

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.,  
*Respondents.*

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

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**AMICUS BRIEF FOR THE STATES OF WASHINGTON,  
DELAWARE, GEORGIA, INDIANA, IOWA, MARYLAND,  
MICHIGAN, MINNESOTA, MONTANA, NEVADA, OHIO,  
RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH,  
VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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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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## INTEREST OF AMICI CURIAE

This case concerns the interpretation of 49 U.S.C. § 11501.<sup>1</sup> Subsections (1)-(3) prohibit certain acts related to the imposition of ad valorem property taxes on rail carriers. Subsection (b)(4) prohibits imposing “another tax that discriminates against a rail carrier[.]” The issue before this Court is whether a State’s exemption of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes constitutes another tax that discriminates against a rail carrier in violation of subsection (b)(4).

The Amici States have a vital interest in this question. Rail carriers carry on extensive operations within the boundaries of the States that represent a significant presence in terms of personnel and property, and a concomitant obligation on the part of State and local governments to provide essential services. Sales and use taxes are an important part of the revenue systems of most States. Like Alabama, the States have traditionally provided exemptions from their sales and use tax systems that serve important policy objectives, such as encouraging economic development, some of which benefit rail carriers as well as other businesses. Other exemptions are available to rail carriers, but

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<sup>1</sup> 49 U.S.C. § 11501 is the current codification of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54. This brief refers to the current codification. *See* Sup. Ct. R. 34.5.

do not apply directly to the conduct of rail transportation.<sup>2</sup>

If the decision below is reversed, and rail carriers may challenge any State or local tax under subsection (b)(4) other than a generally applicable ad valorem property tax, rail carriers effectively would be immunized from most (if not all) State and local taxes under subsection (b)(4), as it is interpreted by CSX Transportation, Inc. (CSX), since virtually all taxes imposed by State and local governments that are paid by rail carriers contain an exemption that does not directly benefit rail carriers. Thus, rail carriers would be relieved of their obligation to pay their fair share of taxes for the many services they receive from State and local governments.<sup>3</sup>

A broader concern is whether Congress ever intended to restrict the States' exercise of their taxing powers to the degree urged by CSX and the United States. An accelerating trend of federal preemption of State regulatory and taxing powers, even as additional responsibilities are shifted from the

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<sup>2</sup> For example, Alabama's sales and use tax exemptions at issue here are available to rail carriers. Although the purchase and consumption of diesel fuel by CSX Transportation, Inc. (CSX) for rail transportation purposes may be subject to Alabama's sales and use taxes, CSX enjoys the benefit of the exemptions with respect to its purchase and consumption of diesel fuel or other motor vehicle fuel for vehicles that it uses on Alabama's highways.

<sup>3</sup> CSX essentially seeks "most-favored-taxpayer" status under § 11501 "when it comes to *non-property* taxes because they are entitled to every tax benefit given another carrier." See Br. Resp'ts at 23 (CSX's emphasis).

National Government, has long been documented.<sup>4</sup> In this current climate, the States should not be made to suffer the consequences of a sweeping prohibition on the use of their taxing powers, otherwise sovereign, based on statutory language that is inherently vague. Rather, this Court should require Congress to speak with considerably more clarity and precision if it intends to interfere with the States' fundamental power to impose taxes.

### SUMMARY OF ARGUMENT

This case turns on the meaning of 49 U.S.C. § 11501(b)(4). When § 11501 is properly read in context, the meaning of subsection (b)(4) is anything but plain on its face. By its use of the phrase “another tax that discriminates against a rail carrier” in subsection (b)(4), Congress undoubtedly intended some reference to subsections (b)(1)-(3). In those subsections, Congress defined discrimination as imposing higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property. The logical inference is that Congress intended subsection (b)(4) to prohibit like discrimination, not every other conceivable form of alleged discrimination. This is confirmed by subsection (c), which specifically limits the relief that may be granted under § 11501 to taxes on rail transportation property and taxes that can be viewed as equivalent to taxes on rail transportation property. Congress, therefore, did not intend

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<sup>4</sup> See generally U.S. Advisory Comm'n on Intergovernmental Relations, *Federal Statutory Pre-emption of State and Local Authority: History, Inventory, and Issues* (1992).

through subsection (b)(4) to address sales and use taxes.

Nothing in the legislative history suggests that subsection (b)(4) was intended to have the sweeping pre-emptive effects that CSX seeks in this case. Instead, the history shows that Congress intended subsection (b)(4) to apply only to taxes that are imposed in lieu of property taxes. Every explanatory reference to the prohibition in subsection (b)(4) refers to “in lieu taxes.” And no reference or discussion in the legislative history indicates that subsection (b)(4) was ever intended to address sales and use taxes at all.

The expansive interpretations of subsection (b)(4) offered by CSX and the United States are incompatible with the *only* relief that is available under subsection (c). Reading § 11501 as a whole, the only reasonable conclusion is that Congress intended the relief that is available under subsection (c) to be coextensive with the discrimination that is prohibited under subsection (b), including subsection (b)(4). Congress, therefore, did not intend subsection (b)(4) to apply to sales and use taxes.

Section 11501 pre-empts the taxing powers of the States. Therefore, this Court should be hesitant to extend the statute beyond its evident scope. If Congress had intended to prohibit allegedly discriminatory sales and use taxes through subsection (b)(4), it would have spoken with clarity and set forth an explicit prohibition like those contained in subsections (b)(1)-(3) pertaining to discriminatory tax rates and assessment ratios. This Court should decline to adopt—as CSX and the

United States urge—a virtually unlimited interpretation of subsection (b)(4) that would significantly interfere with the States’ taxing powers, particularly where such a broad interpretation is unsupported by any clear language in § 11501.

### ARGUMENT

**1. Subsection (b)(4) Of The 4-R Act, Which Prohibits As Discriminatory “Another Tax That Discriminates Against A Rail Carrier,” Is Inherently Ambiguous**

Subsection (b) of § 11501 lists the State taxing practices that Congress has prohibited because they “unreasonably burden and discriminate against interstate commerce.” Subsections (b)(1)-(3) prohibit certain acts related to the imposition of ad valorem property taxes on rail carriers. Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.<sup>5</sup>

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<sup>5</sup> Subsections (b)(1)-(3) provide:

“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.

The comparison classes of “rail transportation property” and “commercial and industrial property” apply with respect to each of these subsections.<sup>6</sup>

In contrast to subsections (b)(1)-(3), which proscribe specific State acts, subsection (b)(4) employs imprecise language that prohibits the imposition of “another tax that discriminates against a rail carrier.” 49 U.S.C. § 11501(b)(4). Fixating on the words “another tax” and “any other tax,” CSX contends that the meaning of subsection (b)(4) is “plain.” *See* Br. Pet’r at 14-18. According to CSX, “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.” Br. Pet’r at 14.<sup>7</sup> CSX further

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“(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.” 49 U.S.C. § 11501(b)(1)-(3).

<sup>6</sup> “Rail transportation property” is defined as “property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” 49 U.S.C. § 11501(a)(3).

“Commercial and industrial property” is defined as “property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.” 49 U.S.C. § 11501(a)(4).

<sup>7</sup> *See also* Br. United States as Amicus Curiae Supporting Pet’r (U.S. Amicus Br.) at 12 (“the word ‘any’ has an

argues that “[n]othing in subsection (b)(4) precludes its application to generally applicable non-property taxes challenged on the ground that railroad competitors have been granted exemptions.” Br. Pet’r at 14.

CSX’s simplistic “plain meaning” argument misses the mark. First, it improperly reads “another tax” in isolation, not in light of § 11501 as a whole. In myopically focusing on two words in the statute, CSX forgets that courts must not “be guided by a single sentence or member of a sentence,” but must “look to the provisions of the whole law.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 99 (1992). As this Court recognized in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994), such a reading of subsection (b)(4), “while plausible when viewed in isolation . . . is untenable in light of § [11501] as a whole.” When § 11501 is read as a whole, CSX’s argument, which relies entirely on two words from subsection (b)(4), is unreasonable.

Second, contrary to CSX’s argument, the meaning of subsection (b)(4) is anything but plain. Congress surely could not have been less clear than to have prohibited as discriminatory “another tax that discriminates against a rail carrier.” Indeed, this Court, in *ACF Industries*, commented that the scope of subsection (b)(4) is “not as clear” as the scope of subsections (b)(1)-(3). *ACF Indus.*, 510 U.S. at 337. And regarding the question of tax

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expansive meaning”). *But see Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) (“‘any’ can and does mean different things depending upon the setting”).

exemptions, this Court stated that subsection (b)(4) “is, at best, vague on the point.” *ACF Indus.*, 510 U.S. at 337. Congress did not “state whether exemptions are a form of forbidden discrimination against rail carriers” and further did not “provide a standard for courts to distinguish valid from invalid exemption schemes.” *ACF Indus.*, 510 U.S. at 343.<sup>8</sup>

Third, Congress’s use of the word “discriminates,” without additional elaboration, demonstrates that subsection (b)(4) is anything but plain on its face. The vague word “discriminates,” divorced from its context, is inherently ambiguous. *See, e.g., Guardians Ass’n v. Civil Serv. Comm’n of City of New York*, 463 U.S. 582, 592 (1983) (opinion of White, J., announcing the judgment) (“The language of Title VI on its face is ambiguous; the word ‘discrimination’ is inherently so.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J., announcing the judgment) (“The concept of ‘discrimination’ . . . is susceptible of varying interpretations, for as Mr. Justice Holmes declared, ‘[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us.’” (citation omitted)).

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<sup>8</sup> *ACF Industries* resolved whether subsection (b)(4) applies to a generally applicable ad valorem property tax. *ACF Indus.*, 510 U.S. at 340-44. The Court, however, declined to determine what other taxes are covered by subsection (b)(4).

CSX contends that subsection (b)(4) “necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax.” Br. Pet’r at 17. In support, CSX relies on this Court’s statement in *ACF Industries* that tax exemptions “could be a variant of tax discrimination.” Br. Pet’r at 17.<sup>9</sup> CSX also cites several additional cases to argue that “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.” Br. Resp’ts at 17. In contrast, the United States acknowledges that subsection (b)(4) “does not specify the appropriate comparison class, and does not include an objective test by which to measure discrimination.” U.S. Amicus Br. at 11. The United States thus urges the Court to apply the “ordinary meaning” of the word “discrimination.” See U.S. Amicus Br. at 13.

But neither CSX nor the United States acknowledge a more plausible interpretation of what Congress meant by “another tax that discriminates against a rail carrier” in subsection (b)(4). Alabama correctly argues that subsection (b)(4) “gains it[s] meaning by reference to subsections (b)(1)-(b)(3).” Br. Resp’ts at 28; see also *ACF Indus.*, 510 U.S. at 340 (“The interplay between subsections (b)(1)-(3) and the definition of ‘commercial and industrial

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<sup>9</sup> CSX quotes only a part of the Court’s statement. The entire statement is: “It is true that tax exemptions, *as an abstract matter*, could be a variant of tax discrimination.” *ACF Indus.*, 510 U.S. at 343 (emphasis added).

property' in subsection (a)(4) is central to the interpretation of subsection (b)(4).”).

Through subsections (b)(1)-(3), which apply to generally applicable ad valorem property taxes, Congress forbade the imposition of higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property. *See ACF Indus.*, 510 U.S. at 340. Congress, however, did not forbid as discriminatory the granting of exemptions through subsections (b)(1)-(3). *See ACF Indus.*, 510 U.S. at 342 (“railroads may not challenge property tax exemptions under those provisions [referring to subsections (b)(1)-(3)]”). By its use of the phrase “another tax that discriminates against a rail carrier” in subsection (b)(4), Congress undoubtedly intended some reference to subsections (b)(1)-(3). Having defined discrimination in those subsections as applying higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property, the logical inference is that Congress intended subsection (b)(4) to prohibit like discrimination, not every other conceivable form of alleged discrimination. Consequently, read as a whole, § 11501 suggests that Congress did not intend through subsection (b)(4) to address sales and use taxes at all.

Fourth, at its core, CSX’s argument is that a rail carrier may bring an action under subsection (b)(4) challenging any State tax, other than a generally applicable property tax, if the rail carrier merely alleges the tax is discriminatory. Also, rail carriers apparently may compare themselves to whomever they please in alleging discrimination.

CSX's infinitely broad interpretation, however, effectively converts subsection (b)(4)'s prohibition against imposing "another tax that discriminates against a rail carrier" into a prohibition against "another tax against a rail carrier." By its very nature, the selection of the comparison class is critical to determining whether discrimination exists. Consequently, this Court must do more than simply determine whether Alabama's sales and use taxes are "another tax" under subsection (b)(4).

We thus strongly disagree with the suggestion of the United States that 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) [is] outside the scope of the question on which this Court granted a writ of certiorari." U.S. Amicus Br. at 25. To answer the question presented, the Court necessarily must determine the meaning of "another tax that discriminates against a rail carrier" under subsection (b)(4), as well as the proper comparison class under the subsection.

Finally, subsection (c) is an exception to the Tax Injunction Act, 28 U.S.C. § 1341, that generally prohibits federal district courts from enjoining, suspending, or restraining the assessment, levy, or collection of State taxes.<sup>10</sup> Notwithstanding the Tax Injunction Act, subsection (c) grants federal district courts jurisdiction "to prevent a violation of

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<sup>10</sup> 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

subsection (b) of this section.” But Congress expressly limited the relief that is available under subsection (c): “Relief may be granted under this subsection *only if* the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.” (Emphasis added.) Subsection (c) thus specifically limits the relief that may be granted under § 11501 to taxes on rail transportation property and taxes that can be viewed as equivalent to taxes on rail transportation property.<sup>11</sup> By limiting relief in this manner, Congress clearly could not have intended subsection (b)(4) to apply to transactional taxes such as sales and use taxes. Rather, this demonstrates that Congress intended subsection (b) to apply only to generally applicable ad valorem property taxes (through subsections (b)(1)-(3)) and another tax imposed in lieu of a generally applicable ad valorem property tax (through subsection (b)(4)).<sup>12</sup>

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<sup>11</sup> This conclusion is consistent with the definitions in § 11501, which relate solely to types of property (“rail transportation property” and “commercial and industrial property”) and to terms common to ad valorem property taxes (“assessment” and “assessment jurisdiction”). See 49 U.S.C. § 11501(a)(1)-(4).

<sup>12</sup> This Court has implied that subsection (b)(4)’s application may be so limited, noting that industry representatives, “when urging the Senate to adopt subsection (b)(4) . . . characterized the provision as prohibiting only discriminatory in lieu and gross receipts taxes[.]” *ACF Indus.*, 510 U.S. at 346.

Subsection (c) also dictates the comparison class in an action under § 11501. Regardless of what taxes might be governed by subsection (b)(4), the required comparison is to “other commercial and industrial property in the same assessment jurisdiction.” § 11501(c). Consequently, CSX vastly overreaches in arguing that subsection (b)(4) “necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax.” Br. Pet’r at 17.

Therefore, read as a whole, § 11501 refutes CSX’s “plain meaning” argument urging a virtually unlimited application of subsection (b)(4) to any and all State taxes, including exemptions from such taxes, other than generally applicable ad valorem property taxes. As subsection (c) shows, Congress could not have intended subsection (b)(4) to apply so expansively.

In sum, because the meaning of subsection (b)(4) is anything but plain, being susceptible to multiple interpretations, this Court should look to the 4-R Act’s legislative history for guidance, and also should consider applicable principles of federalism when interpreting federal statutes that impinge upon the States’ historic taxing powers.

**2. The 4-R Act’s Legislative History Shows That Congress Intended Subsection (b)(4) To Prohibit Only Discriminatory Gross Receipts Taxes Imposed In Lieu Of Property Taxes**

In 1961, Congress began its inquiry into the matter of tax discrimination against railroads by the

States and their subdivisions. *See* S. Rep. No. 87-445 (1961). Its study of this problem eventually culminated in the enactment of the 4-R Act in February 1976. Throughout this 15-year period, Congress focused on discrimination issues in State and local ad valorem property taxation.

Section 11501 had its origins in the “Doyle Report,” a national transportation policy study requested by the 86th Congress, one portion of which addressed discriminatory ad valorem property taxation of railroad land and rights-of-way. S. Rep. No. 87-445, at 445-91 (1961). The report concluded that States commonly assessed railroad property at a proportion of full value (assessment ratio) substantially higher than other property subject to the same local tax rates. The report endorsed an “antidiscrimination law” drafted by the American Association of Railroads as a solution for this problem. S. Rep. No. 87-445, at 465-66.

In 1964 and 1966, bills were introduced that were modeled closely on this antidiscrimination law. H.R. 736, 88th Cong., 2d Sess. (1964); H.R. 10169, 88th Cong., 2d Sess. (1964); H.R. 4972, 89th Cong., 2d Sess. (1966). These bills were narrow. They addressed only the assessment process and were designed to relieve railroads from only the excessive portion of the property tax.

By 1967, the railroads no longer believed that they could be protected from overtaxation of their property by prohibiting only higher assessment ratios. To address the possibility that States might evade the discriminatory assessment prohibition through the use of discriminatory property tax rates,

a new bill added a third prohibition invalidating a rate imposed on railroad property to the extent it was higher than the rates on “all other property” in a taxing district. S. 927, 90th Cong., 1st Sess. (1967); *see* S. Rep. No. 90-1483 (1968).

The provision in the 4-R Act prohibiting “any other tax which results in discriminatory treatment” surfaced inconspicuously and was present in some bills, but not others. In February 1974, two years before Congress enacted the 4-R Act, Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, introduced H.R. 12891. Section 8 of that bill would have added a new section to the Interstate Commerce Act reading, in part:

“(2) Notwithstanding the provisions of section 202(b) of this Act, the following actions by any State, or subdivision or agency thereof, whether taken pursuant to a constitutional provision, statute, administrative order, or practice, or otherwise, constitute an unreasonable and unjust discrimination against, and an undue burden upon interstate commerce and are prohibited:

“ . . .

“(d) the imposition of any other tax which results in discriminatory treatment of a carrier subject to part I or part III of the Interstate Commerce Act.” *Hearings Before the H. Comm. on Interstate & Foreign Commerce & the Subcomm. on Transportation & Aeronautics on H.R. 12891, H.R. 5385, H.R.*

*13487, H.R. 10694, and S. 1149*, 93d Cong. 2d Sess. 3, 24 (1974) (*1974 Hearings*).

This provision in H.R. 12891 prohibiting “any other tax which results in discriminatory treatment” of interstate carriers was essentially identical to § 11501(b)(4) in its application to railroads.

There is nothing in the legislative history suggesting that this provision was intended to have the sweeping pre-emptive effects that CSX seeks in this case. Initially, the presence of the provision was not deemed by witnesses on either side of the tax discrimination issue to be worth mentioning, and railroad witnesses in particular attached no significance to it. In a written statement prepared for the House Subcommittee on Transportation and Aeronautics, the Chairman of the Interstate Commerce Commission described H.R. 5385—which contained no such provision—and H.R. 12891 as dealing with the problem of tax discrimination “in substantially the same manner.” *1974 Hearings* at 347. Similarly, in a written statement prepared for the same subcommittee, the president of the Transportation Association of America described the provisions in section 8 of H.R. 12891 as “very similar to those in H.R. 5385.” *1974 Hearings* at 372-73, 379. In another written statement, the general counsel of the Freight Forwarders Institute told the subcommittee that both bills “prohibit discriminatory State and local taxation of property” and expressed “no preference as between the two versions.” *1974 Hearings* at 404.

Perhaps more significantly, in his written statement prepared for the same subcommittee, the

president of the Association of American Railroads explained that both section 201 of H.R. 5383 and section 8 of H.R. 12891 were “designed to prevent discriminatory state and local taxation of transportation property.” *1974 Hearings* at 434. He stated that “the provisions of the two bills are substantially the same.” *Id.* Using the H.R. 12891 version “for illustration,” he then listed the actions prohibited by the bills, ending with the provision absent from H.R. 5385—“the imposition of any other tax which results in discriminatory treatment of a carrier subject to Part I or Part III of the Interstate Commerce Act.” *Id.* He ended his discussion of these sections of the bills by noting that “remedial legislation of this character” had been “long advocated by the carriers” and had been before Congress “for many years.” *Id.* at 435.<sup>13</sup>

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<sup>13</sup> The president of the American Trucking Association similarly explained in a written statement that both section 201 of H.R. 5385 and section 8 of H.R. 12891 would prohibit States and their subdivisions “from assessing transportation property (and collecting property taxes on such assessments) higher than the ratio of assessed value to true market value of all other industrial and commercial property in the assessment jurisdiction.” *1974 Hearings* at 462, 467. He objected only to the provisions in both bills allowing discriminatory assessments by as much as five percent and suggested their elimination. *Id.* at 467.

The written statement of the American Farm Bureau Federation explained that both bills prohibited “discrimination in tax policy with respect to transportation property.” *Id.* at 760. But the organization expressed opposition to Congress dictating conditions under which States and their subdivisions “may administer property taxes.” *Id.* at 760.

Thus, the two bills proceeded side-by-side through the lengthy hearings without so much as a single reference to the difference in text or any suggestion that the provision in H.R. 12891 prohibiting “any other tax which results in discriminatory treatment” of interstate carriers was of any substantive significance. To the contrary, all the witnesses who referred to the antidiscrimination provisions in the bills described them as if they were identical in scope and effect.

In September 1974, the House Committee on Interstate and Foreign Commerce reported out H.R. 5385 in the form of a striking amendment, recommending that the bill pass as amended. H.R. Rep. No. 93-1381, at 1 (1974). With minor technical corrections, section 201 of the amended bill, prohibiting discriminatory state and local taxation, was essentially identical to the version previously before the House subcommittee, except that it now contained a new fourth prohibited action in subsection (a)(4)—“The imposition of any other tax which results in discriminatory treatment of a common or contract carrier subject to this part, part II, part III, or part IV of this Act.” *See id.* at 5-6, 74-76. This new language incorporated, in slightly amended form, the provision that had first appeared in H.R. 12891.

The committee described the reported bill as banning “discriminatory taxation of transportation property” by any State or its subdivision. H.R. Rep. No. 93-1381, at 15, 25. The committee explained that eight States then had “either statutory or constitutional taxation provisions” that assessed “transportation property at a higher rate than other

industrial or commercial properties.” *Id.* at 25. The committee explained that the bill would give States and their subdivisions three years “to equalize the tax structure for transportation and other commercial and industrial property.” *Id.* at 26.

The committee also provided a detailed, section-by-section analysis of the reported bill. *Id.* at 33-43. In discussing section 201, the committee described the taxation actions that the bill would make unlawful. *Id.* at 35-36. These included “(4) the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (*the so-called ‘in-lieu tax’*).” *Id.* at 36 (emphasis added). The committee explained that subsection (c) outlined “methods by which true market value can be established” and gave the courts “guidelines for determination of whether a tax is unlawful.” *Id.* The committee further explained that subsection (d) established a new federal court remedy for interstate carriers who wished to challenge taxing authorities under section 201. However, to use this new remedy, the committee stated, “a carrier’s property must be assessed at a percentage at least 5 percent above that applied to all other property in the assessment jurisdiction.” *Id.*

A similar fourth prohibition did not appear in a Senate bill until June 1975. *See* S. 1876, 94th Cong., 1st Sess. (1975). And, even as late as October 1975, some of the Senate’s versions of the 4-R Act did not contain such a provision. *See, e.g., Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on Legislation Relating to Rail Passenger Service*, No. 94-31, 94th

Cong., 1st Sess., Part 5, at 1553 (1975) (*1975 Hearings*). Consequently, in October 1975, the president of the Association of American Railroads, in a written statement prepared for the Senate Subcommittee on Surface Transportation, urged the Senate to include such a provision to protect railroads from discriminatory taxes imposed “in lieu of” property taxes: “We suggest that the bill should be amended by adding a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions listed above.” *1975 Hearings* at 1833, 1837.

Stuart H. Johnson, Jr., on behalf of the New York Dock Railway, likewise testified in favor of such a fourth prohibition. He asserted that such a provision would protect the New York Dock Railway against “a New York City gross receipts tax applicable to public utilities.” *Id.* at 1881, 1883, 1886.

The Senate apparently heeded requests to protect railroads against discriminatory taxes “in lieu” of property taxes because the final Senate bill, which soon became the 4-R Act, included the “any other tax which results in discriminatory treatment” provision. *See* S. 2718, 94th Cong., 1st Sess. (1975).

A House report in December 1975 discussed the intent of the 4-R Act. This report directly stated that the purpose of the section prohibiting certain state taxation actions was to end “discriminatory property and ‘in lieu’ taxation”:

“Specifically, this section amends Part I of the Interstate Commerce Act to include a

new section which would make unlawful *certain* state taxation activities, or actions by any subdivision or agency of a state. These actions include: . . . (4) the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (the so-called “in-lieu tax”).

“ . . .

“The Committee found that railroads are overtaxed by at least \$50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, *the Committee believes discriminatory property and “in lieu” taxation should be ended.*” H.R. Rep. No. 94-725, at 76-78 (1975) (emphasis added).<sup>14</sup>

The final part of the legislative record providing insight into the purpose of the “any other tax” provision is found in the report of the House-Senate Conference Committee on S. 2718. S. Rep. No. 94-595, at 165-66 (1976). That report described the purpose of that provision in H.R. 10979 as

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<sup>14</sup> In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 130 n.\* (1987), this Court cited the same pages of the 4-R Act’s legislative history in discussing the phrase “in lieu tax”: “This Report used the phrase ‘in lieu tax’ to describe *special taxes on common carriers that operate differently from the generally applicable property tax schemes.* H. R. Report No. 94-275, pp. 77, 78 (1975).”

prohibiting “the imposition of a discriminatory ‘in-lieu tax’”: “Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. Such prohibited tax practices included . . . (4) *the imposition of a discriminatory ‘in-lieu tax’*.” S. Rep. No 94-595, at 165-66 (emphasis added).

CSX mischaracterizes this legislative history. As Alabama explains, “CSX’s legislative history is largely predicated on a research error.” Br. Resp’ts at 53. CSX is simply wrong in claiming that the Conference Committee rejected a narrower House version in favor of the Senate version.

The 4-R Act’s actual legislative history shows that Congress intended subsection (b)(4) to apply only to taxes that are imposed in lieu of property taxes. *See Burlington N. R.R. Co. v. City of Superior, Wis.*, 932 F.2d 1185, 1186 (7th Cir. 1991) (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”). From the time it was introduced in 1974, the fourth prohibited act was repeatedly described as addressing “in lieu” taxes, that is, gross receipts taxes imposed as a substitute for property taxes for particular businesses. This Court noted this in *ACF Industries*, stating: “In fact, when urging Congress to adopt subsection (b)(4), industry representatives characterized the provision as prohibiting only discriminatory in lieu taxes and gross receipts taxes[.]” *ACF Indus.*, 510 U.S. at 346. And nothing in the legislative history indicates that subsection (b)(4) ever was intended to address sales and use taxes at all.

As rail carriers typically do in 4-R Act litigation, CSX cites various circuit court opinions to claim that subsection (b)(4) was intended to prevent discriminatory taxation against railroads “in any form whatsoever,” “by any means,” and “in all of its guises.” Br. Pet’r at 16 (quoting, respectively, *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *Richmond, Fredericksburg & Potomac R.R. Co. v. Dep’t of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983)). But none of these statements has any support in the language of § 11501 or its legislative history.

First, some differential treatment of railroads clearly is permissible under § 11501. Subsection (a)(4), for example, excludes non-commercial and non-industrial property, agricultural land, timber land, and property not subject to a property tax from the statutory comparison class, and thus permits States to tax such property more favorably than rail transportation property. Similarly, under subsection (c), “[r]elief may be granted . . . *only if* the ratio of assessed value to true market value of rail transportation property *exceeds by at least 5 percent* the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.” (Emphasis added.) And this Court in *ACF Industries* held that subsection (b)(4) does not permit claims alleging property tax exemption discrimination. *ACF Indus.*, 510 U.S. at 343. Thus, the text of § 11501 shows that Congress did not intend subsection (b)(4) to address

“any and all forms” of alleged tax discrimination.<sup>15</sup> Second, the legislative history discussed in Section 2 of this brief contradicts that Congress intended subsection (b)(4) to prevent discriminatory taxation of rail carriers in “any and all forms.”

CSX, thus, vastly overstates Congress’s purpose of enacting subsection (b)(4). The legislative history shows that Congress considered that § 11501’s impact on States would be limited to “certain abuses” practiced by some, but not all, of the States. *See* 120 Cong. Rec. 38,734 (1974) (Representative Adams explaining the purpose of H.R. 5385 (1974)). Sales and use taxes were never identified as an area of concern. Thus, nothing in the legislative history supports the notion that Congress intended subsection (b)(4) to be broadly used—as CSX argues—to strike down sales and use taxes imposed on a rail carrier merely because some other person is exempt from such taxes.

Railroads actively participated in the 15-year study by Congress of discriminatory taxation and submitted many reports on the subject during that period. Yet, nowhere in those reports or in other legislative history were sales and use taxes mentioned as part of the problem that needed to be addressed. That omission is significant because sales and use tax exemptions were prevalent

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<sup>15</sup> As Alabama correctly notes, it would be “bizarre” to conclude that “Congress spent 15 years refining its prohibition on discriminatory property taxes, only to draw that prohibition more narrowly than subsection (b)(4)’s prohibition on discriminatory sales and use taxes—a topic Congress never discussed when drafting the statute.” Br. Resp’ts at 23-24.

throughout the period Congress studied this tax discrimination problem. Had Congress viewed the States' practice of providing sales and use tax exemptions as part of the problem, it undoubtedly would have prohibited such exemptions specifically. *Cf. ACF Indus.*, 510 U.S. at 344 (“Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, § [11501]’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.”).

In sum, construing subsection (b)(4) to apply to sales and use taxes is at odds with every indication of Congress’s intent to be found in the legislative history of the 4-R Act. Therefore, there is no warrant for concluding that sales and use tax exemptions for diesel fuel can constitute “another tax that discriminates against rail carriers.”

**3. Limiting Subsection (b)(4) To Taxes Imposed In Lieu Of Property Taxes Is Consistent With The Common Sense Relationship Between Subsections (b) And (c)**

This Court should assume that Congress intended all parts of § 11501, including all parts of subsections (b) and (c), to work together in a congruent fashion. Accordingly, Congress must have intended the relief available under subsection (c) to be coextensive with the discrimination prohibited under subsection (b).

As we explained earlier in this brief, at page 12, relief is available under subsection (c) “*only if the*

ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.” 49 U.S.C. § 11051(c) (emphasis added). Subsection (c) thus applies only to taxes on rail transportation property and taxes that can be viewed as equivalent to those on rail transportation property.

Applying subsection (c) is relatively straightforward in a dispute involving generally applicable ad valorem property taxes. The same is true with respect to gross receipts taxes imposed in lieu of property taxes. *See Western Air Lines, Inc. v. Bd. of Equalization*, 48 U.S. 123, 132 (1987) (“The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of any other tax on that property. It therefore stands *in lieu of the generally applicable ad valorem property tax* that had been assessed on most other commercial and industrial property in the State at the time the airline flight property tax was established.”).

In lieu taxes can be evaluated under § 11501 in the same manner as property taxes. First, the court would determine the total amount of property tax that would be due on the rail carrier’s transportation property by applying the assessment ratios and tax rates for other commercial and industrial property. Second, the court would compare the amount of in lieu taxes paid by the rail carrier to the hypothetical property tax amount to determine if the in lieu taxes paid by the rail carrier exceeded by five or more percent the hypothetical

property taxes. If so, relief would be available under subsection (c); if not, no relief would be available.

In contrast, applying subsection (c) to sales and use taxes would be nonsensical. In no sense are sales and use taxes equivalent to a property tax on rail transportation property. No coherent relationship exists between a tax on a rail carrier's purchase and consumption of tangible personal property (such as diesel fuel) and a tax on "rail transportation property."<sup>16</sup>

Notwithstanding subsection (c), CSX seeks full exemptions from sales and use taxes on its purchase and consumption of diesel fuel. Tellingly, however, CSX fails to discuss or even mention subsection (c) in its brief. In fact, when CSX sets out the "relevant part" of § 11051, it includes only subsections (a) and (b). Br. Pet'r at 1-2. Because it never mentions subsection (c), CSX obviously makes no effort to explain how its proposed remedy is compatible with the limited remedy authorized by subsection (c).

The United States attempts to suggest a more moderate approach than CSX, arguing that the appropriate remedy in a successful challenge under

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<sup>16</sup> Alabama correctly points out that the remedy proposed by CSX—full sales and use tax exemptions on its purchase and consumption of diesel fuel—is contrary to subsection (c): "If Congress intended to prohibit States from granting excise tax exemptions under subsection (b)(4), then Congress should not have left a gaping hole in the remedial provision. Congress should have provided the courts with instructions on how to differentiate between valid and invalid exemptions, as well as guidance on how to remedy the invalid ones." Br. Resp'ts at 38.

subsection (b)(4) is for the court to enjoin only the discriminatory portion of the tax. U.S. Amicus Br. at 24 n.7. But it offers no standard for determining what portion of the tax is discriminatory in the context of a claim alleging exemption discrimination. Nor does the United States explain how enjoining the discriminatory portion of a sales or use tax is within the limited remedy provided by subsection (c). Instead, it merely states that through that subsection “Congress crafted an exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation.” U.S. Amicus Br. at 3.

The interpretation of subsection (b)(4) offered by CSX and the United States—that it applies to any non-property tax—is incompatible with the *only* relief that is available under subsection (c). Reading § 11501 as a whole, and in a harmonious fashion, this Court should conclude that the relief available under subsection (c) is coextensive with the discrimination prohibited under subsection (b), including subsection (b)(4). Therefore, the Court should hold that Congress intended subsection (b)(4) to apply only to discriminatory gross receipts taxes imposed in lieu of property taxes, and not to sales and use taxes.

#### **4. Principles Of Federalism Support Adopting The Interpretation Of Subsection (b)(4) That Is The Least Restrictive Of State Taxing Power**

We have shown that Congress could not have intended subsection (b)(4) to address allegedly discriminatory sales and use taxes. There is not one

iota of evidence in the legislative record suggesting that sales and use taxes, let alone sales and use tax exemptions, were a concern of Congress or the rail carriers. But if any doubt exists as to whether Congress intended subsection (b)(4) to reach claims of alleged sales and use tax discrimination, this Court should adopt the interpretation of subsection (b)(4) that is the least restrictive of the States' taxing powers.

Several important principles apply to challenges in federal courts that involve a State's tax system. These principles aid in avoiding an unintended imbalance between federal interests and traditional state prerogatives.

Long ago the Court underscored the fundamental importance of State taxing power. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873) ("And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence."); *see also Bull v. United States*, 295 U.S. 247, 259 (1935) ("taxes are the life-blood of government"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (cautioning against subjecting the essential taxing power of a state to "intolerable supervision").

Because § 11501 pre-empts the taxing powers of the States, this Court should be "hesitant to extend the statute beyond its evident scope." *ACF Indus.*, 510 U.S. at 345; *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring) ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that

which clearly is mandated by Congress' language."); *Cipollone*, 505 U.S. at 523 (opinion of Stevens, J.); *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986). Therefore, the Court "will interpret a statute to pre-empt the traditional State powers only if that result is 'the clear and manifest purpose of Congress.'" *ACF Indus.*, 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The strong presumption against pre-emption thus requires a fair but narrow construction of the statutory language being considered. *Cipollone*, 505 U.S. at 523.

Principles of federalism compelled this Court in *ACF Industries* to conclude that "neither subsection (b)(4) nor the whole of § [11501] meets this standard with regard to the prohibition of property tax exemptions." *ACF Indus.*, 510 U.S. at 345 ("Principles of federalism support, in fact compel, our view."). The Court explained why subsection (b)(4) and § 11501 failed to meet the "clear and manifest purpose" standard:

"Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt non-railroad property, we are confident that it would have spoken with clarity and precision. Property tax exemptions are an important aspect of state and local tax policy. It was common at the time § [11501] was drafted, as it is now, for States with generally applicable ad valorem property taxes to exempt various classes of commercial property. . . . Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, § [11501]'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.” *ACF Indus.*, 510 U.S. at 344.

Section 1 of this brief explains why subsection (b)(4) is not plain. Since more than one permissible reading of the subsection is available, the Court should prefer the one that is the least restrictive of State taxing authority. That approach, required by principles of federalism, respects this Court’s frequently repeated insistence that “in structuring internal taxation systems ‘the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.’” *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). State legislatures pursue a host of legitimate interests through their tax systems. This leeway for States should apply in full to the determination of whether Congress intended subsection (b)(4) to apply to sales and use tax systems.

Section 11501 and subsection (b)(4) are silent with respect to sales and use tax systems. Moreover, nothing whatsoever in the legislative history suggests that Congress had any concerns with such systems, let alone sales and use tax exemptions. Neither § 11501, subsection (b)(4), nor the legislative history indicates that Congress intended to pre-empt the States’ traditional taxing powers with respect to sales and use taxes. Thus, nothing demonstrates a clear and manifest purpose of Congress to address

allegations of sales and use tax discrimination through subsection (b)(4).

Section 11501 also is a limited exception to the general policy of noninterference with State taxation reflected in 28 U.S.C. § 1341, the Tax Injunction Act. So pervasive is the policy behind the Act that exceptions to the Act should be read narrowly. This Court often has recognized the strength of the policy behind the Act. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (“the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations”); *Nat’l Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 586 (1995) (“We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.”).

Here, important principles of federalism strongly caution against concluding that Congress intended through subsection (b)(4) to address alleged discriminatory sales and use tax systems. If Congress had intended to prohibit alleged discriminatory sales and use taxes through subsection (b)(4), and not just taxes imposed in lieu of property taxes, it would have spoken with clarity and set forth an explicit prohibition like those contained in subsections (b)(1)-(3) pertaining to tax rates and assessment ratios. *Cf. ACF Indus.*, 510 U.S. at 344 (“Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision.”).

There is nothing explicit or sufficiently implied in the vague prohibition in subsection (b)(4) to justify finding a manifest and clear intent by Congress to impinge upon the States' sovereign taxing powers in the area of sales and use taxes. Nor through § 11501 has Congress clearly and manifestly expressed any intent to foreclose the States from tailoring their sales and use tax systems to accommodate particular needs. Fairly and narrowly interpreted, subsection (b)(4) should be construed to apply only to in lieu taxes for the reasons explained in Sections 1, 2, and 3 of this brief. This Court should decline to adopt—as CSX and the United States urge—an expansive and virtually unlimited interpretation of subsection (b)(4) that unquestionably would have a significant impact on the States' taxing powers, particularly where such a broad interpretation is unsupported by any clear language in § 11501.

Applying the foregoing principles to § 11501, CSX may not challenge Alabama's sales and use taxes in the federal courts pursuant to subsection (b)(4).

*[end of text on page]*

**CONCLUSION**

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

RESPECTFULLY SUBMITTED.

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