL.

INTEREST OF *AMICUS*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of Appellees Alabama Department of Revenue, et al. All parties have consented to the filing of this brief.

The Commission is an intergovernmental state tax agency established in 1967 by the Multistate Tax Compact in response to threatened federal preemption of state taxing authority. *See* the Compact as enacted by Alabama, Ala. Code § 40-27-1, Art. VI. Forty-eight states and the District of Columbia currently participate in the MTC's programs and activities.[1] The states had four purposes in forming the Compact, the first of which is to "[f]acilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of

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

tax bases and settlement of apportionment disputes." Multistate Tax Compact, Art. I.[2]

Through the MTC and its various programs and committees, participating states cooperate to develop proposed model state tax laws and regulations, conduct joint state tax audits, facilitate voluntary disclosure and tax compliance, and provide litigation and *amicus* support in important state tax cases. Alabama has been an active participant in these programs and activities.

No issue is more important to the Commission than the preservation of the sovereign authority of states to set their own tax policies. As an organization of state tax administrators, the Commission also advocates for tax policies that can be implemented fairly and efficiently. This case concerns the extent to which state taxing authority has been limited by a particular congressional mandate and how that mandate should be interpreted and applied so as to reflect Congress's purpose, consistent with the Constitution, in a way that is administrable. Therefore, it is of the utmost importance to the Commission

SUMMARY OF ARGUMENT

The Commission is well positioned to address two of CSX's claims—first, that 49 U.S.C. § 11504(b)(4) ("subsection (b)(4)") imposes some type of spending requirement on states, and second, that CSX need not show harm to seek a remedy

2 *Available at* http://www.mtc.gov/The-Commission/Multistate-Tax-Compact#Article I

under subsection (b)(4). As to the first claim, there is no textual or precedential basis to conclude that Alabama is barred from justifying a differential tax treatment here. A state tax structure is not invalid simply because the state spends fuel tax revenues on public roads, or because it cannot prove that it spends sales tax revenues to provide railroads with proportional or greater benefits. Proving this type of spending requirement has been met would be extremely onerous for states, leaving them with the practical choice of either exempting railroads entirely, or spending taxes imposed on railroads so as to provide them with unquestionably greater benefits. The Supreme Court has rejected the idea that states must grant railroads "most-favored-taxpayer" status. And assuming Congress intended states to spend more to support railroads, this would raise serious Tenth Amendment anti-commandeering issues. Therefore, if it was Congress's purpose to affect state spending, it should have, at the very least, spoken clearly.

As to CSX's second claim, that it need not show harm to seek a remedy under subsection (b)(4), that claim ignores the requirement that any remedy meet a standard for congruence and proportionality. Moreover, if subsection (b)(4) prevents states from granting any exemption or similar benefit to some taxpayers, but not to railroads, regardless of how inconsequential it might be, the potential disruption to state tax systems would be significant.

Finally, while Congress has tasked the courts with the difficult job of interpreting subsection (b)(4)'s language in the myriad of contexts to which it might apply, this court does not shirk that responsibility by considering the foreseeable consequences of those interpretations and asking whether those consequences further Congress's purpose.

ARGUMENT

A. Subsection (b)(4) does not impose any kind of spending requirement on the states.

When it last considered this case, the Supreme Court was fully aware that there were two different taxes involved and that the revenues from each were used for different purposes. This court's ruling in *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 865–66 (11th Cir. 2013) ("*CSXT II*") set out how Alabama uses the revenue from the state sales tax versus the state fuel tax. Indeed, the fact that there were two different taxes was central to this court's prior holding—that it was improper to evaluate a state's general sales tax against other taxes in the state's code. *CSXT II*, 720 F.3d at 870. But the Supreme Court disagreed with that holding, stating: "We think Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax." *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015). The Court further reasoned, "A comparable tax levied on a competitor may justify not extending that competitor's exemption from a general

tax to a railroad." *Id*. Noticeably absent from the Court's opinion is any reference to, or apparent reservation about, how the two taxes are spent.

Nevertheless, CSX contends it cannot be made to pay the sales tax while truckers pay the fuel tax, because the fuel tax is used exclusively to support the highways, while the sales tax supports general governmental functions. It further insists that it would be the "height of folly" for railroads to choose, instead, to pay the fuel tax which supports "their competitors' infrastructure." CSX Br. 10–11. We do not understand CSX to assert that it receives no benefit from the system of public roads, or from the general services Alabama provides. That would be absurd. Nor do we believe CSX is simply making the same arguments already rejected by the Supreme Court in *CSXT II*. Instead, we understand CSX to argue that the term "discriminate" in subsection (b)(4) prohibits states from spending taxes imposed on railroads and their competitors in a way that provides disproportionate benefits to those competitors.

This argument finds no support in the text of subsection (b)(4) or in Supreme Court precedent, including *CSXT II*. Further, the kind of spending requirement CSX apparently contemplates would be extremely difficult to administer and evaluate. Assuming the requirement would compel states to spend revenues in a particular way, it would also raise serious Tenth Amendment questions. Given all

this, if Congress intended the kind of spending requirement CSX envisions, it should have spoken clearly.

1. Alabama need not show that it spent the sales taxes imposed on railroads to provide them with some level of benefits in order to justify providing truckers, who pay fuel taxes, with a sales tax exemption.

As support for its claim that Alabama cannot justify granting a sales tax exemption to truckers, CSX contends that the compensatory tax doctrine applies. CSX Br. 36. (The compensatory tax doctrine does not apply to whether CSX could simply choose to pay the fuel tax as opposed to the sales tax.) CSX further argues that the compensatory tax doctrine imposes a kind of spending requirement on Alabama. Saving, for the moment, the merits of this argument, we agree with the lower court that the Supreme Court did not invoke the compensatory tax doctrine in *CSXT II*.

Before the Supreme Court, CSX and its *amici* urged the very same holding—that the compensatory tax doctrine applies and that its requirements cannot be met. See Br. of Respondent, in *CSXT II,* October 29, 2014, 39–51; Brief of *Amicus Curiae* Association of American Railroads in Support of Respondent, in *CSXT II,* 25–35; and Brief of the Tax Foundation as *Amicus Curiae* in Support of Respondent, in *CSXT II,* 19–25. Not only does the Court's opinion fail to mention the doctrine or its supposed spending requirement, the citation to *Gregg Dyeing Co. v. Query* does not signal some sort of intent to apply the doctrine, as CSX

argues. In *Gregg Dyeing*, the Court simply concluded that: "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." 286 U.S. 472, 481 (1932). Notably, the Court's opinion in *CSXT II* did *not* cite to the case where it found state spending to be, in any way, relevant to the compensatory tax doctrine: *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

In *Fulton*, the Court found that the tax that the state sought to justify—a facially discriminatory capital tax only on out-of-state companies and purportedly used to support the state's capital market—was not a compensatory tax for the state's apportioned corporate income tax that those out-of-state companies did not pay. *Id*. While the Court found the tax could not be justified, in part, because there were reasons to believe that the corporate income tax was not spent to for the purpose of supporting the state's capital markets, this finding was unnecessary for the holding in the case and the Court explicitly declined to impose any specific spending requirement, saying:

> "While we need not hold that a State may never justify a compensatory tax by an intrastate burden included in a general form of taxation, the linkage in this case between the intrastate burden and the benefit shared by out-of-staters is far too tenuous to overcome the risk posed by recognizing a general levy as a complementary twin."

Fulton, 516 U.S. at 336.

Both the sales and fuel taxes here are spent on the general public good. Alabama, like other states, spends sales taxes primarily to fund general governmental services such as public schools, health care, and public safety.[3] And like other states, Alabama uses fuel taxes to fund the system of public roads, a system which only government is in the position to provide.[4] Because CSX cannot possibly maintain that it receives no benefit from these public services and public infrastructure, it cannot claim that the linkage between the tax imposed and the benefits received is "tenuous."

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[3] State Expenditure Report, National Association of State Budget Officers, 2016, *available at* https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20(Fiscal%202014-2016)%20-%20S.pdf] (last visited June 28, 2016).

[4] See "Spending and Funding for Highways," Congressional Budget Office, (Jan. 2011), *available at* https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/01-19-highwayspendingbrief.pdf (last visited June 28, 2016) stating: "First, such infrastructure displays, at least to some degree, important characteristics of 'public goods.' Such goods are usually not profitable for the private sector to produce, because once they have been produced, they are available to anyone who wants to use them; as a result, they are often provided by the public sector. Second, because such infrastructure is costly to build, though less expensive to operate and maintain, having competing highway networks is not practical. As a result, such "natural monopolies" are often either provided directly by the government or regulated by it. Third, the benefits of highways—promoting commerce, for instance—may extend beyond the places where they are built and beyond the people who use them directly.

2. There is no textual or precedential basis for concluding that the imposition of Alabama's fuel tax on railroads discriminates against them because the tax revenues are spent on public roads.

Since the compensatory tax doctrine cannot support CSX's objection to paying the fuel tax (which under Alabama law it may choose to do in lieu of paying the sales tax), CSX argues that the fuel taxes (which it refers to as "user charges") "impose different burdens and provide different benefits than taxes which support the State's general revenue." CSX Br. 37. In effect, CSX would read subsection (b)(4)'s language—that states may not "impose another tax that discriminates" against railroads—as mandating that states may not "impose another tax that discriminates . . . *or impose a burden on railroads by spending the tax proceeds so as to provide greater benefits to a comparison class of taxpayers*."

Clearly this is a difficult concept to shoehorn into subsection (b)(4)'s text. But to establish that the text will bear the weight of this interpretation, CSX and its *amicus*, the Tax Foundation, rely on a single case, *West Lynn Creamery*, 512 U.S. 186 (1994). *See* CSX Br. 39 and Brief of The Tax Foundation as *Amicus Curiae* at 20–24. In *West Lynn Creamery*, the state acted to shore up domestic milk producers, who could not compete on price with out-of-state producers, by imposing a premium payment on milk sold by local and out-of-state producers with the statutory purpose of paying a subsidy to the local producers. *West Lynn Creamery*, 512 U.S. at 188–191. If this doesn't violate the negative commerce

clause, it's hard to imagine anything that would. It's not surprising, therefore, that the Supreme Court concluded that it could not divorce the nondiscriminatory tax from the local subsidy. *West Lynn Creamery*, 512 U.S. at 201. But in a footnote, the Court also said this:

> We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that "[d]irect subsidization of domestic industry does not ordinarily run afoul" of the negative Commerce Clause. *In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes.*

Id. at 199 n.15 (emphasis added).

West Lynn Creamery is inapplicable here because state spending of tax revenues for a public purpose, even a specific public purpose that may provide one industry with particular benefit, is not a subsidy paid to that industry. Since *West Lynn Creamery*, the Supreme Court has considered one very similar circumstance, *see Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003), but has never used the holding to strike down a tax as discriminatory simply because of how the state spent the tax revenue.

3. If Congress intended to impose a spending requirement, which is potentially unadministrable and unconstitutional, then it should have spoken clearly.

CSX characterizes the system of public roads which Alabama builds and maintains as its "competitor's infrastructure." CSX Br. 3, 11, 16, 28–29. But of course, CSX also benefits from those roads—since many goods shipped by rail get

to and from the railroad terminals through the use of this public highway system—typically by truck.[5] Not only do truckers and trains benefit from this system of public roads, but all citizens of the state do, including railroad employees. And without public roads, states could not administer many of the other governmental services that benefit all businesses, including railroads. Indeed, the court below found that CSX does benefit from these public goods. Appendix II, 20 n.16.

No doubt recognizing these facts, CSX further asserts that it was Congress's purpose to specifically address a problem highlighted in the 1961 Doyle Report. CSX quotes a statement from the Doyle Report at page 459 (which in our version of the report we find at page 450) indicating that Congress understood that fuel taxes ("user charges") were used to build and maintain public roads. CSX Br. 38. But that statement is simply part of a bigger issue highlighted by the report—that while both truckers and railroads "pay" for their "infrastructure," truckers through fuel taxes and railroads directly, railroads also paid property tax on their infrastructure, while truckers did not.[6]

[5] See information on CSX's intermodal service, as an example, available on its website, at: http://www.intermodal.com/ (last visited June 26, 2017).

[6] Report of the Committee on Commerce, Special Study Group on Transportation Policies in the United States, S. Rep. No. 87-445 (1961) ("Doyle Report"), at 450; *see also* H.R. Rep. No. 94-725 (1975), at 78; Report of the U.S. Senate Committee on Commerce, *Discriminatory State Taxation of Interstate Carriers*, S. Rep. No. 91-630 (1969).

In response to this bigger problem, the Doyle Report recommended that Congress simply exempt railroad infrastructure from property tax—thus putting them on roughly equal standing with truckers.[7] But Congress chose not to adopt this recommendation. Instead, it opted for an alternative proposed by the Report—to tie the property tax imposed on carriers to the property tax imposed on other businesses.[8] And four years after passing the 4-R Act, Congress passed the Motor Carrier Act of 1980, now codified at 49 U.S.C. § 14502. Two years after that, it adopted the Airport and Airway Improvement Act of 1982, now codified at 49 U.S.C. § 40116. These enactments addressed the problem that, "interstate carriers are easy prey for State and local assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Bd. of Equalization of State of S.D.*, 480 U.S. 123 (1987)(internal citations omitted). If Congress intended to address the inequity of railroads paying property tax on their infrastructure while truckers pay such tax on public roads, it would have enacted the clear solution recommended by the Doyle Report, rather than expecting courts to read into subsection (b)(4) some kind of unexpressed solution in the form of a state spending requirement.

Nor do the cases cited by CSX alter this conclusion. The second of those cases relies entirely on the first (Iowa) case. *See Burlington N. R. Co. v. Triplett*,

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[7] *Id*. at 463.
[8] *Id*. at 465.

682 F. Supp. 443, 446 (D. Minn. 1988). The Iowa case, in turn, relies on that state's constitution and laws for the proposition that the fuel taxes imposed on trucks "represent the Assembly's judgment as to the portion of the cost of the highways that the trucks should bear." Critically, the majority conducted no analysis of Congress's specific purpose in enacting subsection (b)(4). *See Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983). But four justices dissented in *Bair* and were unwilling to read into subsection (b)(4) any spending requirement given that Congress clearly imposed no such requirement for property taxes. The dissent, also pointed out that: "If benefits to the taxpayer were relevant, the relative value of other government services such as police and fire protection should be considered. If benefits that are paid for by the tax are relevant, so are benefits that are not paid for by it." *Bair*, 338 N.W.2d at 350–51 (McCormick, J. dissenting).

As the dissent in *Bair* suggests, if there were some type of requirement of proportional spending implicit in subsection (b)(4), the necessary inquiry to establish that a state meets that requirement would not be as simple as CSX makes it out to be. Even if we confine that inquiry to the fuel tax, which CSX could choose to pay here, it is not sufficient to conclude that since fuel taxes are expended on public roads, this must necessarily impose a discriminatory burden on railroads. Rather, we must first determine the benefit that both railroads and

truckers receive from public roads, compared to the tax each would pay. Assuming that the standard is "rough equivalence," the result of this inquiry is far from clear. If, instead, the comparison to be made is between the sales tax paid by CSX versus the fuel tax paid by truckers, then the inquiry becomes substantially more complex. In addition to the benefits that CSX and truckers derive from public roads, presumably the benefits that both receive from general public spending would be relevant. States would also presumably need to show that truckers do not get a proportionally greater benefit from general public spending, due to their sales tax exemption on fuel purchases, or if they do, it is no greater than the proportionally greater benefit railroads receive from public roads, for which they would not pay fuel tax. Of course, all this assumes that we can accurately attach values to the benefits involved.

But while CSX cannot win the simple argument, this does not mean that states can necessarily win the more complicated one—since the complexity of the inquiry may effectively make it practically impossible. Unlike the valuation of property, which is a well-established discipline used for property taxation, there are no clearly established standards for valuing the benefits a business may receive from governmental spending. And even if the states put on sufficient evidence to prevail in this case, the results would not necessarily govern future cases. Each state that imposes a sales tax on railroad fuel, versus a fuel tax, would potentially

provide different benefits, even when it comes to general spending versus spending on public roads. The benefits and taxes paid may also be affected by the miles of rail track versus the miles of public roads, the types of shipping done through the state, the location of railroad employees, and other factors. And, as the Supreme Court has now held, subsection (b)(4) allows for more than one possible comparison class. *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1142 (2015). A claim of discrimination involving some other comparison class, or potentially other taxes, would present a whole separate set of issues. Nor will a railroad's presence in the state, or the benefits it receives, or the state taxes imposed remain static.

It is reasonable to expect, therefore, that it will often be prohibitively expensive for the states to establish that some kind of spending requirement has been met. This leaves them with one of two choices—grant railroads the same exemptions provided to any potential comparison class or expend taxes paid by railroads in a way that clearly provides them with the required benefits. As the majority in *CSXT I* noted, subsection (b)(4) need not be read so as to turn railroads into "most-favored-taxpayers," entitled to any exemption (or other tax break) that a state gives to another business. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 288 n. 8 (2011)("*CSXT I*")(rejecting arguments made by the dissent that its opinion did just that). If this was not Congress's purpose, as the Court

apparently agrees, then subsection (b)(4) should not be interpreted as containing a requirement that would make this result inevitable in many cases.

The other alternative, that states expend state taxes imposed on railroads so that any spending requirement is clearly met, is questionable given the Tenth Amendment's prohibition against state commandeering. Congress may not compel states to spend their revenues to directly benefit a particular industry. *See N.Y. v. United States,* 505 U.S. 144, 175 (1992)(where the Court reasoned that a congressionally compelled transfer of nuclear waste to the states was effectively a subsidy from states to the nuclear industry, unconstitutionally "commandeering" state governments into the service of federal regulatory purposes). Nor can Congress coerce states into expending their revenues to serve a federal purpose. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012)(holding that present states with the choice between giving up current federal funding or expanding state Medicaid programs violated the Tenth Amendment).

Given these questions as to administrability and constitutionality, we would expect that, at the very least, Congress would speak more clearly if it intended to impose any type of spending requirement. This "clear statement rule" has long been applied in cases of federal preemption generally. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But especially where state sovereign interests protected by the constitution are implicated, the application of the clear statement

rule should guide construction of federal statutes to avoid such constitutional issues. *See Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011)("The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter."); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation").

B. Subsection (b)(4)'s use of the term "discriminate" does not allow CSX to claim a remedy without showing actual harm.

By claiming that subsection (b)(4) entitles it to the exemption granted to barges for fuel used in interstate commerce, even though the court below found it suffered no particular injury, CSX effectively argues that subsection (b)(4) grants it any tax benefit a member of a comparison class might claim, absent showing a compelling reason, a standard that could rarely be met. CSX Br. 41–46. Had Congress wished to specify this result, it could have imposed a bright line rule—to the effect that states may not "deny to railroads any tax exemption or other tax credit or incentive granted to [some group]." Congress presumably has sufficient authority under the Commerce Clause to issue this sort of sweeping ban on state taxation of an instrumentality of interstate commerce. But Congress did not do so. Instead, after making substantial findings taxes imposed on railroads, it enacted a provision using the word "discriminates." This litigation has been about what that

word requires. We submit that it requires CSX to do more than show differential treatment; it requires CSX to show actual injury.

1. Congress enacted subsection (b)(4) pursuant to its authority under Section 5 of the Fourteenth Amendment, rather than under the Commerce Clause.

CSX asserts that the Supreme Court's negative commerce clause jurisprudence applies and argues that, under those cases, once differential tax treatment is shown, the magnitude of the discriminatory effects is irrelevant. CSX Br. 22. However, the negative commerce clause cases cannot be seen as controlling.

While the Supreme Court has never taken up the question of whether, in enacting subsection (b)(4), Congress exercised its affirmative commerce clause authority, a majority of appellate and other courts have concluded that Congress acted pursuant to its authority under Section 5 of the Fourteenth Amendment. *See Fox River Valley R.R. Corp. v. Dep't of Revenue of State of Wis.*, 863 F. Supp. 893 (E.D. Wis. 1994); *CSX Transp., Inc. v. N.Y. Office of Real Property Services*, 306 F.3d 87 (2d Cir. 2002); *Union Pacific R. Co. v. Utah*, 198 F. 3d 1201 (10th Cir. 1999). This is a critical determination for purposes of jurisdiction. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999).

But if Congress acted pursuant to its authority under the Fourteenth Amendment, then it is not clear what application any negative commerce clause decisions may have, or, specifically, whether the standards and remedies provided under those decisions would necessarily apply. When Congress acts to impose a requirement on the states under the Fourteenth Amendment, it must demonstrate a pattern of discrimination that violates the rights guaranteed under that Amendment and the Supreme Court will hold Congress to a more exacting standard, as compared to when Congress acts under the Commerce Clause. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001). The Supreme Court has also held that when Congress acts pursuant to Section 5 of the Fourteenth Amendment, a claim for relief must show more than a disparate impact to establish discrimination. *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 42 (2012).

2. Any remedy under subsection (b)(4) must meet the standard of congruence and proportionality, which requires that there be a showing of the harm which Congress sought to address.

Assuming Congress enacted subsection (b)(4) using its authority under Section 5 of the Fourteenth Amendment, not only must the harm to be remedied be subject to constitutional protection, but the remedy must also have "congruence and proportionality." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). Again, the Supreme Court has never specifically applied this standard to harms asserted and remedies sought under subsection (b)(4). One court has held that subsection

(c)'s remedies with respect to property taxes have congruence and proportionality because they are narrowly tailored. *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 97 (2d Cir. 2002). Another court has held that the standard for "congruence and proportionality" would prevent the granting of refunds as relief. *Housatonic R. Co. v. Comm'r of Revenue Servs.*, 21 A.3d 759, 770–71 (Conn. 2011). We submit, that under that standard, CSX cannot claim any remedy for *unspecified* harm, and that there is certainly no showing here to support its claim to the exemption granted to barges.

To fully understand the implications of what CSX is asking for, it is important to note two things about the scope of subsection (b)(4). This case involves a comparison class of those carriers that may compete against railroads. But the Supreme Court has not limited the comparison class to those taxpayers. In *CSXT II* the Court also noted that the Equal Protection Clause concept of "similarly situated" taxpayers does not apply, concluding that it would "deprive subsection (b)(4) of all real-world effect." There, the Court further concluded that commercial and industrial taxpayers are another comparison class, since that class was employed by Congress in the property tax area. *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1142 (2015). And while this case involves a tax exemption, subsection (b)(4) is not limited to exemptions. The Court in *CSXT I* reasoned that a difference in effective tax rates triggers a claim under subsection

(b)(4), and that an exemption was no different than a zero-percent rate. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 286–87 (2011). So any tax credit, incentive, or other tax benefit would also be implicated.

Therefore, the potential scope of subsection (b)(4) is all other taxpayers and any differential tax treatment that results in railroads paying a higher real rate of some tax than another group. Without the limitation imposed by the standard for congruence and proportionality, the door would be wide open for any claim that other taxpayer groups receive tax benefits not provided to railroads.

3. A requirement that railroads show some actual injury also protects the prerogative of state lawmakers to make tax policies that may benefit limited groups of taxpayers while not harming railroads.

Requiring railroads to show some actual harm, and limiting the remedy to what is congruent and proportional to that harm, gives state lawmakers and tax administrators the assurance that state tax systems, put in place without any purpose of discriminating against railroads, but which may include numerous exemptions, credits, or similar incentives granted to other taxpayers, will not constitute per se violations of Subsection (b)(4). Those types of incentives may be used to encourage certain activities, including hiring or investment, or refrain from activities, and may be limited so as to reduce the total cost to the state fisc.

C. This court should consider the foreseeable consequences to state tax systems of its interpretation of subsection (b)(4) in this case.

Subsection (b)(4) has just nine operative words—states may not "impose another tax that discriminates against a rail carrier." This court must address, for the third time, the application of these nine words to a challenge brought in 2008 against long-standing elements of Alabama's tax structure. Any fault for the progress of this case lies not with the parties, this court, or the court below. If there is fault, it lies with subsection (b)(4) itself. Its nine operative words simply raise more questions than they answer.

Nor have other interpretative aids proven very helpful. Legislative history is often conflicting. For example, in *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, when addressing whether subsection (b)(4) could be read to prohibit differential property tax exemptions, the Supreme Court found that during congressional hearings, "industry representatives characterized the provision as prohibiting only discriminatory in lieu taxes and gross receipts taxes." 510 U.S. 332, 346 (1994). But in this litigation, in addressing a different question, the Court concluded: " . . . we see no reason to interpret subsection (b)(4) as applying only to the gross-receipts taxes—known as 'in lieu' taxes—that some States imposed instead of property taxes . . . . The argument in favor of this construction relies on the House Report concerning the bill . . . . But the Conference Report on the final bill

abandoned the House Report's narrowing language . . . ." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 285, (2011)(internal citations omitted).

Nor will balancing the competing interests supply the missing answers. Where a balancing of specific interests is required, courts may find the choice a difficult one. *See CSX Transp., Inc. v. Forst*, 777 F. Supp. 435, 441 (E.D. Va. 1991)(finding the competing interests to be equally balanced in the context of fashioning the appropriate remedy). And courts are understandably hesitant to impose their views as to a balancing of the larger interests of railroads and states, given that Congress has effectively already done it. *See CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 20 (2007)(explaining that while the Court had "long held that the means States adopt to collect their taxes 'should be interfered with as little as possible'" Congress had specifically allowed railroads to bring a challenge to valuation methodologies).

Consequently, the four-decades-long history of 4-R Act litigation demonstrates that conflicting interpretations may be equally plausible. But a choice between equally plausible interpretations can have substantially different consequences—to railroads, other taxpayers, and state tax systems generally. This court is justified in weighing these foreseeable consequences. *See Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 614 (1978)(a determination of Congress's intent may be reinforced by consideration of the practical consequences

that could be expected to flow from a holding to the contrary); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 77 (2006)(Alito, J. concurring)(arguing that if the practical effects of a ruling work against the achievement of Congress's purpose, the ruling is flawed); *S. Ry. Co. v. Seaboard Allied Milling Corp*., 442 U.S. 444, 457–58 (1979)(reasoning that the disruptive practical consequences of a particular determination on an administrative agency confirm the view it was not what Congress intended).

We do not argue that all administrative complexity or difficulty can be avoided. Admittedly, the states' contention that they be allowed to justify a differential tax treatment creates some of the complexity—raising questions that can be described as "knotty," *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 297 (2011), or perhaps, "Sisyphean," *Alabama Dep't of Revenue v. CSX Transp*., Inc., 135 S. Ct. 1136, 1144 (2015)(quoting this Court). Nor do we argue that the actual results must be "perfect." They may effectively "forbid some fair arrangements because the actual fairness of those arrangements is too difficult and expensive to evaluate." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987)(rejecting the state's urging to consider the overall economic effect of taxes on railroads in the state). And in some cases, results "not so bizarre that Congress could not have intended [them]," may be the best we can hope for. *See Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 347,

(1994)(internal citations omitted)(describing the conclusion that Congress allowed railroads to bring challenges to non-property tax exemptions, but precluded them form challenging property tax exemptions). But what is troubling to tax administrators is the description that two Supreme Court justices have given to the results of this litigation, thus far— "predictably unworkable," *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136, 1150 (2015)(Thomas, J., dissenting).

Some difficulties are simply inevitable, not just because of subsection (b)(4)'s lack of specific rules (just compare it to the property tax requirements in subsections (b)(1)–(3) and subsection (c)), but also because they must be applied to the complex and well-developed fabric of state tax systems. Also, subsection (b)(4), like the handful of other federal laws that preempt state taxation, do not benefit from authoritative administrative rules, which serve to bridge broad congressional directives with specific practical applications. We are left, therefore, to work out many disputes "gradually in relation to specific disputes," *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 379 (5th Cir. 1987). Lower courts and litigants must expect to struggle with uncertainty as to what specific interpretations apply, and how supporting evidence should be weighed. Even looming inevitable questions can only be addressed when they are ripe. Or as Justice Scalia observed

in *CSXT II*, "Sufficient unto the day is the evil thereof." 135 S. Ct. 1136, 1142 (2015)(quoting Matthew 6:34).

But while inevitable *questions* may be "reserved unto fire against the day of judgment,"[9] it does not follow that courts can ignore the inevitable *consequences* of their judgments. We accept the inherent difficulties presented by subsection (b)(4), but we urge this court to reject CSX's interpretation of its terms, not only because that interpretation lacks textual or precedential support, and not only because it will make the resolution of disputes much more difficult, perhaps impossible, but also because the consequences do not further Congress's evident purpose.

Despite debates as to Congress's *specific* purposes in enacting subsection (b)(4), the outline of its fundamental purpose is clear. So while we might argue about whether Congress intended to make states accountable for how tax revenues are spent, surely we can agree that it was not Congress's fundamental purpose that all state actions that might violate subsection (b)(4) have their sole remedy through litigation, "gradually in relation to specific disputes." Congress's purpose would be substantially furthered if subsection (b)(4) was interpreted to enable state lawmakers and administrators to proactively conform their state tax systems to its commands, without the need for and expense of drawn-out court battles. Nor can it

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[9] 2 Peter 3:7.

have been Congress's purpose to disadvantage railroad competitors by subjecting state policymakers to the hard choice between risking costly and time-consuming battles or granting railroads "most-favored-taxpayer" status. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 288, 131 (2011). And even though it sometimes appears that the broad language of Subsection (b)(4) gives incentives to railroads to "mine" state tax systems for possible windfalls, this cannot have been Congress' purpose either as this would force many needless ongoing disruptions on state tax systems.

CONCLUSION

The Commission asks this court to reject CSX's claims that subsection (b)(4) imposes some kind of spending requirement on the states or that it grants a remedy where there has been no showing of actual harm suffered. The alternative has foreseeable disruptive consequences on state tax systems which no evidence can support Congress intended.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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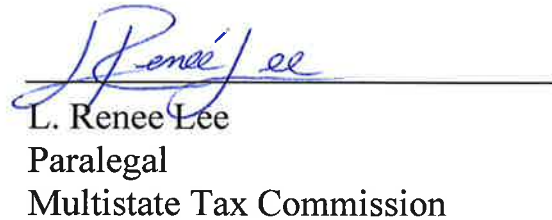

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 30, 2017, a copy of the foregoing brief was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. In addition, seven paper copies were sent by Federal Express to the Clerk of the Court addressed as follows:

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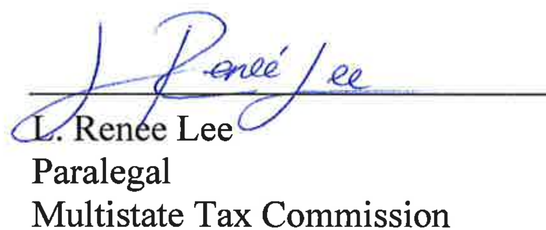

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