No. 09-520

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER

Respondents.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a non-profit trade association of interstate rail carriers.[1] Its members include major freight rail systems, passenger and commuter rail networks, regional railroads and short lines.[2] AAR represents its members before courts, agencies and the Congress in matters of common concern.

AAR's members carry almost all of the Nation's rail freight and employ almost all U.S. railroad workers. Every year they move raw materials and products worth hundreds of billions of dollars, goods that generate economic activity both before they are shipped and after they reach their destination.

Interstate transportation of commodities by rail—from, to and across multiple states—is critical to the Nation's economy. Railroads not only were one of the first instrumentalities of interstate commerce but also continue to be one of the most important. They facilitate an enormous volume of productive activity

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[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. (Petitioner is a member of AAR, however, and pays general membership dues.) No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund this brief.

[2] For a list of AAR's members and affiliate members, *see* Our Members, Ass'n of Am. R.R., http://www.aar.org/aboutaar/ourmembers.aspx?p=1 (last visited Aug. 9, 2010). Affiliate members include additional commuter, regional and short line railroads. *See id.*

in the industrial, mining and consumer goods sectors, as well as others. Indeed, railroad carloadings are widely regarded as a leading economic indicator.[3] Future economic growth throughout the Nation depends on the railroads' ability to invest in expanded and improved facilities.[4]

Railroads are the most efficient mode for long-haul freight transportation, capable of moving larger unit volumes of freight than air or motor carriers and of reaching many more destinations than water carriers. They also are the most environmentally sound: they use less fuel per ton-mile moved and generate less hydrocarbon waste than motor carriers, and provide service without further congesting crowded public highways.[5]

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[3] In the context to today's economy, railroad carloadings have been termed "one of the timeliest gauges of economic activity." Kelly Evans, *Flashing Caution on Weak Rail Demand*, Wall St. J., Jan. 19, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703626604575011051244374676.html.

[4] *See, e.g.*, Joseph Szabo, Administrator, Fed. R.R. Admin., before the Transportation Research Board 1 (Mar. 8, 2010), http://www.fra.dot.gov/downloads/Joseph-Szabo-TRB-Freight03082010FINAL.pdf [hereinafter "Szabo Remarks"] (noting that "it is apparent that additional freight capacity is needed for our economy to grow in the future.").

[5] As Federal Railroad Administrator Szabo recently explained:

> When comparing the fuel efficiency of rail to truck in competitive corridors and for similar service characteristics, rail was up to 5.5 times more fuel efficient than truck.
>
> And as the length of haul increases the advantage of rail's fuel efficiency is compounded.

New entrants into the rail industry have proliferated in the wake of dramatic reforms that culminated in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).[6] There are now more than 500 freight railroads operating in the United States: in addition to 40 Class I and regional carriers, there are more than 300 small line-haul carriers and nearly 200 switching and terminal companies.[7] Almost all of those smaller railroads handle shipments destined for or coming from other states, and consequently are engaged in interstate transportation subject to the jurisdiction of the Surface Transportation Board. *See, e.g.*, *Atl. Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 268 (1927).

The rail industry is subject to a variety of state and local taxes, which generate enormous revenues. The

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> All of the improvements to the system helps lower the nation's total logistics cost bill.
>
> This helps to lower the price that consumers pay for products and helps keep the nation competitive in the world economy.

Id. at 4.

[6] After moving in the aftermath of the Northeast railroad collapse to enact reforms in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306(1)(a), 90 Stat. 31, 54 (1976) [hereinafter the "4-R Act"], Congress eliminated many other restraints that had led to the rail industry's decline in the Staggers Act.

[7] *See* Ass'n of Am. R.R., *Railroad Facts* 68 (2009); *see also* U.S. Surface Transp. Bd., FY 2007-2008 Annual Report, app. D, *available at* http://www.stb.dot.gov/stb/docs/AnnualReports/annreportfinal0708.pdf.

seven Class I railroads alone paid state and local taxes of more than $1 billion in 2009.

Congress enacted Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501 (2006), to ensure that the taxes states impose on these vital instrumentalities of nationwide commerce are not *discriminatory*—as they often had been in the past.[8] It bans four specified "acts" of state and local taxation that Congress declared would "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b).[9] The first three deal specifically with property taxes. 49 U.S.C. § 11501(b)(1)-(3). The fourth, at issue in this case, prohibits "another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

AAR and its members were deeply involved in the process that led to Section 11501's enactment. It is critical for them—as well as the many smaller railroads interconnected with them and customers throughout the Nation reliant on rail service—that

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[8] Congress studied the history of discriminatory state taxation of railroads and its effects over a fifteen-year period leading up to passage of the 4-R Act. *See, e.g.*, S. Rep. No. 94-499 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14; H.R. Rep. No. 94-725 (1975); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630 (1969); Special Study Group on Transp. Policies in the U.S., Sen. Comm. on Commerce, Nat'l Transp. Policy, S. Rep. No. 87-445 (1961).

[9] There are differences in statutory language between Section 306 as enacted and its recodification at 49 U.S.C. § 11503, later redesignated as 49 U.S.C. § 11501. However, recodification was not intended to effect any substantive change. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987) ("*Oklahoma Tax Comm'n*").

the statute be interpreted so as to achieve the goal Congress intended: to eliminate state tax discrimination against railroads, however that discrimination may be accomplished.

Since Section 11501 was enacted, states and localities have been inventive in seeking ways to evade it. Those efforts continue. The decision below offers a "free pass" for discrimination accomplished by exempting other taxpayers from a tax railroads must pay, and provides a road map other states can be expected to follow. AAR and its members have a crucial interest in urging that decision be reversed.

SUMMARY OF ARGUMENT

Congress enacted Section 11501 to eliminate harmful state tax discrimination against interstate railroads for all time. To that end, it did not stop at prohibiting property tax discrimination, which had been the most common vice historically and which is addressed in subsections (b)(1)-(b)(3). Congress went on to add subsection (b)(4), a broadly-worded catch-all banning "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4).

The decision below opens a gaping hole in the protections Congress created. As Petitioner shows, making discrimination-by-exemption free from challenge is contrary to the plain text of the statute when the tax at issue is not a property tax. *See* CSX Br. 13-22. Nothing in *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994)—on which the Eleventh Circuit based its decision—requires otherwise. *See* CSX Br. 22-28.

The harm this invites is enormous. States and localities have always had motive to shift tax burdens away from their own residents and onto instrumentalities of interstate commerce. Congress enacted Section 11501 to keep that motive in check, so that national interests would no longer be thwarted by parochial ones. The Eleventh Circuit's rule would allow states and localities to evade the strict protections Congress sought to impose, adding opportunity to the motive already there.

There is no justification for giving states that opportunity. Congress expressly declared that state tax discrimination against railroads unreasonably burdens and discriminates against interstate commerce. While the statute's prohibition is broad, it is at the same time tightly focused, so that the only intrusion on state tax prerogatives is that necessary to protect the national interest. The concerns of federalism were considered and resolved by Congress; they afford no basis for tampering with what the statutory text requires.

The history of tax discrimination against railroads makes clear that states and localities will take advantage of the opportunity the Eleventh Circuit rule creates. The current economy makes that an even likelier prospect. Indeed, recent experience shows that state and local governments continually seek ways to evade Section 11501 even without the handy device the decision below offers.

The harm the Eleventh Circuit's rule invites is particularly acute in the difficult circumstances now facing the Nation. Future growth depends on a healthy, improved and expanded infrastructure for interstate and foreign commerce, in which railroads

are a critical part. That is precisely the national interest Section 11501 was designed to protect.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISREAD SECTION 11501(b)(4) AND WRONGLY APPLIED *ACF INDUSTRIES*

The court below summarily affirmed dismissal of Petitioner CSX Transportation Inc.'s challenge to the Alabama sales and use tax on railroad diesel fuel, citing *Norfolk Southern Railway v. Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008) (Pet. App. 1a). As Petitioner demonstrates, *Norfolk Southern* was wrongly decided. CSX Br. 13-28. The Eleventh Circuit's interpretation of Section 11501(b)(4) is contrary to the statute's plain language and rests on the false premise that this Court's decision in *ACF Industries* applies here.

There is no need to reiterate Petitioner's arguments. It is important, however, to understand the context in which Section 11501 was enacted and the fundamental problem the statute addressed.

The problem Congress addressed was a structural one, stemming from the very type of conflict between federal and state interests that the legislative power conferred by the Commerce Clause was designed to resolve. As the Founders recognized, in the "competitions of commerce," states will "endeavor to secure exclusive benefits to their own citizens." The Federalist No. 7, at 28 (Alexander Hamilton) (Max Beloff ed., 1948). To a state pursuing its parochial interest, channels of interstate commerce offer particularly attractive targets for taxation. Not only

do instrumentalities operating over those channels create value, they do so in large part for customers who are located in other states; by its nature, a discriminatory tax on interstate railroads will be borne largely outside the taxing state. And this structural impulse is unchecked by any effective political counterweight, because the tax does not have to be paid by in-state voters.[10] Taxing interstate railroads to benefit local constituents is a difficult potion to resist.

So it is not surprising states drank it heartily, to the point that discriminatory state taxation was a major cause of the rail industry's acute deterioration in the middle of the 20th century. *See* S. Rep. No. 87-445. Studying the problem over a decade and a half period in which Northeastern and Midwestern rail systems struggled, then collapsed, Congress recognized that interstate railroads "are easy prey" for state taxes. S. Rep. No. 91-630, at 3.[11]

It was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501. *See* S. Rep. No. 94-499, at 2-3 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14, 15-16; H.R. Rep. No. 94-725, at 53 (1975). Putting an end to discriminatory taxation of railroads was its express goal. And while three

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[10] As this Court has noted, railroads are "'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3).

[11] While Congress spoke there in the context of property taxes levied by "state and local tax assessors," its point is equally true for state legislatures and other types of taxation.

provisions dealt specifically with property taxes, a source of much of the harm theretofore, Congress took pains to ensure that discrimination did not return in some different guise by adding the broadly worded catch-all in subsection (b)(4).

The passage of time has not diminished the evils Congress addressed, or the importance of the remedies it enacted. The impulse to impose discriminatory state taxes on railroads remains strong. It is particularly acute today, when many state and local governments face sharply falling revenues caused by the recent decline of world, national and local economies.

At the same time, the need to prevent states and localities from shifting undue tax burdens onto railroads could not be more critical. Interstate railroads must provide the backbone for national economic recovery. To do so, they must invest billions of dollars in new infrastructure to carry freight across the Nation.[12] Congress has affirmed

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[12] *See, e.g.*, Szabo Remarks at 3 ("The [railroad] industry ramped up investment from $6.4 billion in 2005 to $8.5 billion in 2006 and top out at $10.2 billion in 2008.") That is only a fraction of the total capital investment necessary for the improved rail infrastructure on which future national economic growth depends. *See, e.g.*, Ass'n of Am. R.R., *Nat'l Rail Freight Infrastructure Capacity and Investment Study* at ES-1 to -2, 7-1 to -5 (2007), *available at* http://www.aar.org/sitecore/content/Home/AAR/IndustryInformation/National_Capacity_Study/~/media/Files/National_CAP_Study_docs/natl_freight_capacity_study.ashx (estimating required investment of $148 billion in 2007 dollars for rail infrastructure to keep pace with economic growth and meet U.S. Department of Transportation forecast of rail freight demand through 2035). *See also* Am. Ass'n of State Highway and Transp. Officials, *Unlocking Freight* (2010),

the need for rail investment to assist the economy by creating grant programs for rail projects.[13] While such programs pay only a small fraction of capital improvement costs—most of which continue to be borne by the railroads themselves—they underscore the need to prevent any individual state from damaging the instrumentalities of interstate commerce on which true national economic recovery depends.

The Eleventh Circuit's decision would open an enormous loophole in the comprehensive, permanent ban on state tax discrimination that Congress had the foresight to adopt in Section 11501. It would permit states to extract disproportionate tax revenue from interstate railroads by exempting favored, local, non-rail enterprises from "another tax"—which is to say *any* non-property tax. The structural impulse to discriminate would be given an outlet that, driven by the enormous economic pressures of today, could quickly undo the protections Congress enacted.

This statutory context, to which *Norfolk Southern* turned a blind eye, makes plain that the court below fundamentally misread both Section 11501 and *ACF Industries*. Four further points confirm that.

First, because its reasoning expressly turned on how other provisions of the statute placed specific limits on *property* tax challenges, *ACF Industries*

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http://expandingcapacity.transportation.org/unlocking_freight/images/FreightReportFinal_7710.pdf.

[13] Those programs, which include direct federal loans and loan guarantees to finance rail infrastructure development, are described on the Federal Railroad Administration's website at http://www.fra.dot.gov/Pages/26.shtml.

has no relevance to the sales and use tax on diesel fuel challenged here. *See* CSX Br. 22-28. That no doubt was why "neither party briefed *ACF Industries* in depth" in *Norfolk Southern*. *See* 550 F.3d at 1313 (Pet. App. 26a). And that in turn may explain why, without the benefit of briefing, the Eleventh Circuit misapplied it.

Second, the Eleventh Circuit had it exactly backward in presuming that because "sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted . . . Congress' silence reflects a determination to leave such exemptions in place." *See id.* at 1315 (Pet. App. 30a). The fact Congress authorized continuation of *property* tax exemptions by expressly limiting the property tax comparison class used in subsections (b)(1)-(3) to commercial and industrial property "subject to a tax levy" in no way suggests that the comparison made to determine whether non-property taxes discriminate under subsection (b)(4) implicitly contains the same limitation. To the contrary, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotations and citation omitted)). The omission of any language or defined terms in subsection (b)(4) authorizing the continuation of exemptions from other state taxes such as sales and use taxes is persuasive evidence Congress did *not* protect the exemption at issue here.

Third, Alabama's diesel fuel tax is discriminatory even under *ACF Industries*. If the railroads, "either alone or as part of some isolated and targeted group" are the only comparable entities subject to a tax, the issue is not that other property has been "exempted" but rather that railroad property has been "singled out." *ACF Industries,* 510 U.S. at 346-47. That very situation is presented here. Alabama "conceded that '[i]n the instant case, no matter how the comparison class is framed, the comparison class consists of motor carriers and water carriers.'" Pet. App. 12a. And both motor carriers and those water carriers engaged in interstate or foreign commerce are exempt from Alabama's sales and use tax on diesel fuel. Viewed through the prism of the comparison class, it is clear that railroads are indeed an "isolated and targeted group" that has been singled out for the sales and use tax on diesel fuel, which would be a violation of the statute even with respect to property taxes. *See ACF Industries*, 510 U.S. at 346.[14]

Finally, the Eleventh Circuit's invocation of federalism was profoundly misplaced. It began by quoting what *ACF Industries* said about "principles of federalism": "'When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, [the Court is] hesitant to

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[14] *Norfolk Southern* attempted to skirt this issue by noting that Alabama's sales and use tax applies to a handful of solely *intra*state water carriers (who do not compete with interstate railroads in any meaningful way) and to motor carriers that might hypothetically violate the law by failing to pay other taxes they owe. *See* 550 F.3d at 1316 (Pet. App. 32a-33a). That was sheer rationalization to avoid the fact this tax targets interstate railroads as compared to their competitors, and therefore violates Section 11501 even under *ACF Industries*.

extend the statute beyond its evident scope.'" 550 F.3d at 1314 (Pet. App. 28a-29a) (quoting 510 U.S. at 345). However, *Norfolk Southern* completely ignored the difference in Section 11501's "evident scope" with respect to property taxes as opposed to other taxes.

ACF Industries discussed at length the uncertainty regarding how subsection (b)(4) applies to property taxes that is created by express limitations on property tax relief in subsections (a)(4) and (b)(1)-(3). *See* 510 U.S. at 339-44. But there is no such uncertainty in applying subsection (b)(4) to a sales and use tax or other non-property tax. Nothing elsewhere in the statute creates any ambiguity about what constitutes discrimination when a property tax is not at issue. The law's plain text is clear and its "evident scope" is not limited in any way.

The Eleventh Circuit's bare assertion that "concerns for state sovereignty are just as keen" in this context, 550 F.3d at 1315 (Pet. App. 31a), is a hollow incantation that adds nothing to the analysis. It merely echoes another Eleventh Circuit panel that recently sought to limit Section 11501 based on *ACF Industries'* "principles of federalism," an argument this Court expressly rejected when it reversed that panel in *CSX Transportation, Inc. v. Georgia State Board of Equalization,* 552 U.S. 9, 20-22 (2007).

What this Court said in 1987 when principles of comity were invoked to limit Section 11501 applies equally to the federalism arguments that the Eleventh Circuit has now twice raised: "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." *Oklahoma Tax Comm'n,* 481 U.S. at 464.

II. PROPERLY APPLIED, SECTION 11501 PROVIDES RELIEF FROM STATE TAX DISCRIMINATION WITH MINIMUM NECESSARY INTRUSION INTO STATE TAX POLICY CHOICES

Two Eleventh Circuit panels in a span of two years have sought to wield *ACF Industries'* narrow treatment of federalism as a broad tool to restrict very different Section 11501 claims. That in itself suggests some lower courts may harbor a fundamental misunderstanding of how the statute, properly applied, affects state taxing powers.

There is no question Congress intended to exercise its powers under the Commerce Clause to prohibit states from subjecting railroads—and the interstate commerce they carry—from discriminatory taxes.[15] It went on to provide an express exception from the Tax Injunction Act so that prohibition could be enforced in federal courts. *See* 49 U.S.C. § 11501(c). Congress set a clear and carefully focused limit on a state's freedom to adopt whatever taxes it might choose—one plainly warranted by the long history of discriminatory railroad taxes, the incentives that led to them and the results they fostered—to further the national interest. Here again, concerns about state sovereignty were weighed by Congress, and the line

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[15] As the United States puts it, "[t]he 4-R Act is preemptive in its design and by its broad, clear, and express terms." U.S. Br. in Support of Cert. 13 (citing *CSX Transp., Inc.*, 552 U.S. at 20-21).

it drew must be respected. *See Oklahoma Tax Comm'n*, 481 U.S. at 464.

Despite this express, well-justified congressional decision to stop states from imposing discriminatory taxes, interference with state prerogatives continues to be argued in efforts to limit Section 11501 claims. While that argument may be wrapped in the rhetoric of federalism, it ignores how Section 11501 was designed to and should operate.

Section 11501 does not mandate any specific way in which states must tax their residents or activities affecting them. It simply says that when a state decides to levy a tax, that tax cannot discriminate against interstate railroads.

The distinction is crucial: the normal remedy against a tax that violates Section 11501 is to enjoin the state from collecting that specific tax from the railroad. Unless a tax applies solely to railroads, it continues to apply to other taxpayers while its discriminatory application to railroads is enjoined. Other, non-discriminatory taxes are not affected.

This focused remedy makes the smallest possible intrusion into state taxing activities in the interest of overriding national concerns. State legislators can correct the problem by eliminating the discrimination against railroads, but even if they do not, federal law blocks only a narrow sliver of their overall tax regime—the application of a specific tax to interstate rail carriers.

Courts enforcing Section 11501 have carefully kept this narrow focus. Consistent with the statutory text prohibiting "a tax" and "another tax," 49 U.S.C.

§ 11501(b)(2) & (4), they have confined both the analysis and the relief to the specific tax at issue.

For example, in *Kansas City S. Ry. v. McNamara*, 817 F.2d 368 (5th Cir. 1987)—a case brought under subsection (b)(4)—the Fifth Circuit rejected a state's urging to look beyond the specific tax challenged:

> The 4-R Act precludes the difficult analysis that the [state] requests. The statute speaks in simple and categorical terms about property tax rates and assessments, § [11501](b)(1)-(3), then prohibits "another tax that discriminates against a rail carrier . . . ." § [11501](b)(4). The focus is on particular taxing entities—"a State, subdivision of a State, or authority acting for a State or subdivision"—and particular assessments and particular taxes. There is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state.

Id. at 377 (footnote omitted). As the Fifth Circuit explained, "the categorical language of the 4-R Act demands bright-line rules for simple judicial administration." *Id.* at 378 (expressing agreement with *Gen. Am. Transp. Corp. v. Kentucky,* 791 F.2d 38 (6th Cir. 1986)).

Other courts of appeals have reached the same conclusion. The Eighth Circuit has repeatedly rejected state attempts to broaden the inquiry—and potential interference with state taxing power—beyond the specific tax being challenged. *See Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. & Santa Fe Ry. v.*

Lohman, 193 F.3d 984, 986 (8th Cir. 1999); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991); *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 209-10 (8th Cir. 1981). The Seventh Circuit endorsed the analysis in *Kansas City Southern Railway* and *Trailer Train* with the observation that "[r]eading subsection (b)(4) of our statute in light of the approach taken in the first three subsections, we infer a congressional desire that courts avoid the thicket of incidence analysis and forbid states to single out railroads for taxation." *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186-88 (7th Cir. 1991). The Sixth Circuit also has adopted this consensus view, holding that "'[u]nder a 4-R Act analysis, a reviewing court need not consider the state's entire tax structure—just an analysis of the individual tax imposed by the taxing entity alleged to be discriminatory.'" *Gen. Amer. Transp.*, 791 F.2d at 41 (quoting district court decision affirmed).[16]

As these decisions reflect, the issue has usually arisen when a state has sought to justify a tax that discriminates against railroads by saying other taxes offset the discrimination—a question AAR recognizes is not before the Court here.[17] But it is tightly bound

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[16] Two state supreme courts are also in accord. *Burlington N. R.R. v. Comm'r of Revenue*, 509 N.W.2d 551, 554 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338, 346 (Iowa 1983). The Eleventh Circuit itself declined "to look past the particular tax at issue to analyze the overall state tax structure" in considering whether Alabama subsidized motor carriers. *Norfolk Southern*, 550 F.3d at 1318 (Pet. App. 36a).

[17] AAR observes, however, that this unanimous consensus of the courts of appeals is contrary to the view expressed by the government in its brief supporting certiorari. *See* U.S. Br. in

with the federalism concerns the Eleventh Circuit invoked in *Norfolk Southern*.

Nothing makes that clearer than this Court's decision in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). *Snead* considered a provision of the Tax Reform Act of 1976—enacted by the same Congress as the 4-R Act—that prohibited states from imposing "a tax" on electricity if it discriminated against out-of-state parties. *See id.* at 146. The state argued the prohibition was invalid under the Commerce Clause, contending that the constitutional test "require[d] examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of State." *Id.* at 149. This Court disagreed:

> To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute, but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

Id. at 149-50 (footnote omitted). The Court went on to conclude that the law was within the power of Congress under the Commerce Clause because it

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Support of Cert. 17 & n.8. Even though the Acting Solicitor General correctly noted that the issue is not before the Court, it is important to emphasize that the government's view was misinformed and that it did not address any of the multiple grounds on which the courts of appeals have rested their decisions limiting the inquiry to the specific tax challenged.

prohibited a tax that "interfered with interstate commerce" and used "a reasonable method to eliminate that interference." *Id.* at 150.

Snead's teaching applies to federal-state relations under Section 11501 as well.[18] By narrowly focusing the law's analysis and relief on the particular tax at issue, Congress minimized the impact on state prerogatives, doing only what it found necessary to eliminate interference with interstate commerce.

Section 11501 is fully consonant with principles of federalism exactly as Congress wrote it. There is no warrant in those principles for limiting what the plain text of the statute requires, including subsection (b)(4)'s catch-all prohibition of "another tax that discriminates against a rail carrier."

III. THE ELEVENTH CIRCUIT'S DECISION INVITES A RESURGENCE OF DISCRIMINATORY STATE TAXES ON RAILROADS AND, THROUGH THEM, ON INTERSTATE COMMERCE

The impulses that prompt state and local governments to pursue sources of tax revenue other than their own voters have not abated since the 4-R Act was passed. Even though Congress laid down bright-line rules, there have been continual efforts to evade them. In times such as this, with tax revenues reduced by general economic conditions, those efforts are even more frequent. A few examples of what

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[18] Two courts of appeals have cited *Snead* as support for limiting the Section 11501 analysis to the specific tax being challenged. *See Trailer Train Co.*, 929 F.2d at 1302-03; *Kansas City S. Ry.*, 817 F.2d at 376.

railroads have encountered recently illustrate the variety of techniques by which states and localities persistently seek some way around Section 11501.

A.

One of the most egregious is the effort last year by a levee drainage district in Illinois to make railroads pay a hugely disproportionate share of its budget shortfall. *See Kansas City S. Ry. v. Borrowman*, No. 09-3094, 2010 WL 1849844 (C.D. Ill. May 6, 2010), 2010 WL 2178699 (C.D. Ill. May 28, 2010), *appeal pending sub nom. Kansas City S. Ry. v. Koeller,* No. 10-2333, (7th Cir.). Prior to 2009, Sny Island Levee Drainage District divided its operating budget by the number of acres it benefitted and assessed a per-acre fee, subject only to a per-tract elevation adjustment. Under that system, land owned by railroads was taxed exactly the same as land owned by any other taxpayer. However, flooding in the first half of 2008 caused the district to incur unusually high expenses, which the revenue from existing tax assessments was insufficient to cover. At that point, instead of simply raising taxes for all landowners the district devised a new assessment method, placing railroads, pipelines and for-profit utilities in a separate category to be taxed on a "benefit basis."

The taxes on other landowners, including owners of other commercial and industrial property, went up $10 per acre. Had railroads been taxed in the same manner, Kansas City Southern's tax would have grown from $1,773.94 to $3,897.14. But under the new "benefit" scheme, its tax rose to $85,544.26—an astounding 4,700%. Norfolk Southern's tax rose an even more astonishing 8,000%, from $1,126.50 to $93,917.34. *See* 2010 WL 1849844 at *3. The

district court's refusal to enjoin collection of the inflated tax on the railroads is currently being briefed to the Seventh Circuit.

B.

The City of Vernon, California enacted a "parcel tax" imposed only on "non-refrigerated warehouses, truck terminals, freight terminals or other distribution facilities." *See* Order at 2, *Burlington N. & Santa Fe Ry. v. City of Vernon*, No. CV00-12891 (C.D. Cal. Aug. 7, 2003) (order granting permanent injunction), ECF No. 151. BNSF challenged that tax, and the district court properly concluded the city had "taxed railroads 'as part of some isolated and targeted group'" in violation of subsection (b)(4). *Id.* at 17-18 (quoting *ACF Industries*, 510 U.S. at 347-48). The parcel tax was therefore permanently enjoined. *Id.*

C.

States also have tried to find "backdoor" measures to extract additional tax revenues from railroads. In 2006 Kansas enacted a 2.5 percent tax on the gross receipts of car line companies that own rail cars supplied for railroad operations there.[19] The burden of that tax obviously would have been borne by the railroads. TTX, the largest car line company, challenged the tax under subsection (b)(4). The state did not even attempt to defend; instead, it reached a settlement in which it agreed to a consent permanent injunction. *See* Consent Permanent Injunction, *TTX*

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[19] The fact that a similar Missouri tax on rail-car rental revenue had been enjoined under Section 11501 some fifteen years earlier, *Trailer Train Co.*, 929 F.2d at 1301-02, apparently had no impact on the Kansas legislature.

Co. v. Kan. Dep't of Revenue, No. 5:09-cv-04019-JAR/JPO (D. Kan. Mar. 17, 2009), ECF No. 10.

D.

Even states with abundant natural resources that offer an ample tax base yield to the temptation to seek revenue from the railroads transporting those resources rather than the resources' owners. A double-barreled Wyoming effort targeting railroads is illustrative.

Wyoming is the Nation's largest producer of coal. In 2008, its twenty mines produced over 467 million short-tons—almost 40 percent of total U.S. coal production.[20] That coal is shipped to utilities in the Midwest, Mid-South, Southwest, Northeast and Southeast, virtually all by rail.

In 2000 the Wyoming legislature enacted two laws imposing taxes on railroads: a Train Mile Tax and a Coal Transportation Tax. The Train Mile Tax on its face applied only to railroads—a per se violation of Section 11501. *See Burlington N. & Santa Fe Ry. v. Dover*, No. 00-CV-109-J (D. Wyo. Apr. 25, 2003) (order granting permanent injunction).

The Coal Transportation Tax was more inventive. It applied to "anyone commercially transporting coal in Wyoming." *Burlington N. & Santa Fe Ry. v. Atwood*, 271 F. Supp. 2d 1359, 1363 (D. Wyo. 2003). However, it was undisputed that well over 99% of the coal transported in Wyoming moved by rail. In the tax year at issue, BNSF and UP carried 356 million tons of coal in Wyoming, whereas all other carriers

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[20] U.S. Energy Info. Admin., *Ann. Coal Rep. 2008*, Mar. 2010, at 10, http://www.eia.doe.gov/cneaf/coal/page/acr/acr.pdf.

combined accounted for only 1.5 million tons. *Id.* at 1362. The total tax burden for the railroads would have been over $5.7 million, compared to less than $19 thousand for non-rail carriers. *Id.*

The district court had no difficulty concluding that this tax "single[d] out railroads" and thus violated Section 11501. *Id.* at 1367. But Wyoming's attempted justification was revealing. It argued the Coal Transportation Tax was merely "designed to tax one of Wyoming's principal resources, coal." *Id.* Rejecting that argument, the district court pointedly observed: "If the legislature truly desired to achieve maximum tax benefit from taxation of one of this State's primary natural extractive resources, it could do so easily, without resulting in a discriminatory tax on railroads, simply by increasing or otherwise modifying the severance taxes imposed on coal, for example." *Id.* That, of course, was precisely what the legislature was trying to avoid—by shifting the tax burden onto out-of-state railroads.

E.

Oklahoma recently adopted a new Business Activity Tax.[21] That new tax is "in lieu of any and all other taxes imposed by the state" or its subdivisions "on intangible personal property"—"*except* for public services corporations, *railroads*, and air carriers." *Id.* § 5.F (emphasis added.) In other words, while all other businesses except air carriers and public service corporations pay only the new tax and are relieved of any personal property tax on intangibles, railroads now pay *both* the new tax *and* substantial

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[21] *See* Enr. S.J. Res. 61, 52nd Leg., 2d Sess. § 5 (Okla. 2010), *http://webserver1.lsb.state.ok.us/2009-10bills/SB/sjr61_enr.rtf.*

taxes on intangibles. A more blatant violation of Section 11501 is difficult to imagine.

F.

Finally, taxes on railroad diesel fuel such as the tax at issue here present recurring problems. While railroads use fuel very efficiently, they nonetheless use it in large volume, making it an attractive tax target. In addition to six cases already decided by the lower courts, a challenge to Tennessee's sales and use tax on diesel fuel is now before a federal district court, which has stayed further proceedings pending the decision in this case. *Ill. Cent. R.R. v. Tenn. Dep't of Revenue*, No. 3:10-CV-00197, (M.D. Tenn. June 29, 2010) (order staying proceedings), ECF No. 16.

* * * *

As these examples illustrate, more than thirty years after it was enacted states and localities are still actively seeking ways to evade Section 11501's clear and simple mandate: that their taxes not discriminate against railroads. The continuing proliferation of taxes designed to shift tax burdens away from local residents and onto the railroads confirms the continued need for strict enforcement of this law—for the protection of not only the railroads but also shippers and customers in other states. A clear ruling that discrimination cannot be accomplished by manipulating exemptions from sales and use taxes or other non-property taxes will help deter states and localities from further efforts to evade a ban that Congress enacted to benefit the entire national economy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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