

No. 09-520

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In the Supreme Court of the United States

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CSX TRANSPORTATION, INC., PETITIONER

v.

ALABAMA DEPARTMENT OF REVENUE, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

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ROBERT S. RIVKIN  
*General Counsel*

PAUL M. GEIER  
*Assistant General Counsel  
for Litigation*

PETER J. PLOCKI  
*Deputy Assistant General  
Counsel for Litigation*

JOY K. PARK  
*Trial Attorney  
Department of Transportation  
Washington, D.C. 20590*

KAREN J. HEDLUND  
*Chief Counsel*

MICHAEL T. HALEY  
*Deputy Chief Counsel  
Federal Railroad  
Administration  
Washington, D.C. 20590*

NEAL KUMAR KATYAL  
*Acting Solicitor General  
Counsel of Record*

TONY WEST  
*Assistant Attorney General*

MALCOLM L. STEWART  
*Deputy Solicitor General*

MELISSA ARBUS SHERRY  
*Assistant to the Solicitor  
General*

ANTHONY J. STEINMEYER

MARK W. PENNAK  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

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**QUESTION PRESENTED**

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."

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**BRIEF FOR THE UNITED STATES  
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**INTEREST OF THE UNITED STATES**

This case concerns Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (49 U.S.C. 11501). The United States has an interest in the proper application of this statute to preclude the imposition of discriminatory taxes on rail carriers. The Department of Transportation is charged with, *inter alia*, overseeing rail safety, 49 U.S.C. 20103 (2000 & Supp. IV 2004), and administering various railroad financial assistance programs. The Surface Transportation Board—an independent federal agency with responsibility for the economic regulation of the Nation’s railroads, 49 U.S.C. 721—is charged with fostering economic conditions that allow rail carriers to earn adequate revenues. At the

invitation of this Court, the United States filed a brief as amicus curiae at the petition stage of this case.

#### STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the 4-R Act 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.” 4-R Act § 101(a), 90 Stat. 33; see *Burlington N. R.R. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 457 (1987).

The 4-R Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See 4-R Act § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007).<sup>1</sup> After long study, Congress found that certain forms of state taxation of rail carriers “unreasonably burden and discriminate against interstate commerce.” 49 U.S.C. 11501(b). To protect these important channels of interstate commerce, Congress crafted an

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<sup>1</sup> Section 306 of the 4-R Act, 90 Stat. 54, has been repeatedly recodified and rephrased without substantive change. It was originally codified at 49 U.S.C. 26c (1976). It was then recodified in 1978, with a slight change in language, at 49 U.S.C. 11503 (1994), as part of the enactment into positive law of Title 49. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. That restatement of prior law was “without substantive change.” *Id.* § 3(a), 92 Stat. 1466; *Burlington N. R.R.*, 481 U.S. at 457 n.1; cf. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2446-2447 (2010). In 1995, the provisions of Section 11503 were again reenacted without substantive change but renumbered as Section 11501, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission (ICC) and created the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. Accordingly, this brief refers throughout to the current codification of Section 306 at 49 U.S.C. 11501. See Sup. Ct. R. 34.5.

exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c).

Section 11501(b) of Title 49 describes several types of prohibited state taxation.<sup>2</sup> Subsections (b)(1)-(3) specifically address ad valorem property taxes; those provisions bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property relative to “other commercial and industrial property.” The phrase “commercial and industrial property” is defined to mean “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.” 49 U.S.C. 11501(a)(4). Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *CSX Transp.*, 552 U.S. at 16, 18 (referring to “objective benchmark[s]” underlying “the comparison of ratios the statute requires” in Subsections (b)(1)-(2)); *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as “untenable” the view that a claim under Subsection (b)(1) requires proof of intentional discrimination).

A separate catch-all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States from imposing “another tax that discriminates against a rail carrier.” As originally enacted, this provision proscribed “any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.” 4-R Act § 306, 90 Stat. 54. By its

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<sup>2</sup> The 4-R Act prohibits “a State, subdivision of a State, or authority acting for a State or subdivision of a State” from engaging in any of the specified forms of discriminatory taxation. 49 U.S.C. 11501(b). Because the record in this case focuses primarily on Alabama’s taxation scheme (see p. 5 n.3, *infra*), this brief refers generally to the State or the States as the acting party.

terms, Subsection (b)(4) reaches beyond the ad valorem property taxes addressed in the preceding provisions “to prevent discriminatory taxation of a railroad carrier by any means.” *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

2. Alabama imposes four-percent sales and use taxes on the retail sale, storage, use, or consumption in Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (LexisNexis Supp. 2009) (sales tax), *id.* § 40-23-61(a) (LexisNexis 2003) (use tax). Although the sales and use taxes are generally applicable, state law expressly exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (LexisNexis Supp. 2009) (exemption from sales tax), *id.* § 40-23-62(12) (LexisNexis Supp. 2009) (exemption from use tax). Consequently, water carriers engaged in interstate or foreign commerce typically do not pay tax to respondents on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of motor fuel, including diesel fuel. Ala. Code § 40-17-2(1) (LexisNexis 2003) (primary motor fuel excise tax), *id.* § 40-17-220(e) (LexisNexis Supp. 2009) (additional motor fuel excise tax). Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-2(1) (LexisNexis 2003). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to respondents, and they do not pay a sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama’s motor fuel excise taxes. That is because dyed diesel fuel designated for off-road use under 26 U.S.C. 4082—which is what locomotives burn—is exempt from Alabama’s primary motor fuel excise tax. Ala.

Code § 40-17-2(1) (LexisNexis 2003). In addition, railroad locomotive fuel is expressly exempted from Alabama's additional motor fuel excise tax. *Id.* § 40-17-220(d)(2) (LexisNexis Supp. 2009). Consequently, railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise tax exemptions) typically pay sales or use taxes of four percent to the State, and they do not pay an excise tax on their fuel.<sup>3</sup>

3. Petitioner, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation Board, sued respondents Alabama Department of Revenue and its Commissioner in federal district court under the 4-R Act. Petitioner contended that, by requiring rail carri-

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<sup>3</sup> The foregoing describes only the state-level tax scheme. Certain subdivisions of Alabama are authorized to levy and collect taxes. See, e.g., Ala. Code § 11-3-11(a)(2) (LexisNexis 2008) (powers of county commissions include levying taxes), *id.* § 11-3-11.2 (LexisNexis 2008) (powers of county commissions include collecting local taxes), *id.* § 11-51-200 (LexisNexis 2008) (powers of municipal corporations include levying taxes). The record in this case appears to contain relatively little evidence regarding county or municipal taxes. See Pet. Br. 6-7 (discussing record evidence of cumulative tax rates in Mobile, Birmingham, and Montgomery). Petitioner has filed several state-court complaints for refund and notices of appeal with respect to these county and municipal taxes. See, e.g., *CSX Transp., Inc. v. City of Mobile*, No. CV-2010-901129 (Mobile County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc. v. Jefferson County*, No. CV-2010-01490 (Jefferson County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc. v. City of Birmingham*, No. CV-2010-901772 (Jefferson County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc. v. Montgomery County*, No. CV-2010-900648 (Montgomery County Cir. Ct. filed May 19, 2010); *CSX Transp., Inc. v. City of Montgomery*, No. CV-2010-900652 (Montgomery County Cir. Ct. filed May 19, 2010). Petitioner has also filed a state-court complaint for refund and notice of appeal with respect to the state sales and use taxes challenged in this case. *CSX Transp., Inc. v. State of Ala. Dep't of Revenue*, No. CV-2010-900645 (Montgomery County Cir. Ct. filed May 19, 2010).

ers to pay sales and use taxes from which motor carriers and water carriers are exempt, respondents had discriminated against petitioner in violation of 49 U.S.C. 11501(b)(4).

a. In July 2008, the district court granted petitioner's motion for a preliminary injunction against collection of the sales and use taxes. The court noted that respondents "ha[d] conceded that \* \* \* 'no matter how the "comparison class[]" is framed, [it] consists of motor carriers and water carriers.'" Pet. App. 12a (quoting Defs. Resp. to Req. for Inj. Relief 5). The court then held that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, \* \* \* there is reasonable cause to believe that the [4-R] Act has been violated." *Ibid.* The district court also granted respondents' motion to stay further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway v. Alabama Department of Revenue*, No. 08-12712 (*Norfolk Southern*), in which a different rail carrier had brought a materially identical challenge to Alabama's sales and use taxes. Dkt. 19 (July 23, 2008).

b. In December 2008, the Eleventh Circuit announced its decision in *Norfolk Southern*, rejecting the rail carrier's challenge there. Pet. App. 13a-38a. The court of appeals in *Norfolk Southern* found the case to be controlled by this Court's holding in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 340 (1994) (*ACF*), that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." The Eleventh Circuit acknowledged that *ACF* involved property taxes rather than sales or use taxes. Pet. App. 29a. The court concluded, however, that this Court's analysis was "equally applicable" to the exemptions from sales and use taxes that were at issue in *Norfolk Southern*. *Ibid.*

In discussing *ACF*, the court of appeals focused on this Court’s observations that Subsection (b)(4) does not specifically address discriminatory property tax exemptions, see 510 U.S. at 343; that property tax exemptions were ubiquitous when the 4-R Act was passed, see *id.* at 344; and that “concerns for state sovereignty” disfavored federal constraints on a State’s property tax exemptions, see *id.* at 345. See Pet. App. 29a-31a. The court of appeals concluded that, because those observations were also applicable to sales and use tax exemptions, such exemptions could not be the basis for a discrimination claim under Subsection (b)(4). *Ibid.* The court stated that its holding aligned it with “other courts that also have applied [*ACF*’s] analysis to state and local taxes analogous to Alabama’s.” *Id.* at 31a; see *id.* at 31a n.14 (citing cases). The court of appeals acknowledged, however, that some courts have “scrutinized exceptions to generally applicable *non*-property taxes.” *Id.* at 31a; see *id.* at 31a n.15 (citing cases).<sup>4</sup>

c. After the Eleventh Circuit issued its decision in *Norfolk Southern*, the district court in this case sua sponte entered an order dissolving its preliminary injunction and dismissing petitioner’s suit. Pet. App. 3a. Petitioner ap-

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<sup>4</sup> The *Norfolk Southern* court stated that, although “a tax with widespread exemptions could indicate that a state has ‘single[d] out’ the railroad for discriminatory treatment,” such was “not the case here.” Pet. App. 32a (quoting *ACF*, 510 U.S. at 347) (brackets in original). The court also rejected the rail carrier’s argument that respondents had unlawfully discriminated against rail carriers by “us[ing] the proceeds of the taxes levied on motor carriers to maintain roads [while] railroads do not receive similar subsidies.” *Id.* at 35a. The court refused to “compare the sales and use tax to the fuel excise tax, insofar as there are differences in the ways in which their respective proceeds are spent.” *Id.* at 36a. The court believed it to be inappropriate “to look past the particular tax at issue to analyze the overall state tax structure,” *ibid.*, or to scrutinize “the use to which a state puts its tax revenue,” *id.* at 37a.

pealed and, acknowledging that *Norfolk Southern* was controlling, sought initial hearing en banc. *Id.* at 2a & n.1. The court of appeals denied initial hearing en banc, *id.* at 39a, and a panel subsequently affirmed the district court’s dismissal order in a per curiam decision resting on *Norfolk Southern*, *id.* at 1a-2a.

On June 14, 2010, this Court granted the petition for a writ of certiorari limited to the following question: “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.’”

#### SUMMARY OF ARGUMENT

1. A state non-property tax that rail carriers are required to pay, but from which competing transportation providers are exempt, may run afoul of 49 U.S.C. 11501(b)(4) as “another tax that discriminates against a rail carrier.” The word “discrimination” is ordinarily understood to mean the “failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” *Black’s Law Dictionary* 534 (9th ed. 2009). This Court has long recognized that selective tax exemptions granted to favored classes may constitute one form of economic discrimination against persons who are required to pay the taxes. Nothing in the structure or history of the 4-R Act suggests that Congress carved out one area of common tax policy, non-property tax exemptions, from scrutiny under Section 11501(b)(4). To the contrary, by its terms, Section 11501(b)(4) prohibits a State from imposing upon rail carriers any non-property tax that similarly situated economic actors are not required to pay unless the State can identify an acceptable justification for the disparate treatment.

2. This Court’s decision in *ACF*, *supra*, is not controlling here. The *ACF* Court addressed Section 11501(b)(4)’s application to property taxes and did not comment on any other type of tax. The Court’s analysis, moreover, rested primarily on structural inferences drawn from neighboring 4-R Act provisions that specifically address state property taxes and that manifest Congress’s intent not to disturb state property tax exemptions. With respect to non-property taxes, by contrast, discrimination against rail carriers is governed solely by Section 11501(b)(4)’s catch-all provision. The principal reasons this Court gave for rejecting the plaintiff’s 4-R Act claim in *ACF* are therefore inapplicable to this suit.

3. The Court should resolve the question on which it granted a writ of certiorari by holding that a state non-property 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 remand, the lower courts can then determine whether the challenged taxes actually “discriminate” against petitioner.

#### ARGUMENT

#### **A STATE NON-PROPERTY 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)**

##### **A. A State Non-Property Tax Paid By Rail Carriers Is “Another Tax” That May “Discriminate[] Against A Rail Carrier” Within The Meaning Of 49 U.S.C. 11501(b)(4) When Competing Transportation Providers Do Not Pay The Tax**

The text, structure, and history of the 4-R Act support petitioner’s view that a non-property 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).

1. Section 11501(b) contains a four-part prohibition against discriminatory state taxation of railroads. The first three prohibitions (Subsections (b)(1) through (b)(3)) address only ad valorem property taxes and specifically forbid States from

(1) [a]ssess[ing] rail transportation property at a value that has a higher ratio to [its] true market value \* \* \* than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to [its] true market value \* \* \* [;]

(2) [l]evy[ing] or collect[ing] a tax [based on such] an assessment \* \* \* [; and]

(3) [l]evy[ing] or collect[ing] 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 assessment jurisdiction.

49 U.S.C. 11501(b)(1)-(3). The fourth prohibition, by contrast, provides that States may not

[i]mpose 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).

A state tax that possesses the explicit, objective characteristics stated in Subsections (b)(1), (2), or (3) is discriminatory *per se*. Each of these subsections requires a comparison between the State's assessment or taxation of "rail transportation property" and its assessment or taxation of non-railroad "commercial and industrial property." Because the 4-R Act limits the term "commercial and industrial property" to property that is "devoted to a commercial or industrial use *and subject to a property tax levy*," 49

U.S.C. 11501(a)(4) (emphasis added), the statute makes clear that the relevant comparison is to commercial and industrial property “that is taxed,” *Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 341-342 (1994).

The fourth prohibition (Subsection (b)(4)) is a catch-all provision that bars States from imposing “another tax that discriminates against a rail carrier.” 49 U.S.C. 11501(b)(4). Both the nature of the prohibition (“discrimination”) and the description of the protected class (“rail carriers”) are broader and more general than Subsections (b)(1)-(3). Unlike the preceding subsections, Subsection (b)(4) is not limited to property taxes, does not specify the appropriate comparison class, and does not include an objective test by which to measure discrimination. By its plain terms, Subsection (b)(4) is a general prohibition of tax discrimination against a rail carrier in any form and “by any means.” *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); see *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 441 (9th Cir.) (*ATSF*) (Subsection (b)(4) “is designed to encompass all discriminatory state taxes.”), cert. denied, 519 U.S. 1029 (1996); *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (Subsection (b)(4) “was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means.”).

The statutory history confirms Subsection (b)(4)’s broad scope. Congress studied and debated discriminatory property taxation for 15 years before passing the 4-R Act, and during that time it devised finely calibrated rules about property taxation. *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 372-373 (5th Cir. 1987). Near the end of the legislative process, however, it became clear that “banning discriminatory property taxes was not enough to save the railroads from unfair state taxation.” *Id.* at 373; see *Alabama*

*Great S. R.R.*, 663 F.2d at 1041. Congress thus included Subsection (b)(4) “to ensure that the statute would not fail of its broader purpose,” and “to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections of § 1150[1](b).” *Kansas City S. Ry.*, 817 F.2d at 373-374; *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991) (“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,” whether it be “an income tax, a gross-receipts tax, a use tax, an occupation tax \* \* \* whatever.”). Rather than attempt the impractical task of anticipating every tax scheme that could result in unjust discrimination against rail carriers, Congress enacted the broad prohibition that is now codified at 49 U.S.C. 11501(b)(4).

2. In addition to the specific forms of discrimination described in current Subsections (b)(1)-(3), the 4-R Act as originally enacted prohibited “[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad.” 4-R Act § 306, 90 Stat. 54. As this Court has often recognized, the word “any” has “an expansive meaning.” See, e.g., *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (“Of course the word ‘any’ (in the phrase ‘any other provision of law’) has an ‘expansive meaning.’”) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (holding that the phrase “‘any other law enforcement officer’ suggests a broad meaning” and citing cases).<sup>5</sup> Read naturally, Subsection (b)(4) broadly prohibits

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<sup>5</sup> The modest alterations in wording that have occurred since that time were not intended to effect any substantive change, see p. 2 n.1, *supra*, and current Subsection (b)(4)’s unqualified reference to “another tax that discriminates against a rail carrier” is in any event capacious.

States from imposing any tax that is not addressed in Subsections (b)(1)-(3) and “that discriminates against a rail carrier.”

The statute does not define the term “discriminates.” As this Court recently explained, “[w]hen terms in a statute are undefined,” they should be given “their ordinary meaning.” See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). The ordinary meaning of the word “discrimination” is the “failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” *Black’s Law Dictionary* 534 (9th ed. 2009); accord *Black’s Law Dictionary* 420 (5th ed. 1979); *Richmond, Fredericksburg & Potomac R.R.*, 762 F.2d at 380 n.4 (citation omitted).

A state taxation scheme can discriminate against a disfavored class in a number of different ways. A taxing regime could, of course, be discriminatory because it taxes similarly situated persons at different rates. But discrimination can also be effected through differential tax bases, see, e.g., *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 162-163 (1999) (different franchise tax bases for domestic and foreign firms); targeted tax deductions, see, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327-328 (1996) (intangibles tax deductions based on percentage of business conducted within the State); tax credits, see, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271 (1988) (tax credit against motor fuel sales tax to sellers of ethanol if produced in-state or in a State with reciprocal tax benefits); or any number of variations, see, e.g., *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 324-325 (1977) (50 percent reduction in transfer tax rate for nonresident transactions involving domestic sale of securities, and limited tax liability for single transaction involving domestic sale).

A state taxation scheme can also discriminate against a disfavored class by exempting similarly situated persons from its reach. In *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), for example, the Court held that a generally applicable state income tax scheme that exempted retirement benefits provided by the State, but did not exempt retirement benefits provided by the federal government, violated principles of intergovernmental tax immunity. See *id.* at 806, 808, 814-818. The Court held that the state tax was not authorized by 4 U.S.C. 111, which gives the United States' consent to taxation of federal employees' compensation "if the taxation does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." See *Davis*, 489 U.S. at 808 (quoting 4 U.S.C. 111). The Court explained, *inter alia*, that it was "undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees." *Id.* at 814. The Court in *ACF* cited *Davis* in support of the proposition that "tax exemptions, as an abstract matter, could be a variant of tax discrimination." 510 U.S. at 343.

In other cases, the Court has held that various state laws exempting favored classes (typically local businesses) from generally applicable taxes unconstitutionally discriminated against interstate commerce. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984), for example, the Court held that a state excise tax on alcohol "discriminated" against interstate commerce in violation of the Commerce Clause because certain locally produced beverages were granted exemptions. See also, *e.g.*, *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 567, 583, 595 (1997) (holding that "an otherwise generally applicable state property tax violates the Commerce Clause \* \* \* because its exemption for property owned by chari-

table institutions excludes organizations operated principally for the benefit of nonresidents”); *Armco Inc. v. Hardesty*, 467 U.S. 638, 639-646 (1984) (holding that State’s wholesale gross receipts tax unconstitutionally discriminated against interstate commerce by exempting local manufacturers).

Accordingly, it is natural to think that tax exemptions given only to some individuals or businesses can be discriminatory. As Justice Scalia explained in his concurring opinion in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210-211 (1994), an “‘exemption’ \* \* \* against a ‘neutral’ tax, is no different in principle from” “a discriminatory tax” that “impos[es] a higher liability” on disfavored persons. Cf. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2328, 2333 (2010) (explaining that the respondents’ complaint, whether framed as an equal protection or a dormant Commerce Clause challenge, was that the State had “select[ed] [them] out for discriminatory treatment by subjecting [them] to” generally applicable taxes from which “others of the same class” were exempt) (second and third part of brackets in original) (citations omitted).

3. The 4-R Act’s legislative history reinforces the natural reading of Section 11501(b)(4)’s term “discriminates” as encompassing disparate treatment of taxed and exempt entities. “The legislative history of the antidiscrimination provision \* \* \* demonstrates Congress’ awareness that interstate carriers ‘are 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.” *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969) (*1969 Senate Report*)). Those concerns are directly implicated when railroads, lacking political influence, are unable to procure the

avored tax-exempt treatment afforded to their competitors. See *West Lynn Creamery*, 512 U.S. at 200 (explaining that when a generally applicable tax is coupled with exemptions to similarly situated taxpayers, the “State’s political processes can no longer be relied upon to prevent legislative abuse, because one of the [taxpayer] interests which would otherwise lobby against the tax has been mollified” by the exemption).

**B. This Court’s Decision In *ACF* Does Not Bar Petitioner’s Claim**

The Eleventh Circuit in *Norfolk Southern*, Pet. App. 26a-32a, and the Ninth Circuit in *ATSF*, 78 F.3d at 443, held that a state law under which rail carriers pay a non-property tax while certain other persons (typically competing transportation providers) are exempt cannot be challenged under Subsection (b)(4).<sup>6</sup> In so holding, these two courts failed to grapple with the plain language of Subsection (b)(4), the ordinary meaning of the term “discriminates,” and the structure of the 4-R Act’s anti-discrimination prohibition. Instead, the courts concluded that this Court’s decision in *ACF*, *supra*, compelled dismissal of the railroads’ discrimination claims. Pet. App. 26a, 32a (finding that *ACF* “controls our analysis” and that the decision is “determinative”); *ATSF*, 78 F.3d at 442-443 (“Although

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<sup>6</sup> By contrast, the Eighth Circuit has entertained rail carriers’ challenges under Subsection (b)(4) to state sales and use taxes from which the carriers’ direct competitors were exempt. See *Union Pac. R.R. v. Minnesota Dep’t of Revenue*, 507 F.3d 693, 695-696 (2007); *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984, 985-986 (1999), cert. denied, 529 U.S. 1098 (2000). Two state supreme courts within the Eighth Circuit found similar challenges cognizable under Subsection (b)(4). See *Burlington N. R.R. v. Commissioner of Revenue*, 606 N.W.2d 54, 57-59 (Minn. 2000); *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 344-346 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984).

*ACF* specifically addressed property tax exemptions, the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions.”). Those courts misread *ACF*.

1. In *ACF*, this Court considered whether “a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4).” 510 U.S. at 340. To decide that question, the Court looked to “[t]he interplay between subsections (b)(1)-(3)” and the definition of “commercial and industrial property in (a)(4),” which it deemed “central to the interpretation of subsection (b)(4).” *Ibid.* Subsections (b)(1)-(3), which are specific to property taxes, require a comparison between the rate (or the assessment ratio) imposed on railroad property and the rate (or assessment ratio) imposed on other “commercial and industrial property.” *Ibid.* Subsection (a)(4) identifies the reference point for the inquiries prescribed in Subsections (b)(1)-(3), by defining the term “commercial and industrial property” as “property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.” See *ibid.* In light of that statutory structure, the Court explained, a plaintiff may establish a violation of Subsections (b)(1)-(3) only by showing that railroad property is taxed at a higher rate (or assessed at a higher percentage of true market value) than non-railroad commercial-or-industrial-use property that is actually “subject to a property tax levy” (*i.e.*, not exempt). *Id.* at 340-342. The Court further explained that, because any property that is exempt from state taxation falls outside the 4-R Act’s definition of “commercial and industrial property,” such “[e]xempt property \* \* \* is not part of the comparison class against which discrimination is mea-

sured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions.” *Id.* at 342.

Having concluded that Subsections (b)(1)-(3) do not prevent States from taxing railroad property while exempting particular categories of non-railroad property, the *ACF* Court then addressed the question whether such differential taxation is nevertheless prohibited by Subsection (b)(4). The Court stated that “[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 explained that “reading subsection (b)(4) to prohibit what” the other subsections, “in conjunction with subsection (a)(4), w[ere] designed to allow,” would “subvert the statutory plan” and “contravene the ‘elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.’” *Id.* at 340 (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). The Court therefore concluded that although “tax exemptions, as an abstract matter, could be a variant of tax discrimination, [t]he structure of § 1150[1] \* \* \* warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of non-railroad property.” *Id.* at 343 (internal citation omitted).

The Court further explained that “[o]ther considerations reinforce[d] [this] construction of the statute.” *ACF*, 510 U.S. at 343. Because “[p]roperty tax exemptions are an important aspect of state and local tax policy,” the Court found that the 4-R Act’s “silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place.” *Id.* at 344. The

Court also stated that “the prevalence of property tax exemptions when Congress enacted the 4-R Act” suggested that “[p]rinciples of federalism” counseled against reading Subsection (b)(4) as a “prohibition of property tax exemptions,” *id.* at 344-345, and that the legislative history of the 4-R Act did not support the plaintiff’s position, *id.* at 345-346.

The Court determined that “though some may think it unwise to forbid discrimination in tax rates and assessment ratios while permitting exemptions of certain non-railroad property, the result is not ‘so bizarre that Congress ‘could not have intended’ it.” *ACF*, 510 U.S. at 347 (citation omitted). Based on “[t]he structure of § 1150[1] as a whole,” the Court “conclude[d] that a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4).” *Id.* at 340.

2. The Court in *ACF* did not decide the question presented in this case: whether a *non*-property tax that rail carriers pay, but from which certain other persons (including their trucking and shipping competitors) are exempt, is subject to challenge under Subsection (b)(4). The Court addressed the scope of Subsection (b)(4) with respect to property taxes, see 510 U.S. at 338-339; it did not comment on any other type of tax. Indeed, the *ACF* Court’s only discussion of tax exemptions in general—as a category broader than property tax exemptions—came in its acknowledgment that “tax exemptions, as an abstract matter, could be a variant of tax discrimination,” though the 4-R Act “does not speak with any degree of particularity to the question of tax exemptions.” *Id.* at 343.

Contrary to the Eleventh Circuit’s assertion (Pet. App. 29a), the *ACF* Court’s analysis is not “equally applicable” to non-property taxes. The Court in *ACF* relied on the

facts that Subsections (b)(1)-(3) establish specific non-discrimination requirements for property taxes, and that those subsections require a comparison between taxes on rail transportation property and taxes on other “commercial and industrial property.” 510 U.S. at 340. Because the term “commercial and industrial property” is limited to specified categories of “property \* \* \* subject to a property tax levy,” *id.* at 341 (quoting 49 U.S.C. 11501(a)(4))—a phrase the Court construed to mean “taxed property,” *id.* at 342—a rail carrier cannot establish a violation of Subsections (b)(1)-(3) by showing that its property is taxed while other property is exempt, see *ibid.*

The Court in *ACF* further explained that Subsection (b)(4) should be construed with due regard for Congress’s decision to “place[] exempt property beyond the reach of subsections (b)(1)-(3).” 510 U.S. at 343. The Court observed that “[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).” *Ibid.* Although Subsection (b)(4) “viewed in isolation” might plausibly be read to reach discrimination effected through tax exemptions for non-railroad property, the Court found that reading of Subsection (b)(4) “untenable in light of § 1150[1] as a whole.” *Ibid.*

That structural analysis does not logically apply to the sales and use taxes at issue here. Whereas Subsections (b)(1)-(3) specifically address (and allow) property tax exemptions, they are silent as to non-property tax exemptions. Neither Subsections (b)(1)-(3) nor any other 4-R Act provision establishes specific non-discrimination requirements for non-property taxes. No 4-R Act provision otherwise indicates that, with respect to allegedly discriminatory sales or use taxes, the only appropriate point of comparison

is other *taxed* transactions or activities. And nothing in the statute’s text or history suggests that Congress intended to “allow[] the States to grant” exemptions from their sales and use taxes. Treating petitioner’s current challenge as cognizable under Subsection (b)(4) therefore poses no threat of “nullify[ing]” (*ACF*, 510 U.S. at 343) any congressional policy choice reflected in the more specific 4-R Act provisions.

As applied to non-property taxes, Subsection (b)(4)’s prohibition on state taxes “that discriminate[] against a rail carrier” therefore should be given its ordinary and natural meaning. As explained above (see pp. 14-15, *supra*), this Court has frequently struck down, as impermissibly discriminatory, state regimes that required some persons to pay taxes from which others were exempt. Indeed, absent some persuasive justification for the disparity, requiring a rail carrier to pay a tax from which its direct competitors are wholly exempt is an even starker form of discrimination than is requiring the rail carrier to pay a higher rate of tax than its taxed competitors are forced to pay. Because the language of Subsection (b)(4) readily encompasses state regimes that exempt competitors from taxes that railroads must pay, and because the structural inferences on which the *ACF* Court relied are rooted in 4-R Act provisions that apply only to property taxes, petitioner’s challenge is cognizable.

3. Although the *ACF* Court described its structural analysis as “central to the interpretation of subsection (b)(4),” 510 U.S. at 340, the Eleventh Circuit did not discuss that analysis in *Norfolk Southern*. Instead, it focused on what the *ACF* Court described as “[o]ther considerations” that “reinforce[d]” the basic structural inference. *Id.* at 343; see Pet. App. 28a-31a; see also *ATSF*, 78 F.3d at 443.

None of those considerations warrants the weight the court of appeals gave them.

a. The court of appeals thought it significant that “[t]he language of [Sub]section (b)(4) prohibits a discriminatory ‘tax’ not a discriminatory tax exemption.” Pet. App. 29a; see *ATSF*, 78 F.3d at 443. As an initial matter, and as the reformulated question presented makes clear (see p. (I), *supra*), this case involves a challenge to a discriminatory “tax.” See Gov’t Pet. Stage Br. 19 (suggesting that the question presented be reformulated because “petitioner’s Subsection (b)(4) suit is properly viewed as challenging the allegedly discriminatory tax imposed on rail carriers”); Resp. Supp. Br. 6 (agreeing “that the United States more accurately frames the threshold question”). To be sure, petitioner’s contention that the challenged taxes “discriminate[] against \* \* \* rail carrier[s],” 49 U.S.C. 11501(b)(4), ultimately depends on the fact that its competitors are exempt. But the need for that comparison does not cast doubt on the cognizability of petitioner’s discrimination claim. To the contrary, it is typical of discrimination cases that a plaintiff shows its own treatment to be unlawful by contrasting it with the more favorable treatment given to other, similarly situated persons.

This Court has frequently found unlawful tax discrimination in analogous circumstances (see pp. 14-15, *supra*), and it acknowledged in *ACF* that “tax exemptions, as an abstract matter, could be a variant of tax discrimination.” 510 U.S. at 343. The *ACF* Court found the 4-R Act’s failure to speak with a “degree of particularity to the question of tax exemptions” significant only when “contrast[ed]” with the “precise standards for judicial scrutiny” of property tax rate and assessment practices. *Ibid.* Without that contrast, the absence of an express mention of one potential means of discriminating (selective exemptions) is of little

significance—particularly in a catch-all provision like Subsection (b)(4), whose very purpose is to avoid the impractical task of anticipating and enumerating every possible discriminatory mechanism. See, e.g., *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) (“Congress possessed a general concern with discrimination in all of its guises.”), cert. denied, 465 U.S. 1100 (1984).

b. The court of appeals also observed that, “as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted.” Pet. App. 30a. Again, although the *ACF* Court viewed that state-law backdrop as confirming evidence of Congress’s intent to leave property tax exemptions undisturbed, see 510 U.S. at 344, it does not bear the independent weight the court of appeals gave it. The Court in *ACF* found preexisting state tax practices relevant only “in light of the explicit prohibition of tax rate and assessment ratio discrimination,” *ibid.*—a counterpoint notably absent here. Standing alone, the ubiquity of a practice prior to the 4-R Act cannot render Section 11501 inapplicable because it was precisely the prevalence of discriminatory taxation schemes that prompted Congress to enact the 4-R Act’s prohibition.

c. The court of appeals’ third concern—principles of federalism—also carries little weight in this specific context. The 4-R Act is preemptive in its design and by its broad, clear, and express terms. Cf. *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 20-21 (2007) (“[E]ven if important questions of state policy are [implicated], \* \* \* judicial scrutiny \* \* \* is authorized by the 4-R Act’s clear command.”); *Burlington N. R.R. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461, 464 (1987) (“[T]he language of [Section] 1150[1] plainly declares the congressional purpose,” and “principles of comity” do not require a different outcome.). Thus, any presumption against pre-

emption is overcome by “the clear and manifest purpose of Congress” to preempt any discriminatory tax. *ACF*, 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.) (“[T]he argument that there is a presumption in favor of the states’ broad taxing power must fail where the purpose of the legislation was to curb the states’ power to inequitably tax railroads.”), cert. denied, 454 U.S. 1086 (1981); cf. *CSX*, 552 U.S. at 21 (“That the statute should vest this authority in the Nation’s courts is hardly surprising, given Congress’s conclusion that the States were assessing railroad property unfairly.”).<sup>7</sup>

**C. The Court Should Hold That Petitioner’s Challenge Is Cognizable Under 49 U.S.C. 11501(b)(4) And Remand The Case For Further Proceedings To Determine Whether The Challenged Taxes Are Unlawful**

Petitioner alleges that, by requiring rail carriers to pay sales and use taxes from which motor carriers and water carriers engaged in interstate and foreign commerce are

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<sup>7</sup> Notably, the appropriate remedy in a successful Section 11501(b)(4) challenge is not to undo the putatively favorable tax treatment accorded to non-rail carriers (here, the exemption of certain non-rail carriers from Alabama’s sales and use taxes). As this Court has explained in connection with constitutional challenges to state taxes, a federal court may not “decree a valid tax for the invalid one which the State ha[s] attempted to exact”; rather, the appropriate decree is that the invalid tax “may not be exacted.” *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961) (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960)). The remedial approach Congress prescribed in the 4-R Act is less intrusive to state sovereignty than this Court’s approach in constitutional challenges. See *1969 Senate Report* 13 (rejecting the *Moses Lake* approach and indicating that, under the remedial provisions of 49 U.S.C. 11501(c), “[t]here is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion”).

exempt, respondents have “discriminated against a rail carrier.” J.A. 22. On its face, that is an actionable claim of discrimination under 49 U.S.C. 11501(b)(4). If Alabama had adopted generally applicable sales and use taxes that taxed fuel at a rate of four percent when used by rail carriers, and at a rate of two percent when used by motor carriers and water carriers engaged in interstate and foreign commerce, that scheme would be “subject to challenge” (*ACF*, 510 U.S. at 338) under Subsection (b)(4). For the reasons set forth above, petitioner’s challenge does not cease to be cognizable simply because petitioner’s competitors are exempt altogether (*i.e.*, taxed at a rate of zero percent) from the sales and use taxes at issue in this case.

A determination that petitioner’s 4-R Act claims are cognizable would not necessarily mean that petitioner can ultimately prevail on the merits. As the United States explained in some detail in its amicus brief in *ACF*, Subsection (b)(4) prohibits “discrimination,” not “differentiation.” See generally Gov’t Br. at 16-24, *ACF*, *supra* (No. 92-74). A state tax that treats a rail carrier differently than a similarly situated person “discriminates against a rail carrier” (49 U.S.C. 11501(b)(4)) only if the State cannot justify the differences in treatment.

The precise nature and contours of the inquiry into whether a particular state tax “discriminates against a rail carrier” in violation of Subsection (b)(4), however, are outside the scope of the question on which this Court granted a writ of certiorari. On remand, the lower courts can consider a number of subsidiary legal questions and can engage in any necessary factual inquiries. For example, the courts may be required to decide whether other aspects of respondents’ overall tax scheme justify disparate application of the sales and use taxes on motor fuel; to assess whether respondents can otherwise justify such treatment;

and to consider what (if any) relevance the use to which state taxes (once collected) are put, or the taxes imposed by Alabama's political subdivisions, have on the analysis.<sup>8</sup>

This list is not exhaustive, and the government expresses no view on whether petitioner will ultimately be able to prove a 4-R Act violation. The ultimate question of discrimination is inherently factbound and may sometimes be complex, but this is a task that “district courts are used” to undertaking. *CSX Transp.*, 552 U.S. at 19 (noting that, under the 4-R Act, courts were required to ascertain a property’s “true market value,” however “complex” the judicial inquiry); cf. *Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), “is a factual matter”).

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<sup>8</sup> In *Norfolk Southern*, the plaintiff railroad argued that Alabama’s taxing regime discriminates against rail carriers in violation of Section 11501(b)(4) “because Alabama uses the proceeds of the taxes levied on motor carriers to maintain roads and railroads do not receive similar subsidies.” Pet. App. 35a. The Eleventh Circuit held that a claim of discrimination under Section 11501(b)(4) may not be premised on the manner in which tax proceeds are used. See *id.* at 35a-37a. The court explained that, *inter alia*, such an inquiry would require the court to “look past the particular tax at issue to analyze the overall state tax structure,” which the court “decline[d]” to do “in line with the majority of other jurisdictions.” See *id.* at 36a-37a & n.18 (citing cases). As the United States previously explained in *ACF* and in this case, a State may be able “to justify a specific tax exemption by showing that the exempt” class is subject to alternative and comparable “state or local taxes that are not levied against railroads.” See Gov’t Br. at 21-22, *ACF*, *supra* (No. 92-74); Gov’t Pet. Stage Br. 17. This Court need not (and should not) decide these subsidiary questions. But they should be open on remand for full development by the parties and full consideration by the courts below.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ROBERT S. RIVKIN  
*General Counsel*

PAUL M. GEIER  
*Assistant General Counsel  
for Litigation*

PETER J. PLOCKI  
*Deputy Assistant General  
Counsel for Litigation*

JOY K. PARK  
*Trial Attorney  
Department of Transportation*

KAREN J. HEDLUND  
*Chief Counsel*

MICHAEL T. HALEY  
*Deputy Chief Counsel  
Federal Railroad  
Administration*

NEAL KUMAR KATYAL  
*Acting Solicitor General*

TONY WEST  
*Assistant Attorney General*

MALCOLM L. STEWART  
*Deputy Solicitor General*

MELISSA ARBUS SHERRY  
*Assistant to the Solicitor  
General*

ANTHONY J. STEINMEYER  
MARK W. PENNAK  
*Attorneys*

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