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

REPLY BRIEF FOR PETITIONER

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After prohibiting specific, carefully defined forms of unlawful property tax discrimination, the anti-tax discrimination provision of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") concludes by prohibiting the States from "[i]mpos[ing] another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). Respondents do not deny the breadth of the terms employed in this catchall provision. Respondents do not deny that the ordinary meaning of the broad terms would prohibit a state from imposing a tax on a railroad that discriminates against it by exempting the railroad's competitors from the tax. Instead, respondents argue that "discriminates" is used in a special and unique sense, one that is not expressly defined in the section of the statute that defines other terms, *id.* § 11501(a), but rather is left for courts to discern by criss-crossing around the statute and twisting it like a pretzel. The end result, according to respondents, is that "discriminates" means treating unfavorably, but not if the railroads are treated unfavorably by the use of exemptions from a tax, and not if the railroads are treated unfavorably by comparison to their direct competitors. According to respondents' strained interpretation, only unfavorable treatment of railroads vis-à-vis local businesses accomplished without using exemptions constitutes actionable discrimination. Incredibly, after poking massive holes into this broad catchall provision, respondents conclude by urging the railroads, if they are unhappy with respondents' handiwork, "to ask Congress to re-write § 11501." Resp. Br. 60.

Petitioner prefers the statute as written, and asks this Court simply to interpret it as such. Petitioner also asks this Court simply to answer the narrow

question that this Court adopted upon granting certiorari. The Eleventh Circuit did not purport to determine what counts as unlawful discrimination under § 11501(b)(4). It never reached that issue because it ruled that Congress, in the statute, preserved the States' authority to impose non-property taxes on railroads while exempting their competitors just as Congress had preserved the States' authority to impose property taxes on railroads while exempting non-railroad property. Whether such non-property tax exemption schemes are even subject to challenge as discrimination is all this Court agreed to review. In this proceeding, this Court need say no more than that a railroad may challenge a non-property tax imposed on it as discriminatory based on exemptions.

I. THE TEXT AND STRUCTURE OF § 11501(b) PERMITS A CHALLENGE TO NON-PROPERTY TAXES THAT EXEMPT RAIL-ROAD COMPETITORS.

1. Section 11501(b) has three distinct parts. First, the opening paragraph declares that "[t]he following acts unreasonably burden and discriminate against interstate commerce" and that States and their subdivisions are prohibited from adopting such measures. As the language makes clear, this opening paragraph merely declares that the States are prohibited from doing the acts that follow, along with the reason Congress chose to prohibit them. Second, the first three subparagraphs identify particular prohibited acts with regard to property taxes. 49 U.S.C. § 11501(b)(1)-(3). Third, the last subparagraph is a generally worded catchall that prohibits "[i]mpos[ing] another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4). Given this language and structure, which are the starting points for any

question of statutory construction, *Jiminez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009), it is hard to imagine what Congress could say that would more clearly indicate that Congress has proscribed a broader range of acts with respect to non-property taxes than with respect to property taxes.

The portion of the statute addressed exclusively to property taxes, subsections (b)(1)-(3), is specific. It identifies the taxes to which railroad property taxes are to be compared: taxes concerning "other commercial and industrial property in the same assessment jurisdiction." Indeed, because the phrase "commercial and industrial property" is a defined term, the comparison class with regard to property taxes is even more narrow than the ordinary meaning of the language employed would suggest. For instance, agricultural and timber property would comfortably fit within the ordinary meaning of "commercial and industrial property." But Congress chose to permit the States to continue to discriminate against railroad property as compared with agricultural and timber property. 49 U.S.C. § 11501(a)(4) (defining "commercial and industrial property" to exclude agricultural and timber property). Likewise, on its face the phrase "commercial and industrial property" would comfortably cover both taxed and exempt property. But Congress chose to permit the States to continue to discriminate against railroad property as compared with other commercial and industrial property that a State has exempted from property taxes. *Id.* (defining "commercial and industrial property" to include only "property … subject to a property tax levy").

By contrast, the portion of the statute that reaches non-property taxes is general. It broadly prohibits "another tax that discriminates against a rail

carrier." As the parties agree, the word "another" means the same as "any other," which appeared in the original version of the statute. Resp. Br. 9 n.1; Pet. Br. 4 n.1. So subparagraph (b)(4) includes "other" (not exclusively property) taxes, and prohibits discrimination against railroads with respect to them. No defined terms are used in subsection (b)(4), like those in subsections (b)(1)-(3), that have the effect of narrowing the scope of the ordinary meaning of the broad terms employed. There is, thus, no reason to conclude that Congress shielded from challenge a railroad's claim of discrimination based on non-property tax exemptions provided to its competitors.

2. Despite the conspicuous absence of the kind of specific, narrowing language in subsection (b)(4) that this Court held authorized the states to discriminate by use of tax exemptions with regard to property taxes, *Dep't of Revenue* v. *ACF Indus., Inc.,* 510 U.S. 332, 342 (1994), respondents contend that the statute as a whole provides a "singular definition of discrimination," Resp. Br. 18, through which Congress "express[ed] its intent to prevent exemptions from being considered discriminatory," *id.* at 19. Respondents never deny that the ordinary meaning of the word "discriminates" with regard to taxes encompasses taxing the protected class while exempting others similarly situated from that tax. *ACF Indus.*, 510 U.S. at 343 ("It is true that tax exemptions, as an abstract matter, could be a variant of tax discrimination."); see U.S. Br. 8 (quoting *Black's Law Dictionary* 534 (9th ed. 2009)) (defining "discrimination" to mean "'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored'"). Respondents never even discuss the numerous cases in petitioner's

opening brief that have recognized that tax exemptions are a form of discrimination. *Ark. Writers' Project* v. *Ragland*, 481 U.S. 221 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Walling* v. *Michigan*, 116 U.S. 446 (1886). Instead, respondents argue that Congress provided a special definition, different from its ordinary meaning, for the word "discriminates" throughout § 11501(b). Resp. Br. 25. Respondents reach this conclusion by mangling the statute.

As an initial matter, if Congress meant to attribute a special, narrow meaning to the word "discriminates" § 11501(b), one would expect Congress to provide that definition in § 11501(a), where Congress specified the narrow meaning it was attributing to other terms in the statute. Of course, "discriminates" is not among the 4-R Act's defined terms. That the statute defines some terms, but not others, provides especially strong reason to apply the undefined terms in their ordinary sense. *Lopez* v. *Gonzales*, 549 U.S. 47, 53-54 (2006) ("Congress can define [a statutory term] in an unexpected way. But Congress would need to tell us so …."); *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

Respondents root their made-up proposition—that the word "discriminates" has a specially defined meaning throughout § 11501(b)—in the doctrine of *ejusdem generis*. Resp. Br. 26-27. Under that doctrine, "'[w]here general words follow specific words *in a statutory enumeration*, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S.

105, 114-15 (2001) (emphasis added; alteration in original) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)).

The doctrine applies when a statute enumerates specific objects "in the same sentence" as a general phrase, *id.* at 114, because otherwise the specifically identified objects would have no independent meaning or effect. In *Circuit City*, for instance, the relevant sentence of the statute enumerated certain contracts to which the Federal Arbitration Act did not apply, "'contracts of employment of seamen, [and] railroad employees,'" and concluded its list with the broad phrase "'or any other class of workers engaged in foreign or interstate commerce.'" *Id.* at 112 (quoting 9 U.S.C. § 1). As this Court reasoned, if the phrase "any other class of workers engaged in interstate or foreign commerce" were given the unqualified, broad scope that those words in isolation suggest, then "there would be no need for Congress to use the phrases 'seamen' and 'railroad employees'" in the statute at all. *Id.* at 114. The Court limited the otherwise broad phrase to the characteristics of the enumerated items to preserve some effect for the specifically enumerated terms. *Id.* at 114-15; see *Begay* v. *United States*, 553 U.S. 137, 142 (2008) (general phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" is narrowed in scope by preceding enumeration of specific crimes).

In § 11501(b), there is no need to narrow the meaning of the word "discriminates" to give effect to any other term in the statute. This Court, in *ACF Industries*, has already made clear what is necessary to ensure that subsection (b)(4) does not render other parts of § 11501 "inoperative." 510 U.S. at 340. Subsection (b)(4) does not encompass those forms of

tax discrimination that subsections (b)(1)-(3) expressly permit: discrimination against railroads in *property taxes* as compared with agricultural and timber property, *id.*, and discrimination against railroads in *property taxes* as compared with property exempt from property taxes altogether, *id.* at 343. Importantly, the interpretation of subsection (b)(4) that prevents the statute from "nullify[ing]" itself, *id.*, turns not on the word "discriminates" in subsection (b)(4), but on the phrase "another tax." This Court in *ACF Industries* concluded that the "other" taxes covered by (b)(4) must exclude those specifically authorized by Congress in (b)(1)-(3).

Respondents are thus asking the wrong question when they ask "what characteristic is shared by subsections (b)(1)-(b)(3) that helps define *discrimination* in subsection (b)(4)." Resp. Br. 27 (emphasis added). Subsections (b)(1)-(3) do not limit the meaning of discrimination at all. The right question is what characteristic is shared by subsections (b)(1)-(3) that helps define *another tax* in subsection (b)(4). And that question was answered in *ACF Industries*: because subsections (b)(1)-(3) authorize certain discriminatory property taxes, the "other" taxes that are not allowed to discriminate against railroads must be different from those.

Contrary to respondents' argument, Resp. Br. 28, this Court has never said, and nothing in the text or structure of § 11501(b) suggests, that exempting non-railroad commercial property from taxation is not discrimination within the meaning of § 11501(b). Indeed, this Court's characterization of the State's argument in *ACF Industries* assumes the existence of "discriminatory property tax exemptions," *ACF Indus.*, 510 U.S. at 339, but that Congress expressly chose not to prohibit that kind of discrimination. *Id.*

at 343 (holding that "subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property."). And *ACF Industries* further expressly acknowledges "that tax exemptions, as an abstract matter, could be a variant of tax discrimination." *Id.*

In the end, respondent is right in one small respect: "not *every* state tax that grants an exemption is challengeable under § 11501(b)(4)." Resp. Br. 24. Petitioner readily accepts what *ACF Industries* requires: state *property* taxes that grant exemptions are not challengeable under § 11501(b)(4) because Congress, in subsections (b)(1)-(3) expressly left to the states the authority to discriminate through property tax exemptions (so long as they do not effectively single out railroads for taxation, *ACF Indus.*, 510 U.S. at 346). But *non-property taxes* are not addressed at all in subsections (b)(1)-(3). As a result, the text and structure of §11501(b) as a whole supports the view that a *non-property* state tax that discriminates, even by granting exemptions, is challengeable under § 11501(b)(4).[1]

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[1] None of the selected portions of the 4-R Act's legislative history, upon which respondents rely, provides meaningful support for their interpretation. That the States persuaded Congress to preserve their authority to provide discriminatory property tax exemptions that cannot be challenged under § 11501(b), Resp. Br. 50-52, tells us nothing about whether Congress also preserved the States' authority to provide discriminatory non-property tax exemptions. Respondents concede, through their silence, that the States never even asked to preserve their power to employ discriminatory non-property tax exemptions. Respondents appear to be arguing that because the States got what they asked for with respect to property tax exemptions, this Court should also protect non-property tax exemptions, even though they never asked for it. Also, whether members of Congress were thinking about "in lieu taxes," and

3. Contrary to respondents' argument, petitioner's interpretation does not produce "entirely different meanings [of the phrase 'another tax that discriminates'] depending on the type of tax being considered: property or non-property." See Resp. Br. 32. In petitioner's view, "another tax that discriminates" has a single meaning: any tax not specifically authorized in subsections (b)(1)-(3) that discriminates against railroads (even if by exempting railroad competitors) is subject to challenge under subsection (b)(4). It is true that, under *ACF Industries*, if a property tax discriminates against a railroad by exempting non-railroad property, it cannot be challenged under subsection (b)(4) if it has been authorized under (b)(1)-(3) (unless the tax singles out railroads). But that is not because the meaning of subsection (b)(4) changes for property and non-property taxes. It is because, as *ACF Industries* makes clear, the meaning of "another tax" in subsection (b)(4) excludes a property tax from which others are exempt to the extent such a tax has been authorized in subsections (b)(1)-(3).

Respondents contend otherwise—that petitioner's view creates "a chameleon statute," Resp. Br. 33—only because respondents erroneously believe that in *ACF Industries* this Court read the word "discriminates" in § 11501(b)(4) to exclude property tax exemptions. But, as demonstrated above, *ACF Industries* did not turn on the word "discriminate." This Court can give § 11501(b)(4) the meaning its plain language requires, and remain completely

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whether there was even a single understanding of what "in lieu taxes" referred to, does not matter. Even respondent is unwilling to argue "that subsection (b)(4)'s 'another tax' language is limited solely to in lieu gross receipts taxes." *Id*. at 55.

faithful to its construction of that provision in *ACF Industries*.

II. THE "OTHER CONSIDERATIONS" IN *ACF INDUSTRIES* DO NOT COMPEL THE CONCLUSION THAT NON-PROPERTY TAX EXEMPTIONS FAVORING A RAILROAD'S COMPETITORS ARE NOT CHALLENGEABLE UNDER § 11501(b)(4).

This Court's textual and structural analysis fully and independently supported the ruling in *ACF Industries*. As discussed above, the same textual and structural analysis fully and independently supports the conclusion that non-property taxes imposed on railroads from which the railroad's competitors are exempt are challengeable as "another tax that discriminates against a rail carrier." Nonetheless, this Court pointed to three "[o]ther considerations" that "reinforce[d]" this Court's textual and structural analysis. *ACF Indus.*, 510 U.S. at 343. Nothing in *ACF Industries* suggests that any or all of those "considerations" would have been weighty enough to overcome the conclusion compelled by the text and structure of the statute. Thus, even if those "considerations" supported respondents' interpretation of § 11501(b)(4) here, which, as discussed below, they do not, they could not "compel[]" this Court to ignore what the text and structure of the statute so clearly require. See Resp. Br. 34-35.

1. It is true that like subsections (b)(1)-(3), subsection (b)(4) "does not speak with any degree of particularity to the question of tax exemptions." *ACF Indus.*, 510 U.S. at 343. But that consideration took on significance in *ACF Industries* only in light of the fact that Congress addressed discriminatory property tax rates and assessment ratios in detail in subsections (b)(1)-(3), and especially in light of the

fact that Congress had, in § 11501(a), specifically excluded property tax exemptions from the comparison class for subsection (b)(1)-(3) claims. *Id.* This consideration has little or no significance when dealing with the question whether selective exemptions in *non-property* taxes are challengeable under § 11501(b)(4), especially because Congress has nowhere expressly excluded exemptions from the comparison class for non-property discrimination claims.

Subsection (b)(4) was a late addition to the statute, put in as a catchall to ensure that the basic purpose of protecting railroads from discriminatory taxes would not be easily evaded by whatever sort of non-property discriminatory tax a State might impose. *Richmond, Fredericksburg & Potomac R.R.* v. *Dep't of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373-74 (5th Cir. 1987); *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *S. Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983). "[T]he whole value of a generally phrased residual clause … is that it serves as a catchall for matters not specifically contemplated." *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2191 (2009). There is no reason to doubt that when Congress used the word "discriminates" in the catchall, it meant discrimination in all the forms it could take, including through exemptions (that had not been authorized). See *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803 (1989) (exemption for retirement benefits provided by state but not for retirement benefits provided by federal government falls within Congress's prohibition of discriminatory taxes on federal government employees by a state).

That subsection (b)(4) does not speak with particularity about tax exemptions is a strength of this catchall provision, not a reason to weaken it.

Respondents urge this Court not to allow railroads to challenge taxes that discriminate against them by exempting their competitors because such claims would require courts to evaluate a number of other issues to determine whether, in fact, such a tax unlawfully discriminates against railroads. Resp. Br. 36. This is true, but on that logic the Court would not enforce anti-discrimination laws in civil rights and other contexts. Congress chose to prohibit non-property taxes that discriminate against railroads in whatever guise they take.

Moreover, questions like what is the proper comparison class under subsection (b)(4) and what, if anything, might justify facially discriminatory tax treatment will not go away even if this Court were to misread the statute to authorize States freely to exempt railroad competitors from non-property taxes imposed on railroads. If a State imposed a higher tax rate on railroad use of fuel than others pay, even the State would have to concede that such a tax would be subject to challenge under subsection (b)(4); otherwise, the catchall becomes a nullity. And, a railroad challenge to a differential tax rate will still present a complicated set of questions for the court to decide before it can declare the discrimination to be unlawful. The issues are no more difficult in the exemption context than they are in the differential rate context.

2. Respondents also emphasize that, like property tax exemptions, sales and use tax exemptions were prevalent when Congress adopted § 11501(b). *Id.* at 39-41. But, once again, to the extent the prevalence of property tax exemptions played any role in this

Court's ruling that States retained the authority to provide *property* tax exemptions that discriminate against railroads, it did so based on Congress' "silence on the subject … in light of the explicit prohibition of tax rate and assessment ratio discrimination," *ACF Indus.*, 510 U.S. at 344, and especially in light of the fact that Congress had, in § 11501(a), specifically excluded property tax exemptions from the comparison class for subsection (b)(1)-(3) claims. This reasoning does not extend to *non-property* tax exemptions because Congress never dealt with non-property tax discrimination with precision, and could not have done so given that it was trying to enact an inclusive ban on discrimination.

3. Finally, respondents invoke a steroid-laced version of the "principles of federalism," at odds with the way this Court invoked federalism in *ACF Industries*. Compare Resp. Br. 41-44, with *ACF Indus.*, 510 U.S. at 345. Respondents argue that principles of federalism require that this Court be "'*absolutely certain* that Congress intended' to preempt a State's ability to grant exemptions from its sales and use taxes." Resp. Br. 42 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991)). In *ACF Industries*, this Court said that "[w]hen determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, *we are hesitant to extend the statute beyond its evident scope*." 510 U.S. at 345. The statute's scope, with respect to property tax exemptions, was clear: Congress expressly preserved the States' power to employ them freely, even if doing so discriminated against railroads. That is why principles of federalism "compel[led]" the Court not to read the non-specific subsection (b)(4) to take that power away from the States.

Here, as should be apparent by now, the statute's scope and purpose with respect to non-property taxes is equally clear. The desire to interfere with the States' sovereign taxing authority could not be stated more plainly. The first paragraph of § 11501(b) expressly declares that Congress is setting forth taxing acts that the States "may not do." And, when addressing non-property taxing acts, Congress used the broadest language possible. The "clear and manifest purpose of Congress," then, was to permit challenges to state non-property taxes imposed on railroads but that discriminate against them by exempting their competitors. *ACF Indus.*, 510 U.S. at 345 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

III. RESPONDENTS' VARIOUS OTHER ARGUMENTS ARE BEYOND THE SCOPE OF THE QUESTION PRESENTED.

As noted earlier, the question this Court agreed to review is narrow because the holding below was limited, although devastating to the railroad industry. See, generally, Brief of *Amicus Curiae* Association of American Railroads. The Eleventh Circuit held that, under *ACF Industries*, a state is as free to employ discriminatory non-property tax exemptions as it is to employ discriminatory property tax exemptions and that the railroads are barred as a matter of law from bringing a challenge under § 11501(b)(4). That threshold basis for defeating petitioner's claim avoided all of the other issues necessary to determine whether a tax unlawfully discriminates against a railroad, such as what is the proper class against which the treatment of the railroad should be measured, and whether a court should consider the individual tax being challenged

or some broader understanding of a state's entire tax scheme.

The petition for certiorari, brief in opposition and the *amicus* brief of the United States at the certiorari stage provided this Court with various proposed questions presented that would either limit this Court's review to the narrow, threshold ruling of the court of appeals or open this Court's review to the broader range of issues regarding how to determine what is unlawful discrimination. Compare Pet. i, with Brief in Opp. i, with Brief for the United States as *Amicus Curiae* I**.** This Court adopted *verbatim* the United States' proposed question, which focused exclusively on the narrow, threshold ruling of the court of appeals. *CSX Transp.* v. *Ala. Dep't of Revenue*, No. 09-520 (U.S. June 14, 2010) (specifying question presented). Petitioner did not object to that formulation, but respondents argued vigorously for a broader scope. Supplemental Brief of Respondents 7-13. This Court rejected respondents' suggestion. Nonetheless respondents stray beyond the narrow issue before the Court, asking this Court to opine on issues that this Court has expressly determined it will not consider at this time.

1. Two such issues merit only passing notice. First, respondents urge this Court to declare that § 11501(b)(4) requires consideration not only of the tax imposed on the railroad, but also of "the taxes paid by the railroads' competitors on the same taxable event when judging" whether a tax discriminates against railroads. Resp. Br. 59. As the United States urges, this Court should decline the invitation to reach this issue. U.S. Br. 25-26. Nonetheless, petitioner notes that lower courts have acknowledged that courts are ill equipped to evaluate the relative burdens of a state's entire tax scheme on various

taxpayers. *Burlington N. R.R.*, 932 F.2d at 1187-88; *Kan. City S. Ry.*, 817 F.2d at 377-78. And respondent's own brief demonstrates the complexity of evaluating a state's *entire* tax scheme by conspicuously excluding the impact of county taxes on a railroad's overall tax liability in this case. Compare Resp. Br. 16, with Pet. Br. 6-7.

Second, respondent argues that the 4-R Act provides no basis for a federal district court to order relief for a tax that discriminates against railroads by exempting its competitors. Resp. Br. 37-39 (citing 49 U.S.C. § 11501(c)). While petitioner welcomes the opportunity to litigate that issue eventually, it is manifestly premature to be arguing over the scope of the permissible remedy for a State's violation of the Act when the complaint was dismissed on the pleadings.

2. The most systematic effort to force this Court to reach beyond the question presented merits a lengthier response in part because it is disguised as if it is included within the question presented. Respondents contend that non-property tax discrimination against railroads is challengeable under § 11501(b) only when the discrimination favors "local businesses." *Id.* at 29. This is clearly a question concerning the scope of the comparison class. Respondents are arguing that the effects of a tax on a railroad should be compared only with the effects of the tax on local businesses, and not other interstate carriers. The scope of the comparison class in a claim under subsection (b)(4) is an issue for consideration on remand. Accordingly, the Court should decline to consider it. Nonetheless, respondents have attempted to intertwine this issue with the actual question presented by urging the Court to decide more broadly the precise meaning of the word "discriminates" in

§ 11501(b). *Id.* at 19, 25-31. Because it is presented as an alternative basis for affirmance, petitioner will discuss the issue in some detail.

To begin, respondents cite no court that has ever adopted this surprising limitation on the scope of § 11501(b), and petitioner is unaware of any. Reading the word "discriminates" to mean only discrimination that favors local business, not discrimination that favors a railroad's competitors, is certainly not the most natural reading of "any" "tax that discriminates against a rail carrier." Though respondents never acknowledge it in their brief, it would mean that even a single tax that imposes one rate on railroads and a lower rate on all of its interstate competitors would not be a tax that "discriminates against a rail carrier" within the meaning of subsection (b)(4). This of course would neuter the protections of the 4-R Act's catchall provision by rendering it largely a catch-nothing provision.

The opening paragraph of § 11501(b) states that "[t]he following acts unreasonably burden and discriminate against interstate commerce, and a State … may not do any of them." As the text makes plain, Congress is declaring that certain acts unreasonably burden and discriminate against interstate commerce. One of the "acts" that follows is described in subsection (b)(4): "[i]mpos[ing a non-property] tax that discriminates against a rail carrier." Put together, the opening paragraph and subsection (b)(4) combine to mean that the "act" of imposing a discriminatory non-property tax on railroads is what Congress has decided to prevent a state from doing because such discrimination against railroads burdens and discriminates against interstate commerce.

The focus of the text of the operative part of the statute—the part that actually describes what is forbidden—is tax discrimination against *railroads*. Nothing in the text authorizes or requires a court to decide whether Congress was correct in concluding that the prohibited forms of tax discrimination against railroads have the effect of discriminating against interstate commerce. That is a decision that Congress has already made.[2] All a court need do is determine whether the tax under scrutiny discriminates against *railroads*.

What the text makes plain is hardly surprising given the motivation behind the 4-R Act. At the very outset of Congress's investigation into the burdens of state taxation on commerce, Congress was concerned with "the relative tax burdens on truck, air, bus, pipeline, water, and railroad carriers." S. Rep. No. 87-445, at 449 (1961). The need for "remedial national legislation" was born of the concern that railroads (and pipelines) bore a heavier burden of state taxation than their interstate carrier competitors. *Id.* at 451. Discriminatory tax burdens that states imposed among different interstate carriers was from the outset part of what Congress deemed to be discrimination against interstate commerce. This only makes sense because Congress was trying to shore up the railroad industry that was failing economically in part because of its inability to compete against other carriers. Pub. L. No. 94-210, § 101(a), (b)(2), 90 Stat. 31, 33 (1976) (ensuring that the railroad "mode of transportation will remain

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[2] The original version of what is now the opening paragraph of § 11501(b) is even more clear. It provides that "any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." JA 25.

viable in the private sector of the economy," and promoting Congress's policy of "foster[ing] competition among all carriers by railroad and other modes of transportation"). In sum, a non-discriminatory state taxing regime among railroads and its interstate carrier competitors is part of the non-discriminatory playing field between railroads and other interstate carriers that Congress was promoting.

It is hardly surprising, then, that no court presented with a railroad challenge to a tax that favors its direct competitors has concluded that such a challenge fails because the tax does not favor local businesses. *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999); *Burlington N. R.R.* v. *Comm'r of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W. 2d 338 (Iowa 1983). Not even the Eleventh Circuit, which concluded that the tax under review was not challengeable under § 11501(b)(4), ever suggested that the tax should survive because it favors a railroad's interstate competitors and not local businesses. In sum, the issue is not presented here, and if it were the Court would rightly reject respondents' position.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings .

Respectfully submitted,

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