

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 FOR PETITIONER

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QUESTION PRESENTED

As specified by the Court:

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 "another tax that discriminates against a rail carrier."

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly held. No other publicly held company owns more than 10% of petitioner's stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) and its order denying hearing en banc (Pet. App. 39a) are unreported, as are the orders and opinion of the district court (Pet. App. 3a-12a). The controlling opinion of the court of appeals in *Norfolk Southern Railway v. Alabama Department of Revenue* is reported at 550 F.3d 1306 (Pet. App. 13a-38a).

JURISDICTION

The court of appeals entered judgment on September 1, 2009. Pet. App. 1a. The petition for a writ of certiorari was timely filed on October 28, 2009. This Court granted certiorari on June 14, 2010, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (“4-R Act”), provides, in relevant part:

§ 11501. Tax discrimination against rail transportation property.

(a) In this section—

(1) the term “assessment” means valuation for a property tax levied by a taxing district;

(2) the term “assessment jurisdiction” means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term “rail transportation property” means property, as defined by the Board, owned or used by a rail carrier providing trans-

portation subject to the jurisdiction of the Board under this part; and

(4) the term “commercial and industrial property” means 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.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(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.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property 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) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

STATEMENT OF THE CASE

A. Statutory Background

1. Rail carriers were subject to discriminatory state and local taxation for decades prior to the 4-R Act's enactment in 1976. Congress surveyed the nature and impact of the discrimination in 1961. See S. Rep. No. 87-445, at 449-66 (1961). Congress later found that rail carriers were “easy prey for State and local tax assessors’ in that they are ‘nonvoting, often nonresident, targets for local taxation,’ who cannot easily remove themselves from the locality.” *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). Congress quantified the impact of the discrimination to be “at least \$50 million each year.” H.R. Rep. No. 94-725, at 78 (1975); see also S. Rep. No. 91-630, at 1 (noting “long-standing burden on interstate commerce” created by discriminatory state taxation of railroads). Congress eventually concluded that the “temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents ... made federal legislation in this area necessary.” *W. Air Lines*, 480 U.S. at 131.

2. Congress enacted such legislation as part of the 4-R Act. See Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act's purpose is “to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States.” *Id.* § 101(a), 90 Stat. at 33. Congress sought to “foster competition among all carriers by railroad and other modes of transportation,” 45 U.S.C. § 801(b)(2), and in particular to prevent discriminatory state and local taxation of railroads.

Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, prohibits such tax discrimination, setting forth four forbidden tax schemes deemed to “unreasonably burden and discriminate against interstate commerce.” 49 U.S.C. § 11501(b). The first three schemes concern property taxes. Subsection (b)(1) prohibits assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of “other commercial and industrial property.” *Id.* § 11501(b)(1). Subsection (b)(2) prohibits levying a property tax based on such an assessment. *Id.* § 11501(b)(2). And subsection (b)(3) prohibits levying a property tax at a higher rate than the rate imposed on other “commercial and industrial property.” *Id.* § 11501(b)(3). Those discriminatory practices were common prior to the 4-R Act. See S. Rep. No. 91-630, at 3.

Congress did not limit the reach of section 306 to those most obvious and blatant forms of existing tax discrimination. In subsection (b)(4), Congress also prohibited the States from “[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” 49 U.S.C. § 11501(b)(4).¹ The

¹ Section 306 “was originally codified at 49 U.S.C. § 26c (1976 ed.). In 1978, Congress recodified section 306 at 49 U.S.C. § 11503 (1976 ed., Supp. II).” *CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 13 n.1 (2007). The recodification “slightly altered” the statutory text, *Burlington N. R.R. v. Okla. Tax Comm’n*, 481 U.S. 454, 457 n.1 (1987), including the language now codified at § 11501(b)(4). As originally enacted in 1976, that provision prohibited the “imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad”; the amended text prohibits “*another tax* that discriminates against” a rail carrier. Compare Pub. L. No. 94-210, § 306(1)(d), 90 Stat. at 54, with Pub. L. No. 95-473, § 11503(b)(4), 92 Stat. 1337, 1446 (1978). The recodification and

provision came into being when Congress “realized near the end [of the legislative process] that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation,” and “added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose.” *Kan. City S. Ry. v. McNamara*, 817 F.2d 368, 373 (5th Cir. 1987). As one court described it, subsection (b)(4) “is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax.” *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

3. In *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), this Court held that subsection (b)(4) may not be invoked to challenge the imposition of a property tax on railroad property on the ground that certain non-railroad property is exempt from the tax. *Id.* at 339-48. The instant case presents the question whether imposing a generally applicable non-property tax (here, a sales and use tax) on rail carriers, while exempting railroad competitors (here, motor carriers and water carriers), is subject to challenge under subsection (b)(4). As shown below, the answer is yes.

B. Proceedings Below

1. Petitioner CSX Transportation, Inc. (“CSXT”) is a common carrier railroad engaged in interstate

restatement “may not be construed as making a substantive change in the laws replaced.” Pub. L. No. 95-473, § 3(a), 92 Stat. at 1466; *see Burlington N. R.R.*, 481 U.S. at 457 n.1. “Congress recodified [§ 306] again in 1995, without substantive change, this time as § 11501.” *CSX Transp.*, 552 U.S. at 13 n.1. This brief will refer to the 4-R Act as currently codified, although it will note the original language of section 11501(b)(4) as an aid in construing that provision. *See* Sup. Ct. R. 34.5.

commerce. Pet. App. 7a. CSXT operates in Alabama, and is subject to taxation by Alabama and its subdivisions. *Ibid.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code § 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The state sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, and use of diesel fuel in Alabama. Pet. App. 7a. Revenues from the state sales and use tax are deposited in the State's general revenue fund. *Ibid.* (citing Ala. Code § 40-23-35).

Alabama law permits counties and municipalities to impose additional sales and use taxes, which correspond to and parallel the sales and use tax imposed by the State itself. Pet. App. 7a; J.A. 43 ¶ 8; see Ala. Code §§ 11-3-11.2, 11-51-200 to -204. Alabama law requires counties and municipalities to conform their sales and use tax rules, regulations, and procedures to those adopted by the Alabama Department of Revenue. J.A. 43 ¶ 8; see Ala. Code §§ 11-3-11.2, 11-51-200 to -204. CSXT pays sales and use taxes on the purchase and use of diesel fuel to the Counties of Jefferson, Mobile, Montgomery, and Shelby, and to the municipalities of Birmingham, Mobile, and Montgomery. J.A. 36 ¶ 3.

The imposition of these county and municipal sales and use taxes results in CSXT paying in many areas more than the four percent state sales and use tax. CSXT's purchase and use of diesel fuel is subject to a combined state, county, and municipal sales and use tax rate of 8 or 9 percent in Birmingham (depending on whether the tax is applied in Jefferson or Shelby County), 9 percent in Mobile, and 10 percent in the City of Montgomery. J.A. 36 ¶ 4. Thus, for example,

if diesel fuel costs \$3.00 per gallon, the effective sales and use tax rate on CSXT would be 30 cents per gallon in Montgomery and 27 cents per gallon in Mobile.² CSXT paid some \$4.1 million in 2006, and \$3.0 million in 2007, in state and local sales and use taxes on its purchase and use of diesel fuel in Alabama. Pet. App. 8a n.2.

The railroads' principal competitors in Alabama, motor carriers and water carriers, are exempt from state and local sales and use taxes on the purchase and consumption of diesel fuel. Pet. App. 7a-8a; J.A. 44 ¶¶ 10-15. Fuel used by motor carriers is subject instead to a fixed state motor fuel excise tax of 19 cents per gallon. Ala. Code §§ 40-17-2(1), 40-17-220(e). Under Alabama law, the proceeds from the motor fuel excise tax must be devoted to the construction, repair, and maintenance of public roads and bridges; to the costs of tax collection; and to pay the principal and interest on bonds previously issued to finance the building of roads. *Id.* §§ 40-17-13, 40-17-146, 40-17-222. Because motor carriers are subject to the excise tax and not to the sales and use taxes, their tax burden does not fluctuate depending on the price of fuel.

Water carriers benefit from an exemption from sales and use taxes for fuel used by vessels engaged in interstate or foreign commerce. Ala. Code §§ 40-23-4(a)(10), 40-23-62(12).³ Fuel used by water

² Eight days before CSXT filed this action, the average price of diesel fuel in the Gulf Coast states was \$3.90.7 per gallon. See *Norfolk S. Ry. v. Ala. Dep't of Revenue*, No. 2:08-cv-00285-HGD, 2008 WL 6515212, at *14 (N.D. Ala. Apr. 9, 2008), *aff'd*, 550 F.3d 1306 (11th Cir. 2008).

³ Nearly all water carrier transport in Alabama is in interstate or foreign commerce. See *Norfolk S. Ry.*, 2008 WL

carriers in interstate or foreign commerce is not subject to the motor fuel excise tax either.

2. On April 14, 2008, CSXT filed this action in federal district court against respondent Alabama tax authorities (“Alabama”). J.A. 17-24.⁴ The complaint alleged that the 4-R Act prohibits the State of Alabama, and counties and municipalities within Alabama, from imposing sales and use taxes on CSXT’s purchase and consumption of diesel fuel because the exemptions granted to motor carriers and water carriers discriminate against CSXT within the meaning of § 11501(b)(4). J.A. 19-23.

On May 29, 2008, CSXT moved for a preliminary injunction to prohibit the imposition of those sales and use taxes on CSXT. J.A. 29-31. On July 8, 2008, the district court granted a preliminary injunction, which prohibited Alabama “and those in active concert and/or participation with them ... from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by [CSXT].” Pet. App. 4a-5a. The court held that “[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, it follows that there is reasonable cause to believe that the [4-R] Act has been violated—i.e., the Alabama diesel fuel tax on railroads is discriminatory” under subsection (b)(4). *Id.* at 12a.

6515212, at *14 (“Intrastate water carriage is a small percentage of the sales and use tax revenue in the State of Alabama, inasmuch as intrastate freight shipments by water make up only one million tons of the 194.3 million tons of intrastate shipments, or .5%.”).

⁴ Section 306(c) of the 4-R Act, now codified at 49 U.S.C. § 11501(c), “declared an exception from the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, allowing railroads to challenge discriminatory taxation in federal district courts.” *Burlington N. R.R.*, 481 U.S. at 457-58.

The district court then stayed further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway v. Alabama Department of Revenue*, No. 08-12712, where another interstate rail carrier had challenged the same Alabama tax scheme on the same grounds as CSXT.

3. On December 11, 2008, the Eleventh Circuit issued its opinion in *Norfolk Southern*. 550 F.3d 1306 (11th Cir. 2008) (Pet. App. 13a-38a). The Eleventh Circuit rejected the railroad's challenge, ruling that a generally applicable non-property tax is not subject to challenge under subsection (b)(4) on the ground that railroad competitors, but not rail carriers, are exempt from such taxes. *Id.* at 1316 (Pet. App. 32a). Alabama had not advanced the proposition that the railroad's challenge was not even cognizable under subsection (b)(4), and neither party had briefed the issue.

The Eleventh Circuit rested its analysis on this Court's decision in *ACF Industries*. The court of appeals reasoned that "as a result of *ACF Industries*, while the 4-R Act prohibits the imposition of discriminatory property tax rates, the Act does not prevent a state from exempting other commercial entities from such taxes and leaving taxes on railroads in place, so long as the railroad is not targeted." *Id.* at 1314 (Pet. App. 29a). While acknowledging that the case involved "exemptions to a sales and use tax, rather than an ad valorem [property] tax," the court found the distinction inconsequential, explaining that "as with the ad valorem property taxes challenged in *ACF Industries*, there is nothing in the 4-R Act's plain language that indicates an intent to reach exemptions from generally applicable sales and use taxes. The language of section (b)(4) prohibits a discriminatory

‘tax’ not a discriminatory tax exemption.” *Id.* at 1314-15 (Pet. App. 29a-30a).

The Eleventh Circuit acknowledged that other courts, disagreeing with its approach, have “scrutinized exceptions to generally applicable *non*-property taxes” under subsection (b)(4). *Id.* at 1315 & n.15 (Pet. App. 31a & n.15) (citing, *e.g.*, *Union Pac. R.R. v. Minn. Dep’t of Revenue*, 507 F.3d 693, 695-96 (8th Cir. 2007); *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984, 985-86 (8th Cir. 1999); *Burlington N. R.R. v. Comm’r of Revenue*, 606 N.W.2d 54, 58-59 (Minn. 2000)). Rejecting these decisions, the Eleventh Circuit “join[ed] other courts that also have applied the *ACF Industries*’ analysis to state and local taxes analogous to Alabama’s sales and use tax on diesel fuel.” *Id.* at 1315 & n.14 (Pet. App. 31a & n.14) (citing, *e.g.*, *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 442-44 (9th Cir. 1996)).

4. Less than a week after the Eleventh Circuit issued *Norfolk Southern*, the district court in this case vacated its preliminary injunction order and dismissed CSXT’s complaint, based on the Eleventh Circuit’s “dispositive” decision. Pet. App. 3a. CSXT appealed and, in light of *Norfolk Southern*, sought an initial hearing by the court en banc, which the Eleventh Circuit denied. *Id.* at 39a. Shortly thereafter, the panel affirmed the district court’s judgment, recognizing that it was “bound” by *Norfolk Southern*. *Id.* at 2a.

SUMMARY OF ARGUMENT

I. The Alabama tax scheme, which requires rail carriers to pay sales and use taxes on diesel fuel while exempting railroad competitors, is subject to challenge under § 11501(b)(4) as “another tax that discriminates against a rail carrier.” The provision’s

plain text prohibits any discriminatory tax not governed by § 11501(b)(1)-(3), including a tax that discriminates by exempting railroad competitors from an otherwise generally applicable non-property tax.

A. Section 11501 is as broad as it is clear: in addition to prohibiting specific discriminatory property tax schemes in subsections (b)(1)-(3), subsection (b)(4) provides that no State may impose “another tax that discriminates against a rail carrier.” The statutory text does not restrict the types of discriminatory taxes covered by subsection (b)(4). Instead, it provides that all taxes, other than those governed by subsections (b)(1)-(3), are prohibited if they “discriminate[] against a rail carrier.”

Consistent with this Court’s precedents interpreting comparable statutory language, the term “another tax that discriminates against a rail carrier” should be implemented as written to encompass, as relevant here, discriminatory non-property taxation and exemption schemes. Nothing in subsection (b)(4), or in § 11501 as a whole, provides any support for the notion that Congress intended to shield from scrutiny under subsection (b)(4) non-property taxes alleged to be discriminatory because of exemptions granted to railroad competitors.

B. This interpretation of subsection (b)(4) is confirmed by the 4-R Act’s purpose and history. Congress enacted the 4-R Act to promote the railroads’ financial stability by, among other things, prohibiting discriminatory state and local tax schemes. Although the legislative process for many years focused on property taxation, which at the time was the most pervasive form of state tax discrimination against railroads, Congress ultimately determined that an additional “catch-all” provision was necessary to ensure that States and localities did

not frustrate the 4-R Act's purpose by imposing discriminatory non-property taxes. Rejecting a narrower form of subsection (b)(4) proposed in the House, which would have covered only "in lieu" taxes, Congress instead chose to enact the broader and more inclusive version that exists today. The Court should honor that choice by giving subsection (b)(4) the inclusive meaning it plainly was intended to convey.

II. Contrary to the Eleventh Circuit's view, nothing in this Court's decision in *ACF Industries* supports, let alone compels, a different conclusion. *ACF Industries* held that a property tax is not subject to challenge under subsection (b)(4) on the ground that some non-railroad property is exempt.

This holding is limited to exemptions from property taxes, and does not extend to exemptions from non-property taxes. The Court focused on Congress's choice in subsections (b)(1)-(3) to permit States to grant property tax exemptions to non-railroad property. It would be illogical, the Court concluded, for Congress to have permitted property tax exemptions for non-railroad property in subsections (b)(1)-(3), only to prohibit such exemptions in subsection (b)(4). This reasoning has no application to non-property taxes, for there is no indication—in § 11501 or elsewhere in the 4-R Act—that Congress intended to preserve the States' ability to impose non-property taxes on rail carriers while exempting railroad competitors from such taxes.

ARGUMENT**I. A NON-PROPERTY TAX IMPOSED ON RAILROADS IS SUBJECT TO CHALLENGE UNDER § 11501(b)(4) ON THE GROUND THAT THE TAX EXEMPTS RAILROAD COMPETITORS.**

The plain text of § 11501(b)(4) permits a challenge to a State's imposition on a railroad of a generally applicable non-property tax from which railroad competitors are exempt. The statutory language, which prohibits "another tax that discriminates against a rail carrier," must be given its ordinary meaning—that any state or local tax that discriminates against railroads, and that is not governed by subsections (b)(1)-(3), is prohibited. The statutory purpose and history further confirm that Congress meant what it said in subsection (b)(4).

A. The Plain Text Of § 11501(b)(4) Permits Challenge To All Taxes That Discriminate Against Rail Carriers, Other Than Those Governed By § 11501(b)(1)-(3).

Section 11501(b) bars States and their subdivisions from imposing taxes that discriminate against railroads. See *Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987). Subsections (b)(1)-(3) prohibit three specific modes of discrimination, all involving property taxes—assessing railroad property at a higher ratio to true market value than the ratio applicable to other commercial and industrial property in the same assessment jurisdiction, levying a tax on such improperly assessed property, and imposing a higher tax rate on railroad property than on other commercial and industrial property. See *id.* at 464. Four terms of art used in subsections (b)(1)-(3)—“assessment,” “assess-

ment jurisdiction,” “rail transportation property,” and “commercial and industrial property”—are defined in subsection (a) of § 11501. 49 U.S.C. § 11501(a).

Subsection (b)(4) does not mention property taxes, does not use any of the property tax-related terms defined in subsection (a), and does not identify any specific modes of tax discrimination as prohibited. Rather, subsection (b)(4) prohibits “another tax that discriminates against a rail carrier”—or, as originally enacted, “any other tax which results in discriminatory treatment of” a rail carrier. *Id.* § 11501(b)(4); see page 4 n.1, *supra*. The meaning of the text is clear: other than taxes governed by subsections (b)(1)-(3), any other tax that discriminates against railroads falls within subsection (b)(4)’s broad scope. See *ACF Indus.*, 510 U.S. at 343.

The inclusive language of subsection (b)(4) should be implemented as written. “As with any question of statutory interpretation, [the Court’s] analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms.” *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (citation omitted). Nothing in subsection (b)(4) precludes its application to generally applicable non-property taxes challenged on the ground that railroad competitors have been granted exemptions. To the contrary, Congress’s use of the term “another tax” compels the conclusion that subsection (b)(4) permits challenges to *all* tax schemes, not already governed by subsections (b)(1)-(3), that are alleged to discriminate against railroads. See *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 345 (Iowa 1983) (“We see no uncertainty in the clear and unambiguous words ‘any other tax.’”).

When interpreting comparable statutes, this Court routinely has held that the term “any other”—which for purposes of subsection (b)(4) is synonymous with “another,” see page 4 n.1, *supra*—carries a broad meaning. In *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), for example, the Court held that the term “any other law enforcement officer” in 28 U.S.C. § 2680(c) means just what it says: *any* other law enforcement officer. The Court reasoned that “Congress’ use of ‘any’ to modify ‘other law enforcement officer’ is most naturally read to mean law enforcement officers of whatever kind.” *Ali*, 552 U.S. at 220. The Court concluded that, “read naturally, the word ‘any’ has an expansive meaning, that is, one or some indiscriminately of whatever kind.” *Id.* at 219 (alteration and internal quotation marks omitted).

In *United States v. Gonzales*, 520 U.S. 1 (1997), the Court considered the term “any other term of imprisonment” in 18 U.S.C. § 924(c)(1)(D)(ii). The Court held that because “Congress did not add any language limiting the breadth of that word [‘any’], ... we must read § 924(c) as referring to *all* ‘terms of imprisonment.’” *Gonzales*, 520 U.S. at 5 (emphasis added). Likewise, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the Court held that the term “any other final action” in 42 U.S.C. § 7607(b)(1) “must be construed to mean exactly what it says, namely, any other final action.” *Harrison*, 446 U.S. at 589 (emphasis omitted). The Court rejected a narrower interpretation, explaining that “[t]his expansive language offers no indication whatever that Congress intended [a] limiting construction.” *Id.* at 588-89. *Accord, e.g., Collector v. Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1871) (term “in any court” “includes the State courts as well as the Federal courts,” because “there is not a word in the [statute] tending

to show that the words ‘in any court’ are not used in their ordinary sense”), *overruled on other grounds as recognized in Eisner v. Macomber*, 252 U.S. 189 (1920).

Consistent with these precedents, subsection (b)(4)’s reference to “another tax” or “any other tax” demands a broad construction because “Congress did not add any language limiting the breadth” of the provision. *Gonzales*, 520 U.S. at 5. Such is the considered judgment of the lower courts, which generally have held that allegedly discriminatory taxes, other than those governed by subsections (b)(1)-(3), are subject to challenge under subsection (b)(4). See *Richmond, Fredericksburg & Potomac R.R. v. Dep’t of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (“*RFP*”) (“we conclude that subsection (d) was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means”); *Kan. City S. Ry.*, 817 F.2d at 374 (“We hold that § 11503(b)(4) forbids all forms of tax discrimination against railroads by states.”); *Burlington N. R.R.*, 932 F.2d at 1186 (“Subsection (b)(4) is a catchall designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. It could be an income tax, a gross-receipts tax, a use tax, an occupation tax as in this case—whatever.”); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981) (“As noted in our review of the history of this section, its purpose was to prevent tax discrimination against railroads in any form whatsoever.”); *S. Ry. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) (the “broad language of the Act show[s] Congress possessed a general concern with discrimination in all of its guises”).

Indeed, as the Eleventh Circuit explained three decades ago, long before its decision in *Norfolk Southern* and below:

It would be difficult to imagine statutory language that would be less needful of construction than the “any other” language used here. Following three subparagraphs, (a), (b) and (c) [currently subsections (b)(1)-(3)] dealing with taxation of “transportation property,” paragraph (d) [currently subsection (b)(4)] then forbids “the imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad.” Without invoking any of the ordinary rules of construction, it would appear that paragraph (d) [subsection (b)(4)] is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means.

Ala. Great S. R.R. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir. 1981).

Because subsection (b)(4) prohibits “discriminatory taxation of a railroad carrier by any means,” *id.*, it necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax. As this Court recognized in *ACF Industries*, tax exemptions “could be a variant of tax discrimination.” 510 U.S. at 343. Indeed, this Court has long and routinely held that imposing a tax on certain taxpayers while exempting others is a form of discrimination that can be unlawful. See, *e.g.*, *Ark. Writers’ Project v. Ragland*, 481 U.S. 221 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Speiser v. Randall*, 357 U.S. 513

(1958); *Walling v. Michigan*, 116 U.S. 446 (1886); see also *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 446 (9th Cir. 1996) (Nielsen, J., dissenting) (stating “the obvious point that a tax imposed on rail carriers, but not on motor carriers, is discriminatory in the most basic sense of the word—it treats those engaged in an identical activity differently”).

Accordingly, CSXT’s challenge to the Alabama tax scheme fits comfortably within the language of subsection (b)(4). The provision should be interpreted as written.

B. The Statute’s Purpose And History Confirm That The Text Means What It Says.

Because “[s]tatutory construction is a ‘holistic endeavor,’” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004), “the provisions of the whole law, and ... its object and policy,” can be relevant when interpreting a statutory provision, *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (internal quotation marks omitted). Although the plain language of subsection (b)(4) demonstrates that CSXT’s challenge to the Alabama tax scheme is cognizable under that provision, the conclusion is reinforced by the 4-R Act’s purpose and history.

Congress intended the 4-R Act to protect rail carriers “by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads.” *ACF Indus.*, 510 U.S. at 336. Subsection (b)(4) plays an integral role in advancing that purpose. Although subsection (b)(4) was not introduced until several years after Congress undertook to consider what legislative action was necessary to prohibit the discriminatory taxation of railroads, Congress “realized near the end [of the process] that banning discriminatory property

taxes was not enough to save the railroads from unfair state taxation.” *Kan. City S. Ry.*, 817 F.2d at 373. Congress “therefore added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose.” *Ibid.*

The House and the Senate proposed different versions of what ultimately became subsection (b)(4). The House version was narrowly drawn, prohibiting only “the imposition of a discriminatory ‘in-lieu tax.’” S. Conf. Rep. No. 94-595, at 166 (1976); see also H.R. Rep. No. 94-725, at 77; *Burlington N. R.R.*, 932 F.2d at 1186 (explaining that the House’s “reference” to an “in-lieu tax” meant “gross receipts taxes that a few of the states impose in lieu of property taxes”) (internal quotation marks omitted). The conference rejected the House amendment in favor of the Senate version, which more inclusively prohibited “the imposition of *any other tax* which results in the discriminatory treatment of any common or contract carrier.” S. Conf. Rep. No. 94-595, at 166 (emphasis added).

In keeping with the text Congress chose, “the ‘any other tax’ language in [subsection (b)(4)] is not limited to property taxes and other taxes imposed in lieu of the discriminatory property taxes prohibited by [subsections (b)(1)-(3)].” *RFP*, 762 F.2d at 379. As the Fourth Circuit explained:

[T]he legislative history of the 4-R Act does not support a more limited construction of [subsection (b)(4)] because nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [subsection (b)(4)]. It is entirely reasonable to conclude that the legislative history is silent as to the purpose of [subsection (b)(4)] because that subsection, inserted three weeks before the statute’s passage, represented a last minute realization by

Congress that prohibiting only discriminatory property taxes would not be enough relief.

Id. at 379-80 (footnote omitted).

As the statutory background makes clear, Congress recognized that an inclusive “catch-all” protection for railroads, extending beyond the particular variants of tax discrimination set forth in subsections (b)(1)-(3), was necessary to achieve the goal of protecting railroads from discriminatory taxation. See *Ala. Great S. R.R.*, 663 F.2d at 1040 (subsection (b)(4) “is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means”). It would subvert the congressional plan to conclude that subsection (b)(4) does not even speak to circumstances where States or their subdivisions disadvantage railroads by exempting railroad competitors from generally applicable non-property taxes imposed on railroads. See S. Rep. No. 91-630, at 6 (noting that States, in an “ominous trend,” were considering shifting from reliance on discriminatory property assessments to the use of other means of “perpetuating tax discrimination”).

The point is illustrated by *Burlington Northern, Santa Fe Railway v. Lohman*, 193 F.3d 984 (8th Cir. 1999), which invalidated under subsection (b)(4) a Missouri scheme that imposed a generally applicable sales and use tax on the railroads’ purchase and use of diesel fuel while exempting trucks and barges, the railroads’ major competitors. *Id.* at 985. To immunize that tax scheme from challenge, as the Eleventh Circuit has done, would place the railroads “at a competitive disadvantage that would defeat the purpose of the statute—financial stability.” *Id.* at 986. At the same time, the Eleventh Circuit’s interpretation would permit a subsection (b)(4) challenge to a lesser form of discrimination—for instance,

imposing a four percent sales and use tax on the railroads, and a two percent sales and use tax on trucks and barges. There is no basis in the text, history, or structure of § 11501 for, and it is inconceivable that Congress intended, such a result.

To be sure, there remains the question whether a particular non-property tax scheme actually violates § 11501(b)(4) because it exempts railroad competitors. What constitutes unlawful “discrimination” is an issue for another day.⁵ What is clear is that the Congress that enacted subsection (b)(4) did not intend to categorically immunize a state non-property tax scheme from scrutiny simply because it uses exemptions rather than rate differentials as its chosen method of disadvantaging railroads. As the United States put it in urging this Court to grant certiorari:

The text, structure, and history of the 4-R Act support [CSXT’s] view that a tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4). On its face, Subsection (b)(4) reaches beyond property taxes to forbid “another tax”—here, a sales or use tax—“that discriminates against a rail carrier.”

⁵ Having held the Alabama tax scheme not subject to challenge under subsection (b)(4), the Eleventh Circuit found it unnecessary to ascertain the “appropriate ‘comparison class’” against which the discrimination claim should be measured. *Norfolk S.*, 550 F.3d at 1308 n.3 (Pet. App. 16a n.3); see *Burlington N., Santa Fe Ry.*, 193 F.3d at 986 (“the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case”). In this case, as the railroad and Alabama agreed in *Norfolk Southern*, railroad competitors comprise the appropriate “comparison class.” 550 F.3d at 1308 n.3 (Pet. App. 15a n.3).

A rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4).

U.S. Br. in Support of Cert. 14.

II. *ACF INDUSTRIES* DOES NOT REQUIRE A DIFFERENT RESULT.

This Court held in *ACF Industries* that generally applicable property taxes that apply to railroads, but that exempt some other property within the State, are not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. That holding does not apply in the non-property tax context, particularly where the exemption benefits railroad competitors, thereby placing rail carriers at a competitive disadvantage. The limited scope of *ACF Industries* is apparent from the Court's summary of its holding: "We conclude that § [11501], which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad property, but not railroad property, from ad valorem property taxes of general application." *Id.* at 347-48.

In *Norfolk Southern* and the decision below, the Eleventh Circuit construed *ACF Industries* as foreclosing a challenge not only to property tax and exemption schemes, but also to non-property tax and exemption schemes, including those that benefit railroad competitors. 550 F.3d at 1313-16 (Pet. App. 26a-32a); Pet. App. 2a. The Eleventh Circuit's ruling misinterprets *ACF Industries* and, in so doing, improperly curtails the protection Congress intended to provide railroads under subsection (b)(4).

The plaintiff in *ACF Industries* claimed that Oregon violated subsection (b)(4) "by imposing an ad valorem tax upon railroad property while exempting various other, but not all, classes of commercial and

industrial property.” 510 U.S. at 335. To decide whether the claim was cognizable under subsection (b)(4), this Court examined the interplay between that provision and subsections (b)(1)-(3), which focus exclusively on discriminatory property taxes.

The Court first addressed subsections (b)(1)-(3). *Id.* at 340-43. As noted above, those provisions prohibit a State from imposing a property tax rate or assessment ratio on railroads that exceeds the rate or assessment ratio applied to other “commercial and industrial property.” 49 U.S.C. § 11501(b)(1), (3). The term “commercial and industrial property,” in turn, means “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.*” *Id.* § 11501(a)(4) (emphasis added). It follows, the Court reasoned, that a railroad may challenge a tax rate or assessment ratio under subsections (b)(1)-(3) as exceeding the rate or assessment ratio applied to other “commercial and industrial property” only if that other property was actually “subject to a property tax levy.” 510 U.S. at 341-42. Because property exempted from taxation is not “subject to a property tax levy,” the Court concluded that “railroads may not challenge property tax exemptions under” subsections (b)(1)-(3). *Id.* at 342.

That conclusion, the Court explained, impacts the scope of subsection (b)(4). Recognizing that it “must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3),” the Court held that it “would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4).” *Id.* at 343. Accordingly, the Court

ruled that “[t]he structure of § [11501] ... warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property.” *Ibid.*

ACF Industries does not govern in the non-property tax context. The Court’s holding that property tax exemptions are immune from scrutiny under subsection (b)(4) rests entirely on the conclusion that such exemptions are “beyond the reach of subsections (b)(1)-(3).” *Ibid.* That conclusion, in turn, rests entirely on the fact that the comparison class in subsections (b)(1)-(3)—other “commercial and industrial property”—excludes exempt property. *Id.* at 341-42. Congress’s intent to immunize exemptions from scrutiny is unique to property taxes, and has no bearing whatsoever on non-property taxes like the sales and use taxes here. Because subsections (b)(1)-(3) do not address non-property tax exemptions, interpreting subsection (b)(4) to reach such exemptions, far from “subvert[ing] the statutory plan,” *id.* at 340, instead would implement the provision’s ordinary meaning.

Advancing the contrary view, the Eleventh Circuit stated that “nothing in the 4-R Act’s plain language ... indicates an intent to reach exemptions from generally applicable sales and use taxes. The language of section (b)(4) prohibits a discriminatory ‘tax’ not a discriminatory tax exemption.” 550 F.3d at 1314-15 (Pet. App. 29a). That rationale is incorrect. As this Court made clear in *ACF Industries*, exempting some taxpayers, but not others, from taxation “could be a variant of tax discrimination.” 510 U.S. at 343. Subsection (b)(4)’s broad prohibition on tax discrimination thus extends to taxes that discriminate by exempting railroad competitors from

generally applicable non-property taxes. Any other rule would allow States to favor local, non-railroad carriers at the expense of rail carriers in a way that jeopardizes the financial health of the latter, which is the one outcome Congress unquestionably meant to prevent.

The Eleventh Circuit next stated that “the Supreme Court did not limit its conclusion—that the 4-R Act ‘does not speak with any degree of particularity to the question of tax exemptions’—to ad valorem property taxes; its conclusion therefore has direct application to the issue presented here.” 550 F.3d at 1315 (Pet. App. 29a-30a). This conclusion is equally meritless. In *ACF Industries*, this Court left no doubt that its focus was on exemptions from property taxes, not exemptions from other taxes. The Court described its own holding as follows: “a State may grant exemptions *from a generally applicable ad valorem property tax* without subjecting the taxation of railroad property to challenge” under subsection (b)(4). 510 U.S. at 335 (emphasis added). The Court emphasized that the statutory definition of “commercial and industrial *property*” directly “b[ore] on the case before [it].” *Id.* at 342 (emphasis added). And, the Court explained that its decision rested on the fact that Congress had “allowed the States to grant *property tax exemptions* in subsections (b)(1)-(3).” *Id.* at 343 (emphasis added). Nothing in the Court’s opinion suggests any rationale for the notion that *non-property tax* exemptions were encompassed within its holding.

Indeed, in reversing the Eleventh Circuit in another § 11501 case three years ago, this Court confirmed its understanding that *ACF Industries* addressed only property tax exemptions:

[*ACF Industries*] concerned ... the command in § 11501(b)(4) preventing a State from “[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation” in the taxing jurisdiction. This bar on facially discriminatory taxes, we held, did not prevent a State from exempting certain nonrailroad property from otherwise generally applicable ad valorem taxes. At the time the 4-R Act was adopted, a majority of States exempted one or more classes of business property from ad valorem taxation, “including business inventories, raw materials used in textile manufacturing, ... and mechanics tools,” to name just a few. The States had provided such property tax exemptions for years. In the face of this widespread and historical practice, we declined to read the 4-R Act to prohibit a type of tax exemption the text did not expressly mention.

CSX Transp., Inc. v. Ga. State Bd. of Equalization, 552 U.S. 9, 21 (2007) (citations omitted; omission in original) (quoting *ACF Indus.*, 510 U.S. at 343, 344). Thus, properly understood in context, *ACF Industries* does not interpret the 4-R Act broadly to grant the States’ unlimited authority to discriminate against railroads so long as they limit their efforts to exemptions. The case is strictly limited to property tax exemptions, the only type of exemption permitted by subsections (b)(1)-(3).

The Eleventh Circuit next suggested that “as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted.” 550 F.3d at 1315 (Pet. App. 30a). From this premise, the Eleventh Circuit concluded that “concerns for state sovereignty” raised a presumption that “Congress’ silence [as to non-property tax

exemptions] reflects a determination to leave such exemptions in place.” *Ibid.* (Pet. App. 30a-31a). This analysis turns *ACF Industries* on its head. *ACF Industries* ruled that despite subsection (b)(4)’s prohibition on “another tax that discriminates against rail carriers,” the provision could not extend to challenges based on property tax exemptions because subsection (b)(1)-(3) reflected Congress’s decision to protect property tax exemptions from scrutiny. And if the provisions that more directly address property taxation permit the exemption of non-railroad property, then “[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4).” 510 U.S. at 343.

The Court’s conclusion in *ACF Industries* rests not on Congress’s “silence” regarding property tax exemptions, see 550 F.3d at 1315 (Pet. App. 30a), but rather on the notion that subsections (b)(1)-(3) spoke to and affirmatively permitted such exemptions. That reasoning has no application here, as subsections (b)(1)-(3) do not address, much less permit, *non*-property tax exemptions. And even if the Eleventh Circuit is correct that non-property tax exemptions were common when the 4-R Act was enacted in 1976, the undeniable fact remains that exemptions have long been recognized as a form of tax discrimination. See pages 17-18, *supra* (citing cases). Accordingly, the plain language of subsection (b)(4), which straightforwardly prohibits “another tax that discriminates against a rail carrier,” governs the discriminatory use of non-property tax exemptions, without interference from subsections (b)(1)-(3).

Finally, the Eleventh Circuit invoked federalism, stating that “concerns for state sovereignty are just

as keen” in the non-property tax context as *ACF Industries* found they were in the property tax context. 550 F.3d at 1315 (Pet. App. 31a). Again, the court of appeals misinterpreted *ACF Industries*. Federalism supported this Court’s decision to shield property tax exemptions from scrutiny under subsection (b)(4) because other portions of the statute, subsections (b)(1)-(3), expressed Congress’s decision to permit such exemptions. *ACF Indus.*, 510 U.S. 339-43. Given that clear legislative choice, the Court noted that federalism concerns made it “hesitant to extend the statute beyond its evident scope.” *Id.* at 345.

Here, by contrast, nothing in the text or structure of § 11501 raises even the slightest inference that Congress sought to shield non-property tax exemptions from scrutiny. Instead, as shown above, Congress enacted a provision that plainly encompasses discriminatory non-property tax and exemption schemes. See Section I, *supra*. Accordingly, even if non-property tax exemptions implicate “important questions of state policy, ... judicial scrutiny of” tax schemes like Alabama’s “is authorized by the 4-R Act’s clear command.” *CSX Transp.*, 552 U.S. at 20-21.

CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for consideration on the merits of whether the Alabama tax scheme violates subsection (b)(4).

Respectfully submitted,

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