No. 06-1287

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION of the State of Georgia; Bart L. Graham, as Commissioner of Revenue of the State of Georgia; Russell W. Hinton, as State Auditor of the State of Georgia; and Gena L. Abraham, as Director of the Georgia State Properties Commission,

Respondents.

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

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July 30, 2007

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QUESTION PRESENTED

Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501(b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

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

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The order and judgment of the Court of Appeals, reported at 472 F.3d 1281 (11th Cir. 2006), appears at Joint Appendix ("JA") 244-266; see also Petition Appendix ("Pet. App.") 1a-23a. The order of the United States District Court for the Northern District of Georgia, which is reported at 448 F. Supp. 2d 1330 (N.D. Ga. 2005), appears at JA 194-242; see also Pet. App. 24a-72a.

JURISDICTION

The order and judgment of the Court of Appeals was entered on December 19, 2006, JA 244; Pet. App. 1a, and rehearing was denied on February 12, 2007, Pet. App. 73a. This Court granted the petition for writ of certiorari on May 29, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act"), 49 U.S.C. § 11501 (2002), is set forth in the Pet. App. at 75a-77a.[1]

STATEMENT OF THE CASE

Redressing decades of damaging state and local tax discrimination against interstate railroads, Congress in 1976 empowered federal district courts to enjoin the collection of property tax when the ratio of assessed value to the "true market value" of railroad property exceeds the same ratio for other commercial and industrial property in the State by 5%

[1] There are some differences in language between Section 306 as originally enacted in § 306 of Pub. L. No. 94-210, 90 Stat. 31, 54-55 (1976), and as subsequently codified at 49 U.S.C. § 11503 (which was later redesignated as 49 U.S.C. § 11501). The recodification, however, was not intended to effect any substantive change. *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

or more. 49 U.S.C. § 11501(b)(1) & (c). The 4-R Act thus defines a precise formula for proving discrimination based on the economic standard of true market value. The plain meaning of this language is to require the district court to make an independent finding of the "*true* market value" of railroad transportation property. The determination of value is a question of fact that courts routinely decide based on evidence at trial.

Improperly invoking the federalism-based "clear-statement" canon of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), to rewrite the statute, the Eleventh Circuit held categorically that "railroads may not challenge state valuation methodologies under subsection (b)(1)." JA 257; see JA 260 (defining valuation methodology to encompass "all nonfactual determinations . . . [of the State's appraiser] in constructing a valuation process, regardless of how broad or narrow they may be"). The court below thus upheld the exclusion of CSXT's expert testimony on the market value of its property. The Eleventh Circuit's exclusionary rule not only finds no support in the statute, but also makes the non-discrimination provisions completely hollow. A district court's independent determination of a property's market value in adjudicating a federal discrimination claim does not trench upon the State's sovereign power to tax. Because the valuation approaches at issue here are simply standard appraisal tools to generate evidence of a given property's value, a district court must be free to receive competing expert testimony on market value to resolve this factual element of a federal discrimination claim. Most fundamentally, the Eleventh Circuit's rule immunizes a principal means by which States practice discrimination, namely, the adoption and weighting of valuation methods that yield inflated estimates of the market value of railroad property. This Court should not interpret this remedial antidiscrimination statute to be self-defeating, and therefore should reverse the judgment below.

A. Statutory Background

1. Nearly 50 years ago, Congress began an exhaustive examination of the economic situation of the railroad industry in what has since become known as the "Doyle Report." S. Rep. No. 87-445 (1961). The Report identified "trends which g[a]ve cause for concern for the future overall adequacy and efficiency of our transportation system and for the health if not the very existence of common carriers." *Id.* at 47. The Report recognized that "the chief tax burden on railroads is applied by State and local governments," *id.* at 567, and identified "a studied and deliberate practice of assessing railroad property as a proportion of full value substantially higher than other property." *Id.* at 458.

The Doyle Report spurred Congress to hold a series of hearings to consider legislation addressing state-tax discrimination against railroads. On the basis of those hearings, Congress determined that interstate railroads "are easy prey for State and local tax assessors" and that "'the existence of inequitable State and local property assessments and tax policies has served to jeopardize the continued existence of essential rail passenger service.'" S. Rep. No. 91-630, at 2-3 (1969). For example, a 1968 Committee Report highlighted that "[i]n the last 7 years, the railroads alone have been assessed more than $800 million in discriminatory taxes." S. Rep. No. 90-1483, at 2 (1968). In 1972, Congress found that the 19 States that imposed the greatest excess tax burden on railroads on average overtaxed railroads relative to other property in the State by almost 40 percent. S. Rep. No. 91-630, at 5-6 & tbl. In 1975, Congress found that because of discriminatory state taxation, "railroads are over-taxed by at least $50 million each year." H.R. Rep. No. 94-725, at 78 (1975). Congress concluded that discrimination contributed to the "extremely bleak" economic state of the railroad industry. *Id.* at 80.

Congress also recognized that protections for railroads were limited absent remedial federal legislation. Although some federal and state courts had "voided discriminatory tax as-

sessments and levies on common carrier property" based on express state-law protections, those decisions did "not reach the situation . . . where the express provisions of State law or a State constitution permit such discriminatory treatment." S. Rep. No. 90-1483, at 6-7. Moreover, federal constitutional challenges provided little relief. See *id.* at 7. States were permitted to classify carrier property in a separate class from other taxable property in the same district. See *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 368-70 (1940). Thus, it was no surprise that Congress determined that "[c]omplaints to the courts about relative discrimination . . . are seldom successful." S. Rep. No. 87-445, at 454; see also *id.* at 471 ("[T]here was much reason to accept the observation of one writer on constitutional law that 'States can tax interstate commerce if they go about it the right way.'") (footnote omitted). Accordingly, Congress concluded "that such discrimination must be ended." S. Rep. No. 92-1085, at 7 (1972).

2. Finally, in 1976, after eight major railroad bankruptcies, Congress enacted the 4-R Act to address the myriad problems that had been caused by the then-current state of the law. H.R. Rep. No. 94-725, at 53; S. Rep. No. 94-499, at 2-3 (1975). Section 306 was a critical part of that reform, through which Congress intended "'to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district.'" S. Rep. No. 91-630, at 2.[2] Congress intended its legislation to "provide a plain, speedy, and effective remedy" in instances of discriminatory tax assessment, S. Rep. No. 90-1483, at 7, that would ensure "a safe, viable, and efficient rail industry" and promote "the national interest and the national

[2] *See also* S. Rep. No. 91-630, at 17 ("[I]t is well recognized that the basic purpose of this legislation is to provide a solution to a longstanding and deeply rooted problem, the practice of many State or local governments[']taxing authorities setting inequitable and discriminatory assessments and tax levels on the property of the Nation's railroads.").

defense." H.R. Rep. No. 94-725, at 101; see also H.R. Conf. Rep. No. 94-768, at 1 (1975).

Section 306 of the 4-R Act (hereinafter referred to as Section 11501, its present section within the U.S. Code) specifically outlaws four enumerated taxation practices of "a State, subdivision of a State, or authority acting for a State or subdivision of a State" that "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first outlawed practice, at issue here, concerns States'

> [a]ssess[ing] 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.

Id. § 11501(b)(1).

States are also prohibited from "[l]evy[ing] or collect[ing] on an assessment" that is prohibited by subsection (b)(1), *id.* § 11501(b)(2), as well as from "[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 same assessment jurisdiction," *id.* § 11501(b)(3). Finally, 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." *Id.* § 11501(b)(4).

Congress established that "[t]he burden of proof in determining assessed value and true market value is governed by State law." *Id.* § 11501(c). Finally, "notwithstanding" the Tax Injunction Act (28 U.S.C. § 1341) or the amount in controversy, Congress granted federal district courts, "jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of [Section 11501(b)]." 49 U.S.C. § 11501(c). Relief could only be granted, however, "if the ratio of assessed value to true mar-

ket 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." *Id.*

Thus, Congress established a precise formula for determining when a district court could grant relief for a violation of subsection (b)(1):

$$\frac{\text{Assessed Value of Rail Transportation Property}}{\text{True Market Value of Rail Transportation Property}} \text{ exceeds by greater than 5\% } \frac{\text{Assessed Value of Other Commercial \& Industrial Property}}{\text{True Market Value of Other Commercial \& Industrial Property}}$$

B. Valuation of Property

Congress explained that "'true market value'" is the "standard to which values that have already been determined must be compared," and defined it as "the generally accepted standard for assessment purposes." S. Rep. No. 91-630, app. A at 26; S. Rep. 90-1483, app. B at 22 (same). Congress's use of "true market value" as the appropriate measure for the taxation of rail property adopted a concept widely used in the ad valorem taxation of property. *Cleveland, Cincinnati, Chi. & St. Louis Ry.* v. *Backus*, 154 U.S. 439, 447 (1894) ("the rule of all property taxation is the rule of value"). The assessment of ad valorem taxes on real or personal property generally involves three steps. First, the taxing authority calculates a market value for the subject property. See *Property Appraisal and Assessment Administration* 18 (Joseph K. Eckert ed., 1990) (hereafter "*Property Appraisal*"). Second, an "as-

sessed value" is calculated. See *id.* at 18-19. In some states the assessed value is equal to the market value; in others assessed value is a specified percentage of the market value. See Appraisal Institute, *The Appraisal of Real Estate* 29 (12th ed. 2001). Finally, the taxing authority applies a particular tax rate to the assessed value of the property.[3] See *Property Appraisal* 19. In every jurisdiction assessing an ad valorem tax, therefore, the market value of the subject property directly affects the total amount of the tax.

The "market value" of a property is the most probable price at which a willing buyer and a willing seller would agree to exchange the property in a competitive market. Appraisal Institute, *supra*, at 22; *Property Appraisal* 35 ("Generally, market value is the cash price a property would bring in a competitive and open market."); Nat'l Ass'n of Tax Admin'rs, *Appraisal of Railroad and Other Public Utility Property for Ad Valorem Tax Purposes* 2 (1954) (hereafter "*NATA Report*"); accord *United States* v. *Miller*, 317 U.S. 369, 374 (1943) ("'market value' . . . denotes what 'it may fairly be believed that a purchaser in fair market conditions would have given'" (quoting *New York* v. *Sage*, 239 U.S. 57, 61 (1915)). Market value is an objective test of value. The market value is not the value that a particular person might subjectively place on a property; it is the value that an objectively reasonable willing buyer and willing seller would reach. See *Property Appraisal* 80.

The market value of a railroad's property can be determined in two ways. The first, the summation method, individually values each tract of property in a State and then adds the resulting values to derive a total value for the taxing jurisdiction. See S. Rep. No. 87-445, at 453. The unit method, on the other hand, seeks to determine a single system-wide value for the railroad, and then to assign a portion of that system-

[3] Where a property spans more than one taxing jurisdiction (such as a property in more than one county), a fourth step is necessary: allocating the value of the property among the jurisdictions in which it is located.

wide value to the particular State (for interstate railroads) and to the individual taxing districts within the State. This allocation of value is typically proportional to the percentage of a railroad's property located within a State, often measured by factors such as track mileage. Alfred A. Ring & James H. Boykin, *The Valuation of Real Estate* 428-29 (3d ed. 1986). The unit method has been recognized to be a superior method of valuing railroads, largely because it allows a more ready consideration of the railroad's going concern value. See *id.* at 419 ("Railroads . . . are more than a summation of lumber, steel, brick, and mortar. They are going concerns that succeed or fail as a 'whole.'"); *NATA Report* 2 (unit appraisal of utilities is "markedly superior" than summation method). Almost all States, including Georgia, that apply a property tax to railroads use the unit method. See N.Y. State Office of Real Prop. Servs., *Survey of Railroad and Utility Taxation Practices Among the States* tbl.1, *available at* http://www.orps.state.ny.us/ref/pubs/railroadutility/section1.htm (last modified May 17, 2005); James F. Runke & Alan E. Finder, *State Taxation of Railroads and Tax Relief Programs* 27 (1977).[4]

The market value of a property at a given point in time "is not a matter of arithmetical calculation and is not governed by any fixed and definite rule." *Rowley* v. *Chicago & Nw. Ry.*, 293 U.S. 102, 109 (1934), *amended by* 293 U.S. 532 (1934).[5] Instead, ascertaining true market value for any property requires the exercise of judgment, taking into account all the

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[4] This Court has long approved of the unit method of valuing railroads. *See, e.g.*, *Norfolk & W. Ry.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 324 (1968) ("value may be ascertained by reference to the total system of which the intrastate assets are a part"); *Louisville & Nashville R.R.* v. *Greene*, 244 U.S. 522, 548 (1917).

[5] *See Rowley*, 293 U.S. at 109 ("Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property.").

pertinent factors that influence market value. See Appraisal Inst., *supra*, at 65; *NATA Report* 8-9, 60. The professional discipline of property appraisal has developed a variety of techniques to aid property appraisers in assessing the value of property. Appraisers generally study property from three different viewpoints, referred to as the "approaches" to value. Appraisal Inst., *supra*, at 62. These approaches are the cost approach, the sales comparison approach, and the income capitalization approach. See *id.* at 62-65; JA 246; JA 63-64; S. Rep. No. 87-445, at 455-56, 475-78.

The cost approach is predicated on the assumption that a property's value is related to its cost. See Appraisal Inst., *supra*, at 63. Under the cost approach, the estimated value of the land is added to the estimated cost of reproducing all buildings and improvements on the land, minus the amount of depreciation in the structures. See *id.* The cost approach is not well suited for properties with older structures with substantial depreciation, because of the difficulty in accurately estimating obsolescence. See *id.* at 62; *NATA Report* 8.

The sales comparison approach is most useful for properties that are frequently exchanged on the market, such as single-family homes. See Appraisal Inst., *supra*, at 63-64. An appraiser using the sales comparison approach will identify properties sold in the subject property's market that have similar characteristics. See *id.* From these comparable sales, the appraiser derives an indicated value for the subject property. See *id.* Because it is predicated on actual market transactions, the sales comparison approach is a strong indicator of value where there is sufficient sales data to support it. See *id.* at 63; JA 64. It has little utility, however, for properties that are rarely sold on the open market. See Appraisal Inst., *supra*, at 62.

A variant of the sales comparison approach, known as the stock-and-debt approach, has emerged for publicly traded corporations that involve interstate networks (such as railroads and utilities). Because the enterprise as a whole is rarely sold,

and thus there is "seldom available objective market evidence as to the price that railroads or public utilities would command if offered for sale, the next best alternative is the market price of the stocks and bonds of the enterprise owning the property." Ring & Boykin, *supra*, at 426. Although theoretically sound for an enterprise comprised solely of assets subject to assessment, the stock-and-debt valuation approach in practice yields "dubious and unreliable evidence of the value of the assets that are subject to assessment for ad valorem purposes." *Id.* The reason is that many enterprises own assets that are not subject to assessment for property taxes (such as shares of subsidiaries or investments). Furthermore, given the many factors (such as interest rates) that affect stock and bond prices, "[t]here is no reliable relationship between the constantly fluctuating market of stocks and bonds and the tangible and intangible assets reflected by such securities." *Id.* Appraisers generally do not use this approach to determine value, but "appraisal practice does sanction this method as a possible check on the reasonableness of the final estimate of value." *Id.*

The third approach, the income approach, assumes that a property's value is equivalent to its earnings potential. See *id.* at 64; Roger A. Morin, *Regulatory Finance: Utilities' Cost of Capital* 99 (1994) ("the value of an asset stems from the discounted present value of its future cash flow stream"); *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 328 (1893) ("The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."). This approach therefore estimates the present value of a property's future earnings. See Appraisal Inst., *supra*, at 64. An appraiser using the income approach must both determine the likely future income stream and discount future earnings to present value. See *id.* at 64-65.

Each of these three general approaches encompasses several specific analytical techniques. See *id.* at 50. For instance, an appraiser seeking to estimate value through an in-

come capitalization approach could do so through a direct capitalization analysis, a yield capitalization analysis, or a discounted-cash-flow analysis, each of which has various permutations which "yield value conclusions that differ importantly from one another." Ring & Boykin, *supra*, at 333.

Appraisers ordinarily select and apply several valuation methodologies, so that the results of the methodologies can be used as a check on the others. See JA 79; Appraisal Inst., *supra*, at 62. The selection of methodologies must be made in light of the data and the appraiser's professional judgment. See *id.* Appraisers are to "consider[] all conceptual approaches deemed to be relevant by the appraiser," and to "select and apply appropriate valuation approaches, methods, and procedures." Am. Soc'y of Appraisers, *Business Valuation Standards* 5, 6 (2002). The determination of which valuation techniques are appropriate depends on factors such as the characteristics of the property, the available data, and the appraiser's own professional opinion of the utility of the various techniques. See Appraisal Inst., *supra*, at 50, 62; S. Rep. No. 87-445, at 452 ("Valuation or appraisal is a *process* by which an assessor arrives at his *opinion* of the value of the property") (emphasis added). Ultimately, the choice of techniques "depends on the judgment of the appraiser and not on any prescribed formula." Am. Soc'y of Appraisers, *supra*, at 14; see also William N. Kinnard, Jr., *Income Property Valuation: Principles and Techniques of Appraising Income-Producing Real Estate* 49 (1971).

Once methodologies have been selected and applied to the subject property, the appraiser must arrive at his or her opinion of value. No one methodology of value produces the "true market value" of the property. Instead, the different value approaches, and the valuation methodologies within the approaches, are "evidence of value," which the appraiser should consider in exercising his or her professional judgment to arrive at an opinion of value. *NATA Report* at 8; see *id.* at 60 (none of "the value evidences" are "sufficiently error-

proof to warrant implicit reliance" on any single evidence or formulaic average of evidences); JA 123. Sound appraisals therefore are based not on mechanical formulas, but rather on an appraiser's consideration of the different evidence of value in light of "common sense, informed judgment and reasonableness." Rev. Rul. 59-60, 1959-1 C.B. 237 § 3.01.

In general, appraisers give the most weight to the methodology that is most supportable in light of the available data. See *Property Appraisal* 108. If different evidence of value suggests widely different results, appraisers often will use their judgment to discount the methodologies that are less reliable. See *NATA Report* at 8 ("[W]hen one evidence of value varies widely from the others, it should be a warning signal to examine critically the underlying data to see whether this evidence is really persuasive in this particular case. If it is not, this evidence of value should be ignored, or at best should weigh very lightly in the decision . . . .").

While the size and unique characteristics of railroads—and particularly interstate railroads—make the valuation of railroad property more complex than the valuation of most real property, the determination of "true market value" for a railroad's property is governed by the same principles as for any property valuation. An appraiser assessing the value of railroad property chooses techniques to generate evidence of a value and should use the results of those techniques as evidence in forming his or her professional opinion as to market value. Ring & Boykin, *supra*, at 427; *NATA Report* 8, 60.

C. *Burlington Northern Railroad* v. *Oklahoma Tax Commission*

Eleven years after the 4-R Act became law, this Court determined whether section 11501(b)(1) "permits review by federal courts of alleged overvaluation of railroad property by state taxation authorities." *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 456 (1987). Noting the congressional finding that "'railroads are over-taxed by at least $50 million

each year,'" this Court held that Congress chose to accomplish "the goal of furthering railroad financial stability" by prohibiting "discriminatory state taxation of railroad property." *Id.* at 457 (quoting H.R. Rep. No. 94-725, at 78). Section 11501 was "Congress' solution to the problem of discriminatory state taxation of railroads." *Id.*

This Court stated that "the language of [§ 11501] plainly declares the congressional purpose," for "[i]t is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are." *Id.* at 461. Therefore, the Court ruled, "assessed value and true market value are subjects for judicial inquiry," *id.* at 462. This Court found that the statute's plain meaning foreclosed a cramped construction of the term "true market value" to mean "'state determined market value'" (the reading favored by the state authorities) or state-determined market value absent proof of intent to discriminate (the reading adopted by the court of appeals). *Id.* at 461-63. Accordingly, the Court dismissed concerns about federalism, burdens on federal courts, and state tax collection delays, stating:

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

Id. at 464.

In passing, this Court briefly explained in a footnote an issue that had not been presented by petitioner and left that issue open for resolution another day:

> Petitioner has not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology . . . . This case therefore does not present the question whether a railroad may, in an action under [Section 11501] challenge in the district court the appropriateness of the accounting

> methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly, we express no view on that issue.

Id. at 463 n.5. This case brings the Court to that other day.

D. Factual Background

This case involves CSXT's challenge to the 2002 assessment of its property by the State Board of Equalization of Georgia ("the Board"), and raises the issue left open in *Oklahoma Tax*. Under Georgia law, most commercial and industrial property is locally assessed by county boards, but public utilities (including railroads) are centrally assessed by the State. Georgia counties are permitted, but not required, to use the State's proposed assessment in imposing taxes. JA 245-246.

In Georgia, the Property Tax Division of the Georgia Department of Revenue ("the Department") has traditionally valued railroad transportation property by use of the unit method, although there are no state constitutional, statutory, or regulatory provisions dictating the methodology the Department must use. In 2002, Gregg Dickerson, a program manager, performed the appraisal. JA 201. Mr. Dickerson changed the approaches and techniques used to calculate unit value. Formerly, railroad transportation property was valued using a yield capitalization method (an income approach), a direct capitalization method (an income approach), and a stock-and-debt method (a sales comparison approach). For the 2002 tax year, Mr. Dickerson replaced the first two of those methods with a discounted cash flow ("DCF") method (an income approach) and a market multiples method (a sales comparison approach). JA 247.

Mr. Dickerson generated five values from these approaches, ranging from $8.126 billion (using the DCF method) to $12.346 billion (using the market multiples

method). JA 247-248. Mr. Dickerson selected a unit value of $8.2 billion as close to the lowest of his estimates.[6] JA 248. Mr. Dickerson's 2002 overall unit value for CSXT of $8.2 billion was 47% higher than the 2001 valuation. JA 232. After adjustments and deductions, Mr. Dickerson calculated taxable market value of CSXT's property in Georgia (based on the percentage of rail miles in the State) at $514.9 million. JA 248. That was an increase of 36% from the 2001 Georgia taxable value of CSXT's property. Moreover, in 2002, CSXT's property tax liability in Georgia was $6.5 million, whereas its 2001 liability was only $4.6 million. It was undisputed below that no major non-railroad utility taxpayer received any significant increases in values between 2001 and 2002. JA 151.

E. Proceedings Below

1. *The District Court.* CSXT filed a complaint in the United States District Court for the Northern District of Georgia challenging the Department's valuation under Section 11501(b)(1) of the 4-R Act. JA 248. In this case, the ratio of the assessed value to the true market value of other commercial and industrial property was not disputed. Thus, in order to determine whether the assessed value of CSXT's property as determined by Mr. Dickerson was discriminatory, the pivotal issue was what was the true market value of CSXT's property.

After CSXT filed suit, Mr. Dickerson prepared "a complete appraisal of CSXT using essentially the same three valuation methods that he [had] employed" earlier. JA 203. However, after discovery, Mr. Dickerson prepared "a revised full appraisal of CSXT" in which he changed "the calculation of the cost of equity used in deriving the weighted cost of capital." *Id.* As a result of this change, Mr. Dickerson "ultimately

[6] While Mr. Dickerson stated that $8.2 billion was at the bottom of the range of unit values for CSXT, JA 202, his estimate was the highest among the 15 States where CSXT operates that use the unit value method, JA 169.

opined that the fair market unit value of CSXT was $11.807 billion." JA 204.

CSXT argued and proved that its true market value was $6 billion, and thus the State had violated Section 11501(b)(1), since CSXT "was taxed at a higher ratio of assessed value to true market value than other commercial and industrial property." JA 249-250. CSXT submitted an appraisal prepared by a valuation expert, Thomas Tegarden, whose credentials were described by the district court as "'impeccable.'" JA 250 (quoting JA 195).[7] Mr. Tegarden used three different approaches to approximate "true market value," but relied primarily on a yield capitalization analysis. JA 250. Based on a unit value of $6 billion, he calculated the value of CSXT's Georgia property as worth $369.3 million. JA 194.

Thus, CSXT was taxed as though the unit value of its property was worth $8.2 billion, when based on Mr. Tegarden's analysis, the unit value of its property was worth only $6 billion. The parties agreed that the other commercial and industrial properties in the State were taxed at their true market value. Because Mr. Tegarden's appraisal indicated that CSXT's property was appraised for assessment purposes at a value that was 137% of its true market value, unlike other commercial and industrial properties, which were appraised

[7] The district court correctly assessed Mr. Tegarden's credentials. Among other appraisal designations, he is both a Member of the Appraisal Institute, which is considered "the highest appraisal designation offered in the field of appraisal," and a Certified Assessment Evaluator of the International Association of Assessing Officers, which is "the highest designation offered by that organization." JA 128; JA 164. He has more than 35 years of appraisal and consulting experience on behalf of taxpayers and numerous state and local revenue departments, including the Georgia Department of Revenue. JA 164-165. He also has 15 years experience with the Tennessee Public Service Commission, which at the time was responsible for the "tax valuation of public utilities and railroads." JA 166. In contrast, Mr. Dickerson holds no appraisal designation from the Appraisal Institute and has never done a "formal written unit rule appraisal" before this case. JA 149-150.

for assessment purposes at 100% of their true market values, CSXT argued that the State had discriminated against CSXT.

The district court held that it was not permitted to consider Mr. Tegarden's appraisal because the 4-R Act barred consideration of appraisals "based on a valuation methodology different from the methodology used by the State, unless the methodology of the State is irrational or intentionally discriminatory." JA 250. The district court elaborated:

> This is a case brought under the 4-R Act and the court must determine the true market value of CSXT. *CSXT, in turn, has the burden of proving by a preponderance of the evidence that the true market value of its property is $6 billion.* To do this, CSXT presented two types of evidence. First, it criticized the Department's calculations. Second, it presented a valuation of its property by Mr. Tegarden. *In a more typical case, the court would look to both Mr. Tegarden's appraisal and the Department's appraisal to determine the true market value of CSXT.* If the court found by a preponderance of the evidence that CSXT's true market value was $6 billion, as proposed by CSXT, then the court would compare the Department's Proposed Valuation to CSXT's true market value to determine if discrimination occurred. *However, as explained later in this order, the court cannot consider Mr. Tegarden's valuation because it was prepared using different valuation methods than the Department. The court, therefore, is limited to looking solely at CSXT's criticisms of the Department's valuation.*

JA 207 n.8 (emphases added).

The district court further rejected CSXT's argument that Mr. Tegarden's valuation methodology was a variant of the State's own methodology. JA 215. Finally, the district court rejected CSXT's challenges to the Board's calculations, and, using Mr. Dickerson's discounted cash flow number with

some modifications, found that the unit value of CSXT's property was $7.7 billion. JA 241 & n.32. The court therefore found that the ratio of assessed to market value of CSXT's property did not exceed by more than 5% the same ratio for other commercial and industrial property, and entered judgment for the Board. JA 241-42.

2. *The Eleventh Circuit.* A divided court of appeals affirmed. The court began by stating that "[w]hether a railroad may challenge, under the 4-R Act, the valuation methodology of a state is a question the Supreme Court has acknowledged but not decided." JA 252 (citing *Okla. Tax*, 481 U.S. at 462-63 & n.5). The Eleventh Circuit employed a clear statement canon as necessary to uphold the State's approach. The court relied upon this Court's decision in *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), a case which involved a different subsection of Section 11501. JA 256-57. The court below found no clear statement that federal courts could determine true market value using methodologies other than those of state assessors: "[R]ailroads may not challenge state valuation methodologies under subsection (b)(1). The text of the Act does not clearly state that railroads may challenge valuation methodologies. Without that clear statement of congressional intent, the argument of the Railroad fails." JA 257. The district court, it concluded, had to accept "all nonfactual determinations . . . [of the state appraiser] in constructing a valuation process, regardless of how broad or narrow they may be," including not only his choice of analytical techniques but the weighting of the results of those analyses. JA 259-260.

Judge Fay dissented with regard to this holding. JA 263. Judge Fay declared that "[t]he language of the statute is straightforward and prohibits states from assessing rail transportation property at a value that has a higher ratio to the true market value than the ratio that the assessed value of other commercial and industrial property has to its true market value." *Id.* Judge Fay concluded:

> Since the objective of any methodology is a determination of *true market value*, a railroad should be allowed to challenge the method used in an attempt to prove that the result of such a method was not the *true market value* of its property. . . . If the Railroad can prove that the method used by the state does not result in a fair appraisal of true market value and that the assessed value is in fact at a ratio higher than five percent of the ratio of true market value and assessed value of other commercial and industrial property, it is entitled to relief.

JA 266.

SUMMARY OF ARGUMENT

The Eleventh Circuit held that the 4-R Act's grant of power to a federal district court to determine the "true market value" of railroad transportation property in assessing tax discrimination by state governments is limited to finding error in the state appraiser's "factual determinations" in applying valuation techniques. According to the Eleventh Circuit, the statute forbids a district court, in determining true market value, to consider the railroad's expert testimony on market value (or otherwise consider any evidence of value) based on valuation techniques not used by the State's appraiser.

The Eleventh Circuit's exclusionary rule has no foundation in the statute, and is inimical to a statute designed to remedy tax discrimination by state and local authorities. Section 11501(b)(1) prescribes a precise formula for measuring discrimination. Under that formula, true market value is the economic standard by which the existence and degree of discrimination is determined. The market value of a property, and the choice and weight assigned to various techniques for estimating value, are questions of fact, and valuations of property using the techniques at issue here "are routinely made in judicial proceedings." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 741-42 (1997).

Congress did not require proof of "true market value" as an element of a section (b)(1) discrimination claim, but deprive railroads of the power of proving that element with independent valuation evidence. The Eleventh Circuit's characterization of the state appraiser's choice to compare and weigh particular income capitalization and sales comparison techniques as "delicate matters of state policy," JA 260, is unfounded. In any property valuation, it is the standard practice of professional appraisers to employ multiple techniques to generate different evidence of value, which the appraiser considers in reaching a final judgment of value, based on the nature of the property, the relative reliability of the different techniques, and the soundness of the data. Such choices do not involve policymaking. Thus, the plain and ordinary meaning of Congress's delegation to federal courts to determine the "true market value" of railroad transportation property is to make an independent determination of market value, based on any relevant evidence of value presented by the parties.

Nothing in the Act restricts the district court to considering only that evidence of value generated by techniques favored by the state appraiser. The district court does not review the State's methodology for discriminatory purpose or arbitrariness; it does not examine whether States use the same or different valuation methods for railroad and commercial and industrial property; and even if it finds a violation, it does not enjoin the State from using any particular valuation method or technique in future valuations and assessments. Instead, Congress has defined discrimination solely in terms of a comparison of the ratios for assessed-to-true market value of railroad transportation property versus other commercial and industrial property. The district court (1) makes findings of fact on the assessed and true market value of each kind of property, (2) compares the ratios, and (3) may grant relief as long as the railroad ratio is at least 5% higher than the ratio for other commercial and industrial property. 49 U.S.C. § 11501(b)(1) & (c). Claims of contrary "state valuation pol-

icy" cannot prevent an independent judicial finding according to the precise standards of the 4-R Act of whether the State has discriminated against the railroad in valuing and assessing property for tax purposes.

Indeed, the district court's statutory duty to determine "*true* market value" precludes the Eleventh Circuit's construction, which enjoins the district court to accept the methods, approaches, and techniques used by the States even if the valuation results they produce are *inaccurate* and *unreliable*. Other provisions of the statute confirm that the district court is to make an independent determination of market value in adjudicating (b)(1) discrimination claims. Indeed, the Eleventh Circuit's construction disregards the context in which the 4-R Act was passed. As documented in congressional studies and hearings, the valuation methods and practices that the States employed were a major source of discrimination against the railroads. See *infra*, at 35-36, 38. Those methods and practices included using flawed valuation approaches (such as reproduction cost) that inflated railroad valuations, or requiring more frequent revaluations of railroad property that caused assessments to increase more rapidly than other property assessments. Congress did not pass a self-defeating statute that grants a discrimination remedy in district court, but disables courts from rectifying one of the principal means by which states discriminate against railroads.

The Eleventh Circuit's reliance on the clear-statement canon of *Gregory* v. *Ashcroft* is misplaced. That canon applies only when there are two permissible constructions of an ambiguous statute. Even the Eleventh Circuit did not suggest that (absent federalism concerns) the term "true market value" can be plausibly interpreted to mean the state appraiser's valuation of the property, adjusted for mere arithmetic errors. The Eleventh Circuit's exclusionary rule is simply an implied limitation on the railroad's proof to vindicate putative state interests. But the *Gregory* canon does not license the judiciary to rewrite the statute. In any event, the natural meaning

of subsection (b)(1) – that a court may consider any relevant evidence of value in defining "true market value" of property for the sole purpose of deciding a discrimination claim – does not alter the constitutional balance between state and federal governments. Congress altered that balance by imposing a federal prohibition on discrimination practices that were prevalent in the States. No constitutional question is avoided by a statutory construction that limits the evidence the district may receive in adjudicating a subsection (b)(1) claim.

Department of Revenue v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), relied on by the Eleventh Circuit, is not to the contrary. That case concerned a different part of the 4-R Act (subsection (b)(4)). The construction of subsection (b)(4) proposed by the plaintiffs – abolition of state power to grant legislative exemptions for certain kinds of commercial property from ad valorem taxation – would have constituted a significant invasion of state sovereignty. The Court there did not apply the *Gregory* canon to resolve ambiguity; rather it determined that the statute, construed as a whole, had a more limited meaning, and that principles of federalism prohibited expanding its preemptive force beyond its "evident scope." *Id.* at 345. The *ACF* Court specifically contrasted (b)(4) with (b)(1) – the statute at issue here – construing the latter to declare "*precise standards for judicial scrutiny of challenged rate and assessment practices*." *Id.* at 343 (emphasis added). Nothing in *ACF* supports rewriting (b)(1), so that it defeats the purpose for which Congress enacted the 4-R Act.

Finally, recourse to the legislative history is unnecessary given the plain meaning of subsection (b)(1), but that history simply shows that even the opponents of the Act understood that district courts would make independent determinations of true market value.

The 4-R Act is an antidiscrimination statute meant to protect railroads from the damaging effects of unfair and excessive property taxation. The Eleventh Circuit's exclusionary rule is irreconcilable with the plain text and purpose of the

statute, and should be rejected. CSXT was taxed as though the unit value of its property was worth $8.2 billion, when, based on the expert testimony of Mr. Tegarden, the unit value of its property was worth only $6 billion. CSXT should be given an unrestricted opportunity to introduce such evidence of value, and thus to show that its property was discriminatorily appraised for assessment purposes at a value that was 137% of its true market value, unlike other commercial and industrial properties, which were appraised for assessment purposes at 100% of their true market values.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT REQUIRES FEDERAL COURTS TO DETERMINE TRUE MARKET VALUE AND PERMITS THE RAILROAD TO CHALLENGE THE VALUATION METHODS USED BY THE STATE'S APPRAISER.

The Eleventh Circuit improperly held that federal courts must use the methodologies of the state assessors in determining the true market value of railroad property. The Eleventh Circuit's rule is contrary to the language, history, and purpose of § 11501. A federal court cannot accomplish its statutory mandate of determining the ultimate fact of "*true* market value" if it is hamstrung by the Eleventh Circuit's rule that the reviewing court must accept the state assessor's valuation methods. As Judge Fay logically explained in his dissent below, "[s]ince the objective of any methodology is a determination of *true market value*, a railroad should be allowed to challenge the method used in an attempt to prove that the result of such a method was not the *true market value* of its property." JA 266.

"The starting point for [the] interpretation of a statute is always its language," *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989), and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank* v. *Germain*, 503

U.S. 249, 253-54 (1992). Where, as here, the words of the statute are unambiguous, the "'judicial inquiry is complete.'" *Id.* at 254. The Eleventh Circuit's myopic interpretation of Section 11501(b)(1) cannot be reconciled with the plain language of the statute.

Here, Congress has charged the federal district courts with the duty to determine whether state or local authorities are discriminating against railroads by assessing railroad property at a higher ratio to "true market value" than the ratio of assessed to "true market value" of other commercial and industrial property. 49 U.S.C. § 11501(b)(1). The term "*true* market value" precludes any deference to a state or local tax authority as to what the market value is; Congress clearly intended the district court to make an independent finding on this element of a discrimination claim.

Indeed, in *Oklahoma Tax*, this Court rejected the claim of a state tax authority that the statutory term "true market value" should be construed as "'state determined market value.'" 481 U.S. at 461. Dismissing the State's arguments premised on the legislative history, comity, and imputed congressional intent, this Court held:

> In the present case, *the language of [§ 11501] plainly declares the congressional purpose.* Subsection (b)(1) forbids any State to "assess rail transportation property at a value that has a higher ratio to the true market value . . . 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." *It is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the "true market values" are.*

Id. (emphases added) (omission in original). This Court refused to adopt a position that "depends upon the addition of words to a statutory provision which is complete as it stands.

Adoption of [such a] view would require amendment rather than construction of the statute, and it must be rejected here." *Id.* at 463.

To be sure, *Oklahoma Tax* did not express any view on "whether a railroad may, in an action under [§ 11501], challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied." *Id.* at 463 n.5. As the Court noted, that issue was not presented. Burlington Northern challenged only the application of the State's chosen methodology, "particularly the State's evaluation of the cost of capital and the State's refusal to make deductions for property which petitioner claims is obsolete." *Id.* But the plain language of the statute and the logic of *Oklahoma Tax* compel the same result here. By committing the determination of the ultimate fact of "true market value" to the courts in a section 11501(b)(1) action, Congress necessarily intended that the district court would decide that question of fact based on all relevant evidence. Nothing in the statute compels exclusion of the railroad's expert testimony on different evidence of value yielded by reliable valuation approaches that the state appraiser ignored.

A. The Plain Meaning Of Section 11501(b)(1) Is That "The True Market Value Of The Rail Transportation Property" Is A Question Of Fact Committed To The Court Without A Restriction On The Probative Evidence The District Court May Consider.

As this Court recognized in *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), even in the absence of a functioning market, the market value of property is "simply an issue of fact about possible market prices," and "determinations of market value are routinely made in judicial proceedings without the benefit of a market transaction" "in good faith and at arm's length." *Id.* at 741-42. In such cases, the

courts typically determine value on the basis of "'opinion evidence,'" *id.* at 742 (quoting 5 J. Sackman, *Nichols Law of Eminent Domain* § 23-01, at 23-6 (rev. 3d ed. 1997)), including (as here) "expert testimony relating to comparable sales and discounted cash flow." *Id.*

The distinction the Eleventh Circuit drew between "factual determinations" in valuation (for the court) and "nonfactual determinations" (reserved for the State as matters of policy) has no basis in the 4-R Act. As discussed *supra*, at 8-12, the different valuation methodologies, approaches, and techniques are simply tools to generate "evidence of value," which the appraiser considers in exercising his or her professional judgment to arrive at an opinion of value. *NATA Report* at 8; see *id.* at 60. When an appraiser renders an ultimate judgment of market value, professional standards require consideration of "all conceptual approaches deemed to be relevant." Am. Soc'y of Appraisers, *supra*, at 5. Valuation is a factual judgment specific to the property based on "the nature of the problem, the probable applicability and responsiveness of the several analytical methods employed to that problem, the adequacy and reliability of the data used in applying those analytical methods, and the logic and validity of [the appraiser's] own thought processes in conducting the analysis." Kinnard, *supra*, at 52. Congress well understood the nature of valuation in enacting the 4-R Act. See S. Rep. No. 87-445, at 452-59, 475-81; see also Am. Inst. of Real Estate Appraisers, *The Appraisal of Real Estate* 69-70 (4th ed. 1964) (valuation approaches are "indications of value" used to inform the appraiser's "judgment" to "arrive[] at a considered final estimate of value").

The plain meaning of undefined statutory language is its "ordinary meaning." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990). Subsection (b)(1) defines a precise formula for proving discrimination that is measured by true market value. A district court's finding of discrimination in violation of the 4-R Act turns upon the outcome of that formula, not upon the

particular valuation techniques that the state appraiser employed. The district court does not review the State's methodology for arbitrariness or discriminatory purpose; it is unconcerned with whether the valuation methods the State uses for railroad or commercial and industrial property are the same or different; and even if it finds a violation, the district court does not enjoin the State from using any particular valuation method or technique in future valuations and assessments. Rather, Congress has defined discrimination solely in terms of a comparison of the ratios for assessed-to-true market value of railroad transportation property and other commercial and industrial property. The district court makes findings of fact on the assessed and true market value of each kind of property; compares the ratios; and may grant relief so long as the railroad ratio is at least 5% higher than the ratio for other commercial and industrial property. 49 U.S.C. § 11501(b)(1) & (c).

The market value of railroad property has long been recognized to be a question of fact. See *Pittsburgh, Cincinnati, Chi. & St. Louis Ry.* v. *Backus*, 154 U.S. 421, 434 (1894) ("[t]he true cash value of the plaintiff's [railroad] property . . . was a question of fact"). Thus, the power vested in a court adjudicating a section 11501(b)(1) claim to render the ultimate fact determination of the "true market value" of railroad property necessarily includes the power to evaluate all relevant "evidence of value," *NATA Report* at 8, including competing expert opinion testimony applying reliable valuation methodologies, approaches, and techniques, and then weighting the results thereof.

Indeed, in a wide variety of judicial proceedings, both the market value of property and the methodologies used in determining that market value have long been recognized to be questions of fact. In eminent domain proceedings, the finder of fact makes the determinations of market value based on opinion testimony, *Suitum*, 520 U.S. at 741-42, including what "assumptions" are appropriate in making "a guess of

informed persons" as to the value of property that is not actively priced in a market. *Miller*, 317 U.S. at 374-75. Neither the value of the property nor the methodology for determining that value may be altered by legislative policy. The legislature may neither "say what compensation shall be paid" nor determine "what shall be the rule of compensation." *Monongahela Navigation*¸ 148 U.S. at 327. Instead, the ascertainment of the property's value and of any "rule[s]" for deriving that value are matters of fact for the court. *Id.* See *Albert Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 589 (1923) (value of property taken for eminent domain was question of fact for the jury); *United States* v. *0.376 Acres of Land*, 838 F.2d 819, 827-28 (6th Cir. 1988) ("In a condemnation trial, the ultimate factual issue of determining the fair market value of any given parcel of real estate is submitted to the trier of fact, which fact finder, after having had the opportunity of assigning credibility and weighing the testimony of the expert witnesses presented by the adversary parties to the action, determines that value.").

Similarly, in federal tax cases, the Tax Court's determinations of the fair market value of property "is ultimately a finding of fact," *Palmer* v. *Commissioner*, 523 F.2d 1308, 1310 (8th Cir. 1975) (estate tax), as is its choice of an appropriate valuation methodology. See, *e.g.*, *Gross* v. *Commissioner*, 272 F.3d 333, 343 (6th Cir. 2001) ("'The choice of the appropriate valuation methodology for a particular stock is, in itself, a question of fact.'"); *Sammons* v. *Commissioner*, 838 F.2d 330, 334 (9th Cir. 1988) (choice of cost methodology to value donation was a question of fact). What is more, the Tax Court is not bound by the valuation methodologies chosen by the government; instead, it weighs all the relevant evidence and can accept the valuation evidence of the taxpayer, accept the valuation evidence of the government, or reach its own independent valuation. District courts apply the same approach in making other determinations of fair market value under the tax code:

> Complex factual inquiries such as valuation require the trial judge to evaluate a number of facts: whether an expert appraiser's experience and testimony entitle his opinion to more or less weight; whether an alleged comparable sale fairly approximates the subject property's market value; and the overall cogency of each expert's analysis. Trial courts have particularly broad discretion with respect to questions of valuation.

Ebben v. *Commissioner*, 783 F.2d 906, 909 (9th Cir. 1986) (determination of "fair market value" under federal tax laws).

The same is true for valuations in a host of other contexts, from valuing future earnings to calculate damages,[8] to valuing salvage in admiralty cases,[9] to valuing property for conversion damages.[10] Indeed, many of the techniques at issue here—such as the discounted cash flow analysis employed by the State, and the related yield capitalization analysis favored by CSXT's expert witness – are regularly presented in expert testimony as evidence for the trier of fact to consider in rendering a judgment on market value.[11] The Eleventh Circuit's

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[8] *See Monesson Sw. Ry.* v. *Morgan*, 486 U.S. 330, 342 (1988) (appropriate methodology for discounting future earnings to present value is an "essentially factual question" committed to the fact finder).

[9] *See, e.g.*, *Margate Shipping Co.* v. *M/V JA Orgeron*, 143 F.3d 976, 990 (5th Cir. 1998) (valuation of property for salvage purposes was a question of fact; reversing because district court had chosen a valuation methodology that was not "based on principles that reflect sound reasoning"); *cf. Clark* v. *McNabb*, 878 So. 2d 677, 681 (La. Ct. App. 2004) ("the valuation method used by the trial court [for the salvage value of a vehicle] is a question of fact").

[10] *See, e.g.*, *Cross* v. *Berg Lumber Co.*, 7 P.3d 922, 933 (Wyo. 2000) (choice between methods for conversion damages was for the trial court because "'[v]aluation of property is a question of fact, and there is no universal standard for such a determination'").

[11] *See, e.g.*, *Energy Capital Corp.* v. *United States*, 302 F.3d 1314, 1331 (Fed. Cir. 2002) (approving use of discounted cash flow valuation of the venture in calculating lost-profits damages for breach of contract); *Kool, Mann, Coffee & Co.* v. *Coffey*, 300 F.3d 340, 362-63 (3d Cir. 2002) (up-

suggestion that the methods, approaches, and techniques for valuing railroad property are questions of state policy is inconsistent with this broad recognition that market value and the methodologies that generate evidence value are questions of fact, not matters of social policy. There is simply no basis in the statute for the exclusionary rule the Eleventh Circuit adopted to prohibit railroads from offering (and courts from hearing) an expert opinion on the value of railroad property, based on valuation approaches that differ from those used by the State's appraiser. Indeed, the absurdity of this rule is particularly acute in this case, where Mr. Tegarden is by far more qualified than Mr. Dickerson. See *supra*, at 16 n.7.

B. The Statutory Term "True Market Value" Does Not Permit The District Court Blindly To Accept The State Appraiser's Methods.

Market value "is not a matter of arithmetical calculation," *Rowley*, 293 U.S. at 109, and the necessity to use various assumptions "make it unlikely that the appraisal will reflect true value with nicety." *Miller*, 317 U.S. at 374. But Congress's charge to a district court in adjudicating a section 11501(b)(1) discrimination claim to determine the "*true* market value" of railroad property (and of commercial and industrial property), 49 U.S.C. § 11501(b)(1) (emphasis added), requires an independent and neutral finding by the district court of the market

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holding district court's reliance on discounted cash flow model to value pre-fraud business in finding fraudulent conveyance damages, despite criticism of that methodology); *Wilson* v. *Great Am. Indus., Inc.*, 979 F.2d 924, 933 (2d Cir. 1992) (approving of "capitalization of earnings method"); *In re Hotel Assocs., LLC*, 340 B.R. 554, 557-58 (Bankr. D.S.C. 2006) (considering expert testimony on yield and direct capitalization methods to value a hotel in resolving a secured creditor's claim); *Swope v. Siegel-Robert, Inc.*, 74 F. Supp. 2d 876, 887-98 (E.D. Mo. 1999) (applying yield capitalization approach in valuing minority shares of a corporation), *aff'd in part & rev'd in part*, 243 F.3d 486 (8th Cir. 2001); *In re Broad Assocs. Ltd. P'ship*, 125 B.R. 707, 713-14 (Bankr. D. Conn. 2001) (applying yield capitalization approach to value office building).

value of the property that is "true" based on the available evidence presented by the parties.

This statute cannot be reasonably read to require the district court to find the "true market value" of railroad property as an element of a federal discrimination claim, and nonetheless preclude the railroad from presenting evidence of what the "true market value" of the railroad property is. But that is exactly what the Eleventh Circuit's exclusionary rule does: it prevents the railroad from presenting its own impeccably qualified expert's opinion of true market value, arrived at by the standard (and indeed ethically required) professional practice of estimating value by considering and weighing multiple valuation techniques. Am. Soc'y of Appraisers, *supra*, at 5-6. See JA 207 n.8 ("[T]he court cannot consider Mr. Tegarden's valuation because it was prepared using different valuation methods than the Department. The court, therefore, is limited to looking solely at CSXT's criticisms of the Department's valuation.").

Indeed, the statutory requirement that the district court find "*true* market value" affirmatively forbids the Eleventh Circuit's exclusionary rule. The Eleventh Circuit immunizes the state appraiser's choice and weighting of valuation methods, approaches, and techniques from judicial inquiry, JA 258-260, and therefore the district court is forced to accept such methods, approaches, and techniques even if the valuation results they produce are demonstrably *inaccurate* and *unreliable*.

The reason that so many valuation methodologies have developed is that they are not created equal. Each methodology has certain limitations that must be considered by the appraiser when determining what methodologies are suitable for the particular property and when evaluating the weight to give the results of that methodology. Choosing the most accurate methodology for a particular property is a matter of professional judgment—a judgment that must be exercised for each particular property, because different characteristics and

available data may warrant rejection of a specific methodology. *Supra*, at 9-12. Where professionals reach different judgments about the best methodology for a particular property, the decision about which methodology best approximates true market value is a quintessential factual question that ought to be determined by the district court.

In the Eleventh Circuit's view, however, railroads would be forbidden from challenging even the most inapposite methodologies. For example, while some appraisers suggest that a market value for a railroad may be derived by measuring the market price of its stocks and bonds, see *supra*, at 9-10, this approach is "generally dubious and unreliable evidence" of market value, in part because "[t]here is no reliable relationship between the constantly fluctuating market of stocks and bonds and the tangible and intangible assets reflected by such securities." Ring & Boykin, *supra*, at 426; JA 122. Appraisers generally use this method to check the reasonableness of other estimates, not as an independent basis for valuing property. Ring & Boykin, *supra*, at 426. If the Eleventh Circuit's rule were to prevail, the railroad would be powerless to prove in court that a stock-and-debt method cannot reliably estimate "true market value."

Similarly, the cost approach "is poor evidence of system value for railroads," largely because of the difficulty of accurately measuring the effects of property depreciation and obsolescence. S. Rep. No. 87-445 at 456; Ring & Boykin, *supra*, at 422 ("Cost . . . no longer provides an accurate measure of value" for railroads); JA 67-68. But under the Eleventh Circuit's rule, a State could place exclusive or principal reliance on a cost approach with impunity. See *Consol. Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473, 475, 480 (2d Cir. 1995) (noting in a subsection (b)(1) case New York's reliance on "the 'cost approach' method for determining true market value" in 1993). Railroads would be unable to present their own, better evidence of value and would instead be restricted to quibbling about the calculations made in methodologies

that might have fundamental theoretical flaws when applied to railroads. Without warrant in the text of the statute, the Eleventh Circuit's rule converts the district court into a glorified fact- and math-checker, unable to correct the blatant discrimination flowing from the inherent distortions of the State's chosen methodology. As the Fourth Circuit recognized:

> It would be incongruous to accord railroads access to the full range of the court's equitable powers and then to deprive them of the principal means to benefit from that access. If denied the ability to present evidence on the true market value of its property, a railroad's rights under § 306 would be, as [the plaintiff-railroad] aptly summarized, "limited to checking the state's arithmetic."

Richmond, Fredericksburg & Potomac R.R. v. *Forst*, 4 F.3d 244, 250 (4th Cir. 1993).

The Eleventh Circuit's concept of a "true market value" calculated without regard to the inaccuracy and distortion of the valuation method employed is an oxymoron. In *Oklahoma Tax*, this Court rejected proposed constructions of "'true market value'" as "'state determined market value'" (or state determined market value absent intentional discrimination) because they were irreconcilable with the plain language of section 11501. 481 U.S. at 461-63. The Eleventh Circuit's variant – that "true market value" means "state-determined market value, with factual errors in the subsidiary calculations corrected" – is equally indefensible. The Eleventh Circuit's rule impermissibly "depends upon the addition of words to a statutory provision which is complete as it stands." *Id.* at 463.

C. Other Provisions Of The Statute Confirm The Plain Meaning Of Section 11501(b)(1).

Statutory provisions are interpreted in light of their surrounding provisions, *Dolan* v. *U.S. Postal Serv.*, 126 S. Ct. 1252, 1257 (2006); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47:6 (6th ed. 2006), and the sur-

rounding provisions in the 4-R Act confirm the plain meaning of § 11501(b)(1). First, subsection (c) states that "[t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11501(c). "It would be inconsistent to allocate the burden of proof as to an issue which could not be litigated in federal court in the first place." *Okla. Tax*, 481 U.S. at 462. As noted above, Congress did not require proof of "true market value" as an element of a discrimination claim, but then preclude the railroad from offering fundamental evidence of true market value.

Second, subsection (c)'s provisions regarding proof of the market values of other commercial and industrial property underscore that the district court is to determine the true market value of property independently, regardless of what methods the state appraiser employs. Because there are a multitude of commercial and industrial properties in a State, Conggress authorized a specific statistical sampling method for the district court to use in determining the assessed-value/market-value ratio of such properties. Subsection (c) provides that this ratio is to be proved "*to the satisfaction of the district court*" by a "random-sampling method known as a sales assessment ratio study," and provides alternative benchmarks of discrimination if that cannot be done. 49 U.S.C. § 11501(c) (emphasis added). As this Court stated in *Oklahoma Tax*, subsection (c) constitutes an explicit "grant of authority to district courts to use statistical methods for establishing the assessed and market values of 'other commercial and industrial property' where such methods will result in proof '*to the satisfaction of the district court*.'" 481 U.S. at 462 (quoting 49 U.S.C. § 11501(c)) (emphasis added). Congress thus provided that the district court is to make its own findings of the assessed-to-market value ratio of other commercial and industrial property without regard to the valuation methods the State employed in assessing those properties. By necessary implication, the "true market value of railroad transportation property" is likewise to be determined "to the satisfaction of

the district court," without slavish deference to the state appraiser's methodological choices. See *id.* at 462-63 (Congress's specification of "particular means" for proving the value of commercial and industrial property "raises no implication whatever that the value of another kind of property may not be proved at all").

States have no more "policy" stake in valuing railroad transportation property than other commercial and industrial property for tax assessments. Subsection (c) confirms that courts are not concerned with "the methods" the State uses to value property in adjudicating a federal discrimination claim under the 4-R Act. In subsection (b)(1), the "true market values" of both railroad transportation property and other commercial and industrial properties are to be independently determined by the district court as questions of fact, and the district court's role is not one of merely correcting factual errors in the state appraiser's valuation.

D. The Eleventh Circuit's Exclusionary Rule Defeats The 4-R Act's Purpose Of Preventing Tax Discrimination.

"Statutory construction . . . is a holistic endeavor," *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988), and thus this Court will look not only to the ordinary meaning of specific terms but also "'to the provisions of the whole law, and to its object and policy.'" *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)).

The Eleventh Circuit's rule ignores the context in which the 4-R Act was enacted. See *Pfizer, Inc.* v. *Gov't of India*, 434 U.S. 308, 313 (1978) ("the context" "of the statute" is an "aid[] to construction"). Section 11501(b)(1) is a sweeping antidiscrimination statute, prohibiting discrimination-in-fact (whether intentional or not) in tax assessments and valuations against railroads. *Okla. Tax*, 481 U.S. at 462-63. The 4-R Act was designed "'to put an end to the widespread practice

of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district,'" S. Rep. No. 91-630, at 2, 6 (noting "ominous trend" toward new and "effective means of perpetuating tax discrimination").

Congress did not enact a self-defeating antidiscrimination statute. The seminal 1961 Doyle Report stated that state tax discrimination against railroads "results" in large measure from "outmoded assessing procedures" employed at the state level. S. Rep. No. 87-445, at 448. The Report noted that "'the applicable [state] statutes contain few guideposts for the assessor or prescription of the factors, and the weight to be accorded thereto, in arriving at 'full value' of railroad—or any other—real estate,'" and railroad property is "'often valued under divergent theses, processes and procedures and too often inconsistently from year to year.'" *Id.* at 568.

Moreover, "[d]ifferent methods are employed by the various States to find value," many of which were inferior to more appropriate techniques such as a capitalization-of-earnings valuation. *Id*. at 455, 476. Indeed, Congress was aware that States often chose these inferior valuation approaches for the sole purpose of inflating the tax obligations of railroads:

> Despite the inferior quality of cost as evidence of value one of the reasons it remains in use is that cost is usually a higher figure for railroads than current cash value and the temptation to use cost figures on railroads is sometimes influenced by a desire to justify a higher full value which will in turn appear to produce a lower equalized assessment ratio.

Id. at 456-57, 479. Contrary to the Eleventh Circuit's conception, Congress did not insulate from judicial scrutiny the very practices—the choice and weighting of various appraisal methodologies and techniques—that were a root cause of the discrimination that Congress sought to redress. Rather, as

this Court has declared, subsection (b)(1) "set[s] forth *precise standards for judicial scrutiny of challenged rate and assessment practices*." *ACF*, 510 U.S. at 343 (emphasis added).

The Georgia experience is illustrative of the gaping enforcement loophole that the Eleventh Circuit's rule opens. In 2002, as noted above, the appraiser changed his valuation approach, increasing the estimate of CSXT's unit value to $8.2 billion and its Georgia taxable value of CSXT's railroad transportation property to $514.9 million (increases of 47% and 36% respectively over the 2001 values). *Supra*, at 14-15. In 2006, a new in-house employee in Georgia changed the appraisal method, and declared CSXT's unit value as $11.2 billion and its Georgia taxable value as $762 million.[12] The latter was a 40.6% increase over the 2005 Georgia taxable value. Georgia's 2006 change in the method of appraising railroad property did not affect CSXT alone. It resulted in an average Georgia taxable value increase of 46.6% for properties of all railroads operating in the State. See State Bd. of Equalization, *Public Utility and Airline Flight Equipment Digest* 2 (2006). By contrast, the average Georgia taxable value for all other centrally assessed properties increased by only 5.6%. See *id.* Congress did not handcuff district courts in remedying such discrimination, based on the artificial distinc-

[12] Similarly, in 2006 (after the record in this case was closed), the Kentucky tax authority, using solely the disfavored stock-and-debt method, initially presented CSXT with a unit valuation of about $13.5 billion. Kentucky later agreed to reduce the unit valuation.

Florida also dramatically increased CSXT's unit value in 2006 to $14.8 billion. Complaint Seeking Injunctive and Declaratory Relief from Ad Valorem Tax Discrimination (2006 Taxes) ¶ 16, *CSX Transp., Inc.* v. *Dep't of Revenue*, No. 4:06-CV-342SPM (N.D. Fla. filed July 18, 2006). Unlike Kentucky, Florida refused to settle for a lower number with CSXT, and when CSXT brought suit under subsection (b)(1), Florida's answer relied upon the district court decision below in affirmatively alleging that CSXT could not challenge the State's chosen valuation methodology. Answer to the Plaintiff's Complaint ¶¶ 34, 41, *CSX Transp., Inc.* v. *Dep't of Revenue*, No. 4:06-CV-342SPM (N.D. Fla. filed Aug. 8, 2006).

tion drawn by the Eleventh Circuit between "factual determinations" and "nonfactual determinations" in valuation.

Moreover, the Eleventh Circuit's exclusionary rule is logically inconsistent with the longstanding rule under the 4-R Act that district courts shall make independent inquiry into the true market value of other commercial and industrial property for the tax year in question, regardless of the State's valuation procedures. Some of the most egregious discrimination before and after the 4-R Act was passed arose from state laws and practices requiring railroad property to be revalued more frequently than other commercial and industrial property. As one witness testified to Congress, "[t]he railroads are assessed every year and so their value keeps pace. Local property, real estate and so on, is typically assessed only at periodic intervals, most frequently on a quadrennial basis, although in Indiana, for example, every 8 years." *State Tax Discrimination Against Interstate Carrier Property, Hearing Before the Subcomm. on Surface Transp. of the Sen. Comm. on Commerce on S. 2289*, 91st Cong. 63 (1969) (statement of Rolf A. Weil, President, Roosevelt University); *id.* at 67; *Common and Contract Carrier State Property Tax Discrimination, Hearing Before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate & Foreign Commerce*, 91st Cong. 87 (1970) (statement of Rolf A. Weil, President, Roosevelt University) (same); *Louisville & Nashville R.R.* v. *Pub. Serv. Comm'n*, 493 F. Supp. 162, 163-68 (D. Tenn. 1978) (detailing abuses prior to the 4-R Act), *aff'd*, 631 F.2d 426 (6th Cir. 1980). Such regimes have the discriminatory effect that "the interstate carriers pay higher taxes than most other commercial and industrial taxpayers because their assessments reflect current increases in true market value while delayed assessment of other property delays increases in their tax assessments." Scott M. Schoenwald, Note, *Discriminatory Demands and Divided Decisions: State and Local Taxation of Rail, Motor, and Air Carrier Property*, 39 Vand. L. Rev. 1107, 1119-20 (1986).

Courts properly construed the 4-R Act to require an independent judicial determination of the fair market value of other commercial and industrial property for the tax year in question, notwithstanding state statutes that set the present market value of such property based on prior-year valuations. See *Clinchfield R.R.* v. *Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (finding a 4-R Act violation because by statute in North Carolina "the real properties of other commercial and industrial taxpayers were assessed at 72 percent of actual value, while the railroads were taxed at essentially full value"); *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984).

Claims of contrary "state valuation policy" (even when such policy is embodied in statutes) did not and cannot preclude independent judicial determination of the assessed-to-true market value ratio of commercial and industrial property in a given tax year. The same principle applies on the other side of the equation in determining the assessed-to-fair market value of rail transportation property.

Under the proper interpretation of the 4-R Act, federal courts can remedy discrimination by finding the "true market value" of each kind of property in a given year, and determining whether the ratios of assessed-to-market value of the two kinds of property diverge by more than 5 percent. The decision below, which forbids that independent judicial inquiry, cannot be reconciled with the text or object of the Act.

E. The Eleventh Circuit's Rule Is Unworkable.

Finally, the Eleventh Circuit's rule must be rejected because it is unworkable. The rule allows a railroad to contest any factual determination the state appraiser made in employing a particular valuation technique, but not any "nonfactual determinations." JA 260. Such protected nonfactual determinations include not only the state appraiser's choice of estimation techniques, but also his weighting of the results yielded by the different techniques. JA 261.

The problem is that, if the district court cannot depart from the weighting the State would give to various estimates, simply correcting factual errors of the appraiser in applying a particular technique does not allow the district court to make a finding of "true market value" of railroad property. For example, assume a state appraiser had calculated estimates of railroad unit value as $8 billion, $10 billion, and $12 billion under income, sales, and costs approaches, and had set the value as $9.5 billion. If the district court then finds factual error in the state appraiser's estimate under the income approach, and finds that the estimate under that approach should have been $5 billion rather than $8 billion, the district court is powerless to make a finding of "true market value" that accounts for that correction. Under the Eleventh Circuit's rule, the court cannot engage in its own weighting of estimated values, and no weighting rule can generally be extrapolated from the state's prior valuation and applied to the judicially redetermined value estimates. See JA 191-193 (Mr. Dickerson's testimony that his ultimate valuation was a matter of judgment, and not the product of any specific weighting of the different value estimates). The Eleventh Circuit commands deference to so-called state "policy" choices, but it is impossible to identify the state policy to which the district court should defer. This simply underscores that valuation is an issue of professional judgment for a specific property, not a question of policy. The Eleventh Circuit's rule is a contrivance inconsistent with any rational administration of the 4-R Act.

The only proper interpretation of the 4-R Act is that the district court is to make an independent finding of "true market value," based on the adversarial presentation of evidence, including what techniques are properly employed to generate evidence of value; what the proper calculations are under those techniques; and how the values generated should be weighted in arriving at an ultimate estimation of the value of the property in question. Only after the determination is

made can the court undertake a meaningful assessment of whether the State discriminates in its tax assessment of the railroad property.

II. THE "CLEAR STATEMENT" CANON DOES NOT APPLY TO SECTION 11501(b)(1).

Despite the absence of any textual warrant in the statute, the Eleventh Circuit claimed that its exclusionary rule was compelled by *Gregory* v. *Ashcroft*, which requires a clear statement from Congress if it "'intends to alter the usual constitutional balance between the States and the Federal Government.'" JA 254 (quoting 501 U.S. at 461-62). The *Gregory* clear-statement canon has no application here, and cannot justify the decision below, for multiple reasons.

First, the *Gregory* canon does not apply here because section 11501(b)(1) is unambiguous. *Gregory*, 501 U.S. at 464-65 (clear statement canon applies only when statute is ambiguous); *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997); *United States* v. *Lopez*, 514 U.S. 549, 610-11 (1995); *McElroy* v. *United States*, 455 U.S. 642, 657 (1982). The *Gregory* canon resolves congressional intent when a statutory term is "susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers." *Salinas*, 522 U.S. at 59. The Eleventh Circuit did not suggest that (absent federalism concerns) the term "true market value" can be plausibly interpreted to mean the state appraiser's valuation of the property, adjusted for factual error in any of the underlying estimation techniques he used. See *id.* at 60 ("A statute can be unambiguous without addressing every interpretive theory offered by a party."). The Eleventh Circuit's exclusionary rule is simply a limitation on the railroad's proof to vindicate perceived state interests, which the court felt free to write into the statute because (in its view) "[t]he text of the Act does not clearly state that railroads may challenge valuation methodologies." JA 257. But the *Gregory* canon "'is not a license for the judiciary to rewrite lan-

guage enacted by the legislature.'" *Salinas*, 522 U.S. at 59-60.[13]

Second, this Court in *Oklahoma Tax* rejected the invocation of "comity" with the States in holding that the meaning of "'true market value'" in section 11501(b)(1) was plain and could not be construed to mean "'state determined market value'" or "state determined market value" absent intentional discrimination (the alternatives proposed by respondents and the court of appeals in that case). *Okla. Tax*, 481 U.S. at 461-64. Once Congress has weighed the "policy considerations," courts are "not free to reconsider them now." *Id.* at 464.

Third, Congress has already balanced federal and state interests in § 11501(b)(1). As this Court has recognized, "the whole of § 1150[1] sets limits upon the taxation authority of state government." *ACF*, 510 U.S. at 345. However, these limits were carefully crafted to balance federal and state interests.

To protect the legitimate interests of the States while accomplishing its remedial goals of protecting interstate railroads against discrimination, Congress placed four specific restrictions on the exercise of this new federal jurisdiction. First, "[r]elief may be granted under this subsection only if the ratio of the 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. § 11501(c). This 5% tolerance factor is a reasonable margin of error, and it protects taxing jurisdictions from injunctions where uncertainties in the assessment process produce undramatic variations in assessment ratios. See S. Rep. 91-630, at 14-15. Second, and relatedly, by prohibiting only that portion of a tax assessment determined to be excessive

[13] The Court did not hold in *Oklahoma Tax* that section 11501(b)(1) was ambiguous as to whether railroads could challenge accounting methods used by the state; it simply observed that the question was not raised, and so it expressed no view on the issue. 481 U.S. at 463 n.5.

under the assessment-ratio test, the statute limits federal court interference with the state-tax collection process. Pub. L. No. 94-210, § 306(1)(a), 90 Stat. 31, 54 (1976) ("but only to the extent of any portion based on excessive values as hereinafter described").[14] Third, "[t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11501(c). Finally, in order to give the States an opportunity to bring their taxation practices into compliance, Congress granted a grace period of three years before § 11501 went into effect. Pub. L. No. 94-210, § 306(2)(b), 90 Stat. at 54 ("the provisions of this section shall not become effective until 3 years after the date of enactment of this section").

"Congress has exercised its Commerce Clause authority to regulate rail transportation for over a century." *Pittsburgh & Lake Erie R.R.* v. *Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). The balance to be struck between protection of interstate commerce and sensitive state interests is largely committed to the political process itself, and in particular to the national legislature. See *Garcia* v. *San Antonio Transit Dist.*, 469 U.S. 528, 550-52 (1984). The Eleventh Circuit's judicial rewrite of section 11501(b)(1), "'while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.'" *Salinas*, 522 U.S. at 60. A court may not second-guess Congress on the critical policy choices it made in enacting § 11501.

Fourth, the *Gregory* canon does not apply every time a federal law touches upon an aspect of state sovereign power; it applies when one among two or more permissible constructions would "'alter the "usual constitutional balance between the States and the Federal Government."'" *Gregory*, 501 U.S. at 460-61.

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[14] In codifying the original Section 306, some changes to the language were made. However, Congress did not intend a substantive change. *Okla. Tax*, 481 U.S. at 457 n.1.

Allowing a district court adjudicating a federal discrimination claim to take evidence on true market value based on different estimation techniques does not affect, much less alter, the federal-state constitutional balance. The Eleventh Circuit's characterization of Mr. Dickerson's selection and weighting of three valuation techniques for valuing CSXT's property as "delicate matters of state policy," JA 260, is strained. Mr. Dickerson was not engaged in policy choices; he was performing his ordinary duties as an appraiser, applying standard techniques to generate different "evidence of value," *NATA Report* 8, to assist him in rendering a judgment on the value of CSXT's rail transportation property. There is no special sovereign interest in one state employee's particular choice or weighting of valuation techniques for a given property. Indeed, States (including Georgia) generally leave calculation of valuation and the attendant choice of such techniques to state assessors, as opposed to legislating it, precisely because the appropriateness and weight given to any technique depends on the data available and the nature of the property.[15]

The frequent changes in the techniques the state appraiser uses belies any suggestion that the methodology is a considered state policy choice entitled to deference. For tax year 2002, Mr. Dickerson changed the valuation methods used by his predecessor by replacing the capitalized earnings approach with a discounted cash flow model, and by replacing the direct capitalization approach with a market multiple approach. JA 204-205. Later, after CSXT brought suit, Mr. Dickerson decided to prepare "a complete appraisal of CSXT using essentially the same three valuation methods that he [had] employed" earlier. JA 203. However, as the litigation progressed, he then chose to prepare "a revised full appraisal

[15] N.Y. State Office of Real Prop. Servs., *supra*. That has long been true. The Doyle Report noted that "[v]aluation or appraisal is the process by which an *assessor arrives at his opinion* of the value of the property," and that legislatures tended not to define the methods tax appraisers must use. S. Rep. No. 87-445, at 452, 458 (emphasis added).

of CSXT" in which he changed "the calculation of the cost of equity used in deriving the weighted cost of capital." *Id.* As a result of this change, Mr. Dickerson "ultimately opined that the fair market unit value of CSXT was $11.807 billion." JA 204. Moreover, in 2004, the Department, wishing to avoid litigation by major centrally-assessed taxpayers aggrieved by the excessive valuations caused by Mr. Dickerson's new methodology, chose not to use Mr. Dickerson's methods at all. See JA 152-159.

The Eleventh Circuit's invocation of the constitutional-avoidance canon of *Gregory* on the limited question of what evidence of market value a district court may consider is especially perverse given that section 11501(b)(1) itself alters the federal-state constitutional balance. At the time the 4-R Act became law, certain states had either statutory or constitutional provisions that provided for the taxation of railroad property on a higher assessed basis of market value than other commercial and industrial property. Because section 11501(b)(1) unequivocally outlawed that form of discrimination, courts declared those state tax classification schemes in violation of the 4-R Act and granted relief to the railroads. *Arizona* v. *Atchison, Topeka & Santa Fe Ry.*, 656 F.2d 398 (9th Cir. 1981); cf. *Louisville & Nashville R.R.* v. *Pub. Serv. Comm'n*, 493 F. Supp. 162 (M.D. Tenn. 1978) (relief granted under Equal Protection Clause, since 4-R Act not yet in effect), *aff'd*, 631 F.2d 426 (6th Cir. 1980). Congress thus altered the constitutional balance when it prohibited forms of discrimination sanctioned by state statutes and even state constitutions. Given Congress's decision to enact such an anti-discrimination statute, there is no substantial constitutional question to avoid by preventing district courts from determining "true market value" of railroad property based on different valuation techniques than those chosen by a state appraiser.

Fifth, Department of Revenue of Oregon v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), relied on by the Eleventh Circuit,

JA 257, is not to the contrary. At issue in *ACF* was subsection (b)(4), which prohibits "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). The question presented was whether that broadly worded provision outlawed the longstanding practice of creating state tax exemptions from *ad valorem* property taxes for certain other classes of commercial and industrial property. 510 U.S. at 339-40.

Although the Court noted that "[b]oth the State's and the [taxpayers'] readings are defensible if subsection (b)(4) is read in isolation," the Court found that "[t]he structure of § [11501] as a whole does yield an answer, one adverse to the [taxpayers'] challenge to Oregon's property tax." *Id.* at 339-40. The Court held that the taxpayers' reading of subsection (b)(4) would nullify (b)(3), and that the statutory definition of "'commercial and industrial property'" encompassed only "taxed" (*i.e.*, nonexempt) property. *Id.* at 340-43. Indeed, the Court did not invoke *Gregory* at all (because there was no question that section (b)(4) did, by prohibiting all tax discrimination not otherwise addressed in (b)(1)-(3), alter the federal-state balance). Rather, the Court invoked the related federalism-based canon against interpreting a federal statute preempting traditional state powers beyond its "evident scope." *Id.* at 345 (citing, inter alia, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Critically, in contrast to the absence in (b)(4) of express textual support for the taxpayers' position or standards for adjudicating discrimination claims, *id.* at 343, the *ACF* Court observed that

> *[t]he reach of subsections of (b)(1)-(3) is straightforward:* These provisions forbid the imposition of higher assessment ratios or tax rates upon rail transportation property than upon "other commercial and industrial property."

Id. at 337 (emphasis added). In subsections (b)(1)-(3), "Congress prohibited discriminatory tax rates and assessment ra-

tios *in no uncertain terms*, and set forth *precise standards for judicial scrutiny of challenged rate and assessment practices*." *Id.* at 343 (internal citations omitted) (emphasis added). As explained in *Oklahoma Tax*, one of those "precise standards for judicial scrutiny" is the subsection (b)(1) formula, which requires a determination of the railroad property's "true market value." See 481 U.S. at 461-62. Thus, unlike *ACF*, this case involves no attempt "to extend the statute beyond its evident scope." 510 U.S. at 345. It is the evident plain meaning and purpose of (b)(1) that the Eleventh Circuit's exclusionary rule subverts.

Finally, there is no federalism concern remotely comparable to that raised in *ACF*, where a State's power to exercise the critical legislative power of granting tax exemptions was in jeopardy. Here, the only question is whether the district court may make an independent determination of "true market value" of CSXT's rail transportation property by considering evidence generated by different valuation techniques from those the state appraiser employed.

III. THE LEGISLATIVE HISTORY OF THE 4-R ACT SUPPORTS THE PLAIN LANGUAGE.

When Congress has spoken plainly to the matter at hand, as it has done with § 11501(b)(1), the Court's inquiry comes to an end and resort to legislative history is unnecessary. *Okla. Tax*, 481 U.S. at 461. Even though this Court found the legislative history "inconclusive and irrelevant" to the interpretation of section 11501(b)(1), *id.*, the court below purported to find support for its exclusionary rule in that history. JA 257. The Eleventh Circuit was mistaken, and indeed that history shows only that adoption of its position would amount to a judicial award of victory to opponents of the Act who lost legislatively three decades ago.

1. Throughout the debate on proposed legislation, it was well understood that allowing railroads to attack discriminatory taxes by proof of "true market value" would entail judi-

cial scrutiny of state valuation procedures. For example, dissenting Senator Lausche of Ohio attached a statement to a Senate report objecting to the breadth of a precursor bill, S. 927, because "[u]nder S. 927, a Federal court will necessarily be required to *review State valuation principles and procedures* in order to determine whether carrier operating property is assessed at a percentage of true market value that is higher than the assessment percentage of all other property." S. Rep. No. 90-1483, at 26 (emphasis added).

Similarly, George Kinnear, Director of the Washington State Department of Revenue, noted that "it would be immediately necessary under this bill for Federal courts to *review and determine the correctness of . . . valuation procedures* and the actual valuation results for the carriers." *State Tax Discrimination Against Interstate Carrier Property: Hearing Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce on S. 2289*, 91st Cong. 99 (1969) (letter from George Kinnear, Director, Washington State Dept. of Revenue) (emphasis added) (emphasis in original omitted); see also *id.* ("I am deeply concerned that this very broad statutory language is an open invitation, and perhaps even a requirement, for a *Federal judge to determine de novo the true market value of transportation property*") (emphasis added). Indeed, Mr. Kinnear's proposed amendment to define "true market value" as "that true market value finally determined in accordance with state statutory procedures," *id.* at 101-02, was never adopted. See 116 Cong. Rec. 2022, 2024 (1970). The Eleventh Circuit has by judicial revision written Mr. Kinnear's proposed amendment back into the statute.

Finally, there is no suggestion that Congress diluted the impact of the proposed legislation at any time between the reports and hearings of the 1960s and the ultimate enactment of Section 11501(b)(1) in 1976. To the contrary, the changes that were made to the legislation only reaffirm the plain meaning of Section 11501(b)(1). For example, the provision prescribing a burden of proof for determining true market

value, 49 U.S.C. § 11501(c), was added in the 1970s, reaffirming Congress's recognition that true market value would be a factual issue in § 11501 cases and that federal courts would determine true market value as they would in any other valuation case. See S. Conf. Rep. No. 94-595, at 27, 166 (1976); S. Rep. 94-499, at 65, 150; S. Conf. Rep. 94-585, at 24, 139 (1975); S. Rep. 92-1085, at 3, 7.

2. Against this exhaustive legislative history, the court below pointed to two isolated snippets from early in the Act's legislative history as support for its reading that Congress did not intend courts independently to assess methodologies as part of determining true market value. See S. Rep. No. 90-1483, app. B at 22 (1968); *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 132-33, 137-38 (1970) (statement of Philip M. Lanier, Association of American Railroads).

The court below misread these snippets. The testimony simply explained that the proposed legislation

> does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.

S. Rep. 90-1483, app. B at 22. Thus, "true market value" was not an assessment method or practice that the States were be-

ing required by Congress to adopt. States could continue to use whatever methods they liked; courts could not issue injunctions dictating what valuation and assessment methods States must use going forward in imposing taxes.

Instead, whatever methods the State employs, the end result is measured against 49 U.S.C. § 11501(b)(1), which prohibits discrimination against interstate railroads and provides that "true market value" is the standard to which State assessments must be compared. The Lanier testimony is plain: "values that have already been determined must be compared to" the federal standard of "true market value" found by the district court. Thus, railroads are entitled to introduce valuation evidence—including evidence based on valuation methods that are different from the methods used by state appraisers—in order to prove the existence and degree of discrimination. And consistent with the statute's proscriptions, the court may only enjoin a State in violation of the 4-R Act from collecting the excess revenue. The 4-R Act is thus quite deferential to States; it prohibits discrimination, but does not otherwise dictate how the State exercises its power to tax property within the State.

In summary, the Eleventh Circuit's exclusionary rule is irreconcilable with the language, structure, purpose, and history of section 11501(b)(1); is not compelled by federalism principles; and simply operates to vitiate the federal discrimination remedy that Congress created to protect interstate railroads. This Court should reject it.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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