No. 09-520

In the
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,
v.
ALABAMA DEPARTMENT OF REVENUE, AND
CYNTHIA UNDERWOOD, ASST. REVENUE COMMISSIONER,
Respondents.

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

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STATUTORY PROVISIONS INVOLVED

This case involves §306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (the "4-R Act"). The State refers to all versions and drafts of this section by its current codification: 49 U.S.C. §11501. The State reproduces §11501 in its entirety, *infra* at 1a-3a.

Section 11501 is an exception to the Tax Injunction Act, 28 U.S.C. §1341, which provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

INTRODUCTION

The 1961 Doyle Report revealed that States commonly taxed railroad and pipeline property at a proportionately higher level than other taxpayers' property. To end this discriminatory practice, the railroads proposed legislation that would force States to place interstate carriers on equal tax footing with local commercial and industrial taxpayers. After 15 years of debate and refinement, Congress passed §11501.

In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Court held that as long as a State's property tax is "generally

applicable"—*i.e.*, as long as the State taxes railroads proportionately to other taxpayers—the State may exempt various properties from the tax without subjecting it to challenge under §11501(b)(4), which proscribes "another tax that discriminates against a rail carrier." *Id.* at 340. Several considerations compelled the Court's decision, including the facts that "the statute does not speak with any particularity to the question of tax exemptions" and "[does] not provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* at 343.

Congress did not re-write §11501 after the Court's decision. Consequently, the statute still makes no mention of tax exemptions and still provides no standard for determining whether an exemption discriminates against a rail carrier.

Nevertheless, Petitioner CSX Transportation claims that Alabama's generally applicable *sales and use* taxes are subject to challenge under §11501(b)(4) based on two exemptions. In other words, CSX argues that the phrase "another tax that discriminates against a rail carrier" means one thing when property taxes are challenged under §11501(b)(4) and something entirely different when sales and use taxes are challenged. Stranger still, CSX's argument results in §11501 providing its *narrowest* protection when dealing with claims of property tax discrimination, the one type of discrimination expressly mentioned in the statute and the one that Congress spent 15 years trying to eradicate.

The Eleventh Circuit avoided these structural oddities by holding that the granting exemptions from a generally applicable tax, of any kind, does not violate §11501. The court of appeals was correct. Its decision should be affirmed.

STATEMENT OF THE CASE

Alabama imposes distinct excise taxes on diesel fuel based on the fuel's usage: 4% "sales and use" excise taxes for off-road usage and a 19¢ per gallon "motor fuels" excise tax for on-road usage. Because trains operate off-road, CSX pays the 4% sales and use excise taxes on its purchase or consumption of diesel fuel, just like any other non-exempt business or citizen who uses diesel fuel off-road.

CSX argues that Alabama's 4% sales and use taxes are "another tax that discriminates against a rail carrier" under §11501(b)(4) because two of CSX's competitors do not pay sales and use taxes on their purchases of diesel fuel. Specifically, motor carriers are exempted from paying sales and use taxes because they instead pay the motor fuels tax. Interstate water carriers do not pay either excise tax based on an exemption that predates the 4-R Act by nearly two decades.

We detail Alabama's excise tax structure in more detail *infra* at 12-16. But we begin with §11501.

A. Section 11501: History and Text

1. *The Doyle Report*: The 1961 Doyle Report named 31 States that significantly overtaxed the property of interstate carriers in comparison to other taxpayers' property. *See* S. Rep. No. 87-445, at 487 (1961) (hereinafter "Doyle Report"). Railroads and pipelines were especially targeted. The Report proposed alternative solutions.

Under one proposal, Congress would prohibit States from levying ad valorem property taxes on railroads' and pipelines' rights-of-way. *See id.* at 463-65. The stated purpose of this complete prohibition was to "equalize competitive opportunities for our Nation's transportations carriers" by eliminating ad valorem taxes paid by railroads and pipelines (who owned their rights-of-way) but not their competitors (who used public rights-of-way). *Id.* at 463.

Alternatively, the Association of American Railroads ("AAR") proposed an "antidiscriminatory tax law" that would prohibit States from assessing the property of an "interstate common carrier" at a higher ratio to true market value than other property in the State. *Id.* at 465. This proposal protected "all common carriers engaged in interstate commerce" against discrimination *vis-à-vis* the general mass of taxpayers by "ensur[ing] that such carriers would receive equal treatment with other taxpayers subject to the same tax rates." *Id.* at 466. Unlike the first option, the States could still tax the interstate carriers "so as long such carriers [were]

accorded equal tax treatment with other taxpayers." *Id.*

Congress chose the second option.

2. *Equal Treatment:* Congress debated various drafts of §11501 for the next 15 years. All the while, the railroads maintained that §11501 was designed to place interstate carriers as a group on equal footing with the general mass of other taxpayers, not to grant railroads or any other interstate carrier preferential treatment. For example, AAR President Stephen Ailes told Congress, "In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers." *Transp. Act of 1972: Hearings on H.R. 11824, H.R. 11826, and H.R. 11207 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 356 (1972) (hereinafter 1972 Hearings).

Standing alongside the railroads throughout the process were their interstate competitors, as §11501 was drafted to benefit them as well. For example, the American Trucking Association ("ATA") argued in favor of §11501 during the final hearings before the House and Senate in 1975, the year after subsection (b)(4) was added. *See Railroads—1975 (Part 4): Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1166, 1178 (1975) (hereinafter 1975 Senate Hearings) (statement of Peter Beardsley, Vice

President and General Counsel of the ATA); *Railroad Revitalization, Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 618, 621 (1975) (hereinafter 1975 House Hearings) (same).

3. *The States' Fight for Exemptions:* The AAR's original proposal was limited to what became §§11501(b)(1) and 11501(b)(2)—*i.e.*, the overvaluation provisions. Doyle Report at 465. The comparison class in the AAR's proposal was restricted to property "subject to the same property tax levy"—*i.e.* taxed property. *Id.* Thus, the early drafts of §11501 "did not provide that granting full property tax exemptions was discriminatory." Joseph A. Laronge*, Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. Rev. 635, 640 (1990).

That changed (temporarily) in 1967, when the Senate added what is now §11501(b)(3), the higher tax rate provision. *Discriminatory Taxation of Common Carriers, 1967: Hearings on S. 927 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 90th Cong. 1-2 (1967) (hereinafter 1967 Hearings). The new subsection contained a broader comparison class than its predecessors: "any other property in the taxing district"—*i.e.*, taxed *and* untaxed property. *Id.* at 2. The States recognized that "[f]ully exempt property . . . was unlawful under [subsection (b)(3)] because it was part of the comparison class of 'any other property.'" Laronge, *supra*, 641.

Consequently, the States waged an eight-year campaign to alter §11501 in a way that ensured tax exemptions could not be deemed discriminatory. *See* Laronge, *supra*, 641-42 (listing four examples of the State's "complaints" that varying drafts of §11501 "would make granting full property tax exemptions unlawful"); *Dep't of Rev. v. ACF Industries*, No. 92-74, U.S. Br. 20 n.24 (listing three examples of "lobbying by the States to avoid consideration of exempt property" under §11501).

The States prevailed when the Committee on Conference chose language that confined the comparison class for the entire statute to property "subject to a tax levy." *See* Laronge, *supra*, 644 (crediting the narrow class to "suggested amendments" made on behalf of the States); *ACF Industries*, *supra*, U.S. Br. 20 n.24 (crediting the narrowed class as Congress' "response to lobbying by the States").

4. *Subsection (b)(4)*: At least twice during the legislative process, the AAR noted that several States did not impose ad valorem property taxes, "but rather [imposed] in lieu taxes frequently measured by gross receipts." Doyle Report at 487; *see also Common and Contract Carrier State Property Tax Discrimination: Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 96 (1970) (hereinafter 1970 hearings).

The House first introduced subsection (b)(4)'s prohibition on "any other tax which results in discriminatory treatment of a carrier" in March 1974. *Surface Transp. Legislation: Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694, and S. 1149 Before the Subcomm. on Transp. And Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93rd Cong. 24 (1974) (hereinafter 1974 Hearings). The House Committee on Interstate Commerce labeled subsection (b)(4)'s target the "so-called 'in-lieu tax'," H.R. Rep. No. 94-725, at 77 (1975), and stated its belief that "discriminatory property and 'in lieu' taxation should be ended." *Id.* at 78.

Railroad representatives asked the Senate to add the same provision the next year. After reciting subsections (b)(1)-(3), AAR President Stephen Ailes asked the Senate to add "a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions." 1975 Senate Hearings at 1837. On behalf of the New York Dock Railway, Stuart Johnson then read the House's version of the "any other tax" provision and asked the Senate to add it to protect his railway from New York's gross receipts tax. *Id.* at 1883. The Senate subsequently adopted the House's "any other tax" provision and extended it to all interstate carriers. *See* S. Rep. No. 94-499, at 232 (1975) (containing the text of S. 2718).

5. *Passage*: Both Chambers approved the Conference Committee's report on the 4-R Act, which provided §11501(b)(4)'s coverage for all common

carriers. *See* 121 Cong. Rec. 41967 (1975) (House); *id.* at 42209 (Senate); H.R. Rep. No. 94-768, at 24 (1975) (Conf. Rep.) (containing §11501(b) as proposed by the Conference Committee). But to avoid a "certain" Presidential veto on matters unrelated to §11501, Congress vacated its passage of the 4-R Act and recommitted it to the Conference Committee. 122 Cong. Rec. 281-82 (1976) (passing H. Con. Res. 527). When the Act returned from the Conference Committee, the beneficiaries of §11501 had changed from all interstate carriers to just interstate rail carriers. *See* S. Rep. No. 94-595, at 27 (1976) (Conf. Rep.); *see also* H.R. Rep. No. 94-781, at 812, 851 (1976) (Conf. Rep.). The lone mention of the change in the Committee's Report was that "[t]he conference substitute . . . limited the provision to taxation of railroad property." *Id.* at 166. Both Chambers passed the new version after brief debates that did not mention a change in the scope of §11501(b)(4). *See* 122 Cong. Rec. 1334-44 (1976) (Senate); *id.* at 1350-60 (House).

6. *The Text*: Section 11501 embodies Congress' effort to protect railroads from tax discrimination as compared to the general mass of local businesses.[1] Section 11501(b) provides:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority

[1] Section 11501 has been rephrased and recodified several times without substantive change. *See* U.S. Br. 2 n.1 (citing the changes). We refer to §11501's current text unless otherwise stated. *See* Sup. Ct. R. 34.5.

> acting for a State or subdivision of a State may not do any of them:

49 U.S.C. §11501(b). The four subsections that follow prohibit state taxes that "unreasonably burden and discriminate against interstate commerce."

The first three subsections prohibit States from (1) assessing railroad property at a higher ratio to true market value, (2) levying a tax based on such an assessment, and (3) imposing a higher tax rate on railroad property, all in comparison to other "commercial and industrial property." 49 U.S.C. §11501(b)(1)-(3).

Section 11501(a)(4) provides the definition of "commercial and industrial property:"

> (4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

49 U.S.C. § 11501(a)(4). Thus, the comparison class for subsections (b)(1)-(3) is the general mass of taxed properties. Property that is not "subject to a property tax levy" (*i.e.* exempt property) is excluded from the class.

Subsection (b)(4), which is the focus of this case, declares that the final act that "unreasonably

burden[s] and discriminate[s] against interstate commerce" is the "impos[ition of] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board under this part." 49 U.S.C. §11501(b)(4).

B. The *ACF Industries* Opinion

In *ACF Industries*, the Carlines claimed that Oregon's generally applicable ad valorem property tax violated §11501(b)(4) because Oregon exempted various classes of property. 510 U.S. at 335. The Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." *Id.* at 340.

Textually, the Court renounced a reading of §11501(b)(4) "in isolation," and stated that "[t]he structure of [§11501] as a whole" must be reviewed to construe subsection (b)(4) properly. 510 U.S. at 339-40. The Court then keyed on §11501(a)(4)'s restriction of the comparison class for violations of subsections (b)(1)-(3) to property "subject to a property tax levy" (*i.e.*, "taxed property"), *id.* at 340-43, the restriction the States successfully lobbied Congress to secure. *See supra* 6-7. The Court held that it would be "illogical" to conclude that Congress would shield property tax exemptions from challenge under subsections (b)(1)-(3), then "turn around and nullify its own choice in subsection (b)(4)." 510 U.S. at 343.

The Court next noted that "[o]ther considerations reinforce our construction of the statute." *Id.* First, §11501 "does not speak with any degree of particularity to the question of tax exemptions" and "[does] not provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* Second, "[g]iven the prevalence of property tax exemptions when Congress enacted the 4-R Act, [§11501's] silence on the subject . . . reflects a determination to permit the States to leave their exemptions in place." *Id.* at 344. Third, "[p]rinciples of federalism support, in fact, compel, [the Court's] view" because the Carlines could not show that prohibiting exemptions was "the clear and manifest purpose of Congress." *Id.* at 345 (internal quotation marks and citations omitted). Finally, legislative history supported the Court's conclusion that property tax exemptions were not subject to challenge in that the Carlines were unable to cite "a single instance in the 15-year legislative history of the 4-R Act in which representatives of the railroad industry expressed concern about discriminatory property tax exemptions." *Id.* at 346. Instead, the legislative history revealed assurances from three Congressmen that property tax exemptions would not be prohibited. *Id.* at 345.

C. Alabama's Dual Excise Taxes On Diesel Fuel

Title 40 of the Alabama Code contains two excise taxes: the "sales and use" tax (Chapter 23) and the "motor fuels" tax (Chapter 17). For more than 70 years, Alabama has taxed diesel fuel under these distinct provisions based upon the fuel's usage:

on-road or off-road. This differentiation is largely predicated on federal law.

1. *The On-Road/Off-Road Dichotomy*: The Hayden-Cartwright Act of 1934 forced States to choose between (a) expending revenues from highway-related taxes "for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith" or (b) losing a share of their "Federal aid for highway construction." 23 U.S.C. §126(a) (1964). In response, every State adopted a motor fuels tax to be "used only for the state's highway program." Ross D. Netherton, *Intergovernmental Relations Under the Federal-Aid Highway Program*, 1968 Urb. Law 15, 28; *see also* Jerry L. Marshall, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 8 (1973) ("Urged on by the Hayden-Cartwright Amendment of 1934 . . . all states have, by custom, statute or constitution, pledged highway user taxes to highway construction.").

By the time §11501 took effect in 1979, every State levied a distinct motor fuels tax for on-road usage. Netherton, *supra*, 28. To prevent double-taxation, 43 States exempted "[g]asoline and, in most, but not all, cases, other motor fuels subject to the motor fuels tax" from the State's sales tax. John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration* 77 (1983) (surveying the States in 1979-80).

Congress repealed the 1934 Hayden-Cartwright Act. *See* IRS Restructuring & Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998). Still, federal law perpetuates the tax distinction between on-road and off-road usage of diesel fuel. The United States levies a 24.3¢ per gallon excise tax on diesel fuel used on highways, 26 U.S.C. §4081(a)(2)(A)(iii), and requires that diesel fuel designated for off-road usage, and thus exempt from the federal tax, be "indelibly dyed" for identification purposes. 26 U.S.C. §4082(a)(2). Today, all 50 States have a distinct motor fuels excise tax. *See* Federation of Tax Administrators, *State Motor Fuel Tax Rates*, *available at* http://www.taxadmin.org/fta /rate/mf.pdf (charting the Jan. 1, 2010 motor fuels tax rates for all 50 States) (last visited Sept. 27, 2010).

2. *Alabama's Sales and Use Taxes (Off-Road Diesel)*: Chapter 23 imposes a 4% excise tax on the sale, storage, use, or consumption of tangible goods. *See* Ala. Code §§40-23-2(1) (sales tax), 40-23-61(a) (use tax). The 4% rate applies to a business' purchase of hardware, supplies, or diesel fuel, just as it applies to a citizen's purchase of groceries, clothing, or diesel fuel. The proceeds of the sales and use taxes are deposited into Alabama's Education Trust Fund, which primarily funds Alabama's public schools. *See* Ala. Code §§40-23-35, 40-23-85.

Chapter 23 grants an exemption for fuel used by water vessels engaged in interstate or foreign, but not intrastate, commerce. *See* Ala. Code §40-23-4(a)(10) (exemption from sales tax); §40-23-62(12)

(exemption from use tax). Because railroads and intrastate water carriers are not exempt, they pay the State's general 4% sales and use taxes on their purchase or consumption of diesel fuel. Motor carriers are exempted from paying sales and use taxes because they instead pay the motor fuels tax described below.

3. *Alabama's Motor Fuels Tax (On-Road Diesel)*: For diesel fuel used on roads or highways, Chapter 17 imposes two excise taxes totaling 19¢ per gallon. *See* Ala. Code §§ 40-17-2(1) (13¢ per gallon), 40-17-220(e) (6¢ per gallon). To avoid double-taxation, payment of the motor fuels excise tax exempts the taxpayer from additionally paying the general 4% sales and use excise taxes. Ala. Code §40-17-2(1). Accordingly, motor carriers pay only the 19¢ motor fuels tax. [2] Diesel fuel that is marked for off-road usage pursuant to 26 U.S.C. §4082 is exempt from paying Alabama's motor fuels excise tax. Ala. Code §§40-17-2(1), 40-17-220(e). Consequently, railroads and barges are exempt from paying the 19¢ motor fuels excise tax.

4. *Summary of Alabama's Excise Taxes*: The chart on the following page reflects the excise tax

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[2] While it is unlawful to use diesel fuel marked for off-road usage on roads and highways without paying Chapter 17's motor fuels excise tax, Ala. Code §40-17-22, it is lawful to purchase unmarked (on-road) diesel fuel for use off-road. Thus, if rail carriers wanted to avoid the alleged "discrimination" *vis-à-vis* motor carriers, a rail carrier could purchase unmarked diesel fuel and pay the State's 19¢ motor fuels excise tax, thereby exempting themselves from the State's 4% sales and use taxes.

imposed by the State on a gallon of diesel fuel if diesel fuel cost $3.00 per gallon[3]:

Taxpayer	State Tax
Businesses Using Diesel On-Road	19¢
Motor Carriers (Interstate and Intrastate)	19¢
Businesses Using Diesel Off-Road	12¢
Railroads (Interstate and Intrastate)	12¢
Intrastate Water Carriers	12¢
Interstate Water Carriers	0¢

D. The Proceedings Below

1. *The Complaint*: CSX sued the Alabama Department of Revenue and its Commissioner ("the

[3] Diesel fuel retailed at $2.959 per gallon in the Gulf States in August 2010. *See* U.S. Energy Administration Information, *Weekly Retail Gasoline and Diesel Prices*, *available at* http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html (last visited Sept. 27, 2010).

State") in federal district court, claiming that the State's sales and use taxes violate §11501(b)(4) because neither motor carriers nor interstate water carriers pay the tax on their purchase or consumption of diesel fuel.[4] J.A. 17-24 (Complaint). CSX asked the court to enjoin the State from assessing, levying, or collecting its sale-and-use tax from CSX. J.A. 23. The district court granted CSX's motion for a preliminary injunction, Pet. App. 4a-5a, and the State's motion to stay further proceedings pending the Eleventh Circuit's opinion in *Norfolk Southern Railway v. Alabama Department of Revenue*, No. 08-12712, an interlocutory appeal from the denial of a preliminary injunction on the same claim that CSX raised. Docket No. 19.

2. *The Norfolk Southern Opinion*: The Eleventh Circuit concluded that this Court's opinion in *ACF Industries* was "equally applicable" to claims challenging non-property taxes and thus "guide[d the] decision." Pet. App. 29a. Applying *ACF Industries*, the court determined that an exemption from Alabama's sales and use taxes "does not offend the 4-R Act so long as the tax is generally applicable and does not target railroads within Alabama," *id.* at 32a. The court held that the taxes "qualif[y] as generally applicable, and thus [do] not discriminate against railroads in violation of the 4-R Act." *Id.* Accordingly, the court affirmed the denial of Norfolk's motion for preliminary injunction because the railroad "would not succeed on the merits of its case." *Id.* at 37a-38a.

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[4] No counties or municipalities are parties to this proceeding. *See* Blue Br. ii.

3. *CSX's Appeal*: Based on the *Norfolk Southern* decision, the district court in this case dissolved its preliminary injunction and dismissed CSX's suit. *Id.* at 3a. The Eleventh Circuit denied CSX's request for initial hearing en banc, *id.* at 39a, and a panel of the court affirmed the district court's dismissal on the authority of *Norfolk Southern*. *Id.* at 1a-2a.

SUMMARY OF THE ARGUMENT

Every factor that lead to this Court's decision in *ACF Industries* that property tax exemptions are not subject to challenge under §11501(b)(4) applies with full force to sales and use tax exemptions.

1. *Text and Structure*: To avoid *ACF Industries*, CSX argues that the Court should cabin its review solely to subsection (b)(4) because CSX challenges a non-property tax, and the remaining portion of the statute speaks only to property taxes. But as the Court noted in *ACF Industries*, subsection (b)(4)—like any subsection of a statute—should not be read "in isolation," it must be read against "the structure of [§11501] as a whole." 510 U.S. at 339-40.

The structure of §11501 "as a whole" provides a singular definition of discrimination: Imposing a proportionately heavier tax burden on interstate rail carriers than on the general mass of commercial and industrial taxpayers. We know this for two reasons. First, the failure to place rail carriers on equal footing with the general mass of taxpayers is the discriminatory characteristic shared by subsections

(b)(1)-(b)(3), to which subsection (b)(4) is structurally bound. Second, the opening clause of §11501(b) specifies that the state taxes prohibited by subsections (b)(1)-(4) "unduly burden and discriminate against interstate commerce." This confirms that the objective of the provision is to protect interstate rail carriers against discrimination *vis-à-vis* local businesses—not individual interstate competitors.

Generally applicable taxes do not "discriminate" against interstate rail carriers under §11501(b) because they place rail carriers on equal footing with the general mass of other taxpayers. Exemptions from a generally applicable tax likewise do not discriminate against rail carriers under §11501 because (a) rail carriers are taxed proportionately with others who pay the tax and (b) Congress removed exempt property from the comparison class in §11501(a)(4), thereby expressing its intent to prevent exemptions from being considered discriminatory. And exemptions granted to one of an interstate rail carriers' *interstate* competitors (as is the case here) certainly do not "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. §11501(b).

Reading subsection (b)(4) to allow challenges to sales and use taxes based on an exemption to one of the railroad's competitors, while barring the same claim if the railroad challenged a property tax, would result in two structural oddities. First, §11501(b) would provide its narrowest protection against discriminatory property taxes, the only type of taxes

mentioned in §11501 and the type that Congress spent 15 years drafting §11501 to proscribe. Second, the comparison class for discrimination would be upended: for property taxes, it would be the general mass of commercial and industrial taxpayers, *see* 49 U.S.C. §11501(a)(4), while for non-property taxes, the class would solely be competing interstate carriers. Nothing in §11501's text supports either of these results.

2. *Other Considerations*: Just as they did in *ACF Industries*, three additional considerations back our structural analysis. First, Congress failed to provide standards in §11501 for distinguishing valid from invalid exemption schemes, thereby implying that Congress did not deem tax exemptions to be discriminatory. Second, sales and use tax exemptions were just as prevalent as property tax exemptions during the period in which §11501 was considered and passed—yet Congress never expressed a desire to proscribe them throughout the statute's 15-year legislative history.

Third, in *ACF Industries*, the Court held that "principles of federalism . . . compel[led]" its view that property tax exemptions were not subject to challenge under §11501 because neither the statute's text nor its legislative history revealed that it was Congress' "clear and manifest purpose" to subject exemptions to challenge. *Id.* Congress has not re-written §11501(b)(4) since the Court's decision, nor has history been altered. Thus, §11501's text and legislative history still "[do] not speak with any degree of particularity to the question of tax

exemptions." 510 U.S. at 343. Consequently, the "principles of federalism" that compelled a ruling for the State in *ACF Industries* compel the same result here.

3. *Legislative History*: Section 11501's legislative history reveals that generally applicable state taxes were the *goal* of §11501. The railroads proposed §11501 to end the common practice of taxing interstate carrier property at a proportionately higher rate than local property. For 15 years, the railroads assured that, as long as States placed interstate carriers on equal tax footing with local taxpayers, §11501 would not prohibit the States from taxing railroads as they saw fit. As the final product reveals, Congress took the railroads at their word.

Congress was also responsive to the States, who lobbied to protect their ability to grant tax exemptions. Congress' removal of exempt property from §11501(a)(4)'s comparison class was a direct result of the States' efforts, and as the Court noted in *ACF Industries*, Members of Congress assured the States—in no uncertain terms—that §11501 would not prohibit tax exemptions. 510 U.S. at 345-46.

ARGUMENT

The Court has been down this road before. In *ACF Industries*, the Carlines argued that §11501(b)(4) is "a residual category designed to reach any discriminatory state tax," and because property tax exemptions "fall outside the scope of subsections (b)(1)-(3), they are within the ambit of subsection (b)(4)." 510 U.S. at 339. The Court found this

argument to be "defensible if subsection (b)(4) is read in isolation," *id.*, but rejected the Carlines' argument after viewing "the structure of [§11501] as a whole," and in light of several other considerations. *Id.* at 340-47.

CSX dusts off the Carlines' failed argument and sets it on a new target: sales and use taxes. Like the Carlines, CSX argues that "the plain text of §11501(b)(4) permits challenge to all taxes that discriminate against rail carriers, other than those governed by §11501(b)(1)-(3)." Blue Br. 13. Like the Carlines, CSX asks the Court to read §11501(b)(4)'s text with blinders, Blue Br. 24-28, despite the Court having stated in *ACF Industries* that "we must look elsewhere to determine its meaning." 510 U.S. at 340. And, like the Carlines, CSX fails to cite "a single instance" in §11501's 15-year legislative history in which Congress or the railroads "expressed concern about discriminatory tax exemptions." *Id.* at 345-46.

CSX adds a new twist, however. CSX argues that an exemption for an interstate competitor constitutes "discrimination" under §11501(b)(4). This argument is directly at odds with the railroads' and the United States' agreement in *ACF Industries* that discrimination only occurs under §11501(b)(4) if the State fails to place railroads on equal tax footing with *the general mass of taxpayers*:

- *United States*: "The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to

obtain for rail carriers equivalent treatment with the general mass of other taxpayers." *ACF Industries*, Case No. 92-74, U.S. Br. 28.

- *AAR*: "Section [11501] protects railroads from excessive and unfair state taxation by tying their fate to that of local taxpayers." *ACF Industries*, *supra*, Br. of Amicus AAR 26.

- *The Carlines*: "Our position on the proper interpretation of the term discrimination or discriminatory treatment has been . . . once the State exempts more than 50 percent of other business' personal property, other commercial and industrial property, then you have discrimination that is *per se* invalid under (b)(4) . . . ." *ACF Industries*, *supra*, Oral Argument Tr. 36.

In other words, there was universal agreement that §11501 ensures only that railroads are treated as equals when it comes to property taxes. But CSX now argues that §11501 makes them the States' "most-favored-taxpayers" when it comes to *non-property* taxes because they are entitled to every tax benefit given another carrier.

The Court should reject CSX's argument by reading §11501(b)(4)'s text consistently for property and non-property taxes: Generally applicable state taxes, of any kind, do not "discriminate" based on exemptions. To hold otherwise would lead to the bizarre result that Congress spent 15 years refining its prohibition on discriminatory property taxes, only

to draw that prohibition more narrowly than subsection (b)(4)'s prohibition on discriminatory sales and use taxes—a topic Congress never discussed when drafting the statute.

I. THE TEXT AND STRUCTURE OF §11501 ESTABLISH THAT GENERALLY APPLICABLE SALES AND USE TAXES DO NOT "DISCRIMINATE AGAINST A RAIL CARRIER" IN VIOLATION OF §11501(b)(4).

Subsection (b)(4) prohibits "another tax that discriminates against a rail carrier." CSX argues at length that "another tax," and its predecessor "any other tax," mean any other conceivable tax. Blue Br. 13-18. Of course, we know that not *every* state tax that grants an exemption is challengeable under §11501(b)(4) because the Court rejected the same "any means any" argument in *ACF Industries* when it held that generally applicable property taxes are not challengeable based on exemptions. 510 U.S. at 340. As the Court stated in *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004), "'any' can and does mean different things depending upon the setting."

That said, CSX's "any means any" argument misses the bigger picture. Proving that sales and use taxes are encompassed by the phrase "another tax" is irrelevant if the tax does not "discriminate against a rail carrier" as that phrase is defined by §11501(b). Thus, the key to understanding why exemptions from a generally applicable tax are not prohibited by §11501(b) lies in the definition of "discriminate."

"Discriminate" is an inherently ambiguous term. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J., announcing the judgment of the Court) ("The concept of 'discrimination', like the phrase 'equal protection of the laws,' is susceptible of varying interpretations . . . .") But the text and structure of §11501 clarify its meaning in subsection (b)(4).

A. "DISCRIMINATION" UNDER §11501(b) IS LIMITED TO THE IMPOSITION OF A PROPORTIONATELY HEAVIER TAX ON INTERSTATE RAIL CARRIERS THAN ON THE GENERAL MASS OF COMMERCIAL AND INDUSTRIAL TAXPAYERS.

Subsection (b)(4)'s phrase "discriminates against a rail carrier" gains its meaning from the rest of §11501. As the Court stated in *ACF Industries*, subsection (b)(4) cannot be properly understood "in isolation," but must be interpreted in light of "the structure of [§11501] as a whole." 510 U.S. at 339-40; *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* §46:05 (6th ed. 2000) ("A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same subject matter.")

The proper starting point is §11501(b)'s opening clause:

> (b) *The following acts unreasonably burden and discriminate against interstate commerce*,

> and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

49 U.S.C. §11501(b) (emphasis added). As emphasized, §11501(b) binds its four subsections together by declaring that each prohibits an act that "discriminates" in the same manner: by "discriminat[ing] against interstate commerce." The Court confirmed this connection when it noted in *ACF Industries* that "[t]he interplay between subsections (b)(1)-(3) and the definition of 'commercial and industrial property' in subsection (a)(4) is central to the interpretation of subsection (b)(4)." 510 U.S. at 340.

That subsection (b)(4) is inextricably linked to its more specific predecessors is further supported by *ejusdem generis*, the canon of construction that provides "where 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."[5] *Circuit City Stores, Inc., v. Adams*, 532 U.S.

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[5] *Ejusdem generis* literally means "of the same kind." Singer, *supra*, §47:17 at 272. So does the word "another." *See*, *e.g.*, New Oxford American Dictionary 65 (3d ed. 2010) (primary definition: "used to refer to an additional person or thing of the same type as one already mentioned or known about"); Random House Webster's Unabridged Dictionary 85 (2d ed. 2001) (primary definition: "being one more or more of the same"); Webster's Third International Dictionary 89 (1976) (second definition: "being one more in addition to one or a number of the same kind."). Thus, the phrase "another tax that discriminates"

105, 114-15 (2001) (quoting Singer, *supra*, §47:17). In fact, the Court applied the canon in *Circuit City* to limit a general phrase that began, as subsection (b)(4) originally did (J.A. 25), with the words "any other." *Id.* at 114 (confining the phrase "any other class of workers engaged in foreign or interstate commerce" to "transportation workers" based on its specific examples of "seamen" and "railroad employees").

The question, then, is what characteristic is shared by subsections (b)(1)-(b)(3) that helps define discrimination in subsection (b)(4). As detailed below, there are two. First, each subsection prohibits the imposition of a proportionately heavier tax burden on interstate rail carriers than the general mass of commercial and industrial taxpayers. Second, each demonstrates Congress' intent to protect interstate businesses from discrimination *vis-à-vis* local businesses. CSX's argument cannot be reconciled with either structural feature.

1. *Proportionately Heavier Taxation*: Subsections (b)(1) and (b)(2) forbid States from assessing a rail carrier's property at a higher percentage to fair market value than the assessed value of other "commercial and industrial property" in the State, and from levying a tax based on such assessment. Subsection (b)(3) forbids States from subjecting interstate rail carrier property to a higher tax rate than the rate applied to other "commercial and

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further supports application of *ejusdem generis* to define discrimination consistently among §11501(b)'s subsections.

industrial property" in the State. *See also* 49 U.S.C. §§11501(a)(4) (defining "commercial and industrial property"); 11501(c) (requiring courts to determine the "true market value of all other commercial and industrial property").

Subsections (b)(1)-(b)(3) thus share a common characteristic: A State "discriminates" against an interstate rail carrier by forcing the carrier to pay a proportionately heavier tax than the general mass of commercial and industrial taxpayers in the State. Conversely, if the rail carrier is taxed proportionately with other businesses in the State—*i.e.*, if the rail carrier is paying a generally applicable tax—then no discrimination has occurred.

Because "discriminate" under subsection (b)(4) gains it meaning by reference to subsections (b)(1)-(b)(3), "another tax that discriminates" under §11501(b)(4) means a state tax that forces interstate rail carriers to pay a proportionately heavier tax than the general mass of commercial and industrial taxpayers. Judge Posner has read §11501(b) similarly:

> The preceding subsections of the statute [(b)(1)-(b)(3)] . . . forbid states to tax railroad property proportionately more heavily than other commercial and industrial property . . . . By analogy, we may assume that a tax is 'discriminatory' within the meaning of the fourth subsection if it imposes a proportionately heavier tax on railroading than on other activities . . . .

Burlington N. R.R. Co. v. City of Superior, 932 F.2d 1185, 1187 (7th Cir. 1991) (Posner, J.). So, too, did the United States in *ACF Industries*:

> The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to obtain for rail carriers *equivalent treatment with the general mass of other taxpayers*.

ACF Industries, *supra*, U.S. Br. 28 (emphasis added).

Once "discriminate against a rail carrier" is properly defined, it becomes clear that generally applicable taxes do not "discriminate" under §11501(b)(4) because, by definition, they impose the same proportional tax burden on all taxpayers. This is true even if certain businesses are exempt because the railroads are still taxed at the same proportionate rate as the *general mass* of other taxpayers, which is determined by a "random-sampling method," 49 U.S.C. §11501(c), not a one-on-one comparison with any particular business (including the railroads' competitors).

2. *Protection from Local Businesses*: The text of §11501, and a contemporaneous statute, also demonstrate that Congress tied interstate rail carriers' tax fate to the general mass of commercial and industrial businesses in the State to protect interstate carriers against discrimination *vis-à-vis* local businesses.

Again, §11501(b) only prohibits "acts [that] unreasonably burden and discriminate against *interstate commerce*." (emphasis added). When Congress passed the 4-R Act, §11501(b)'s prohibition clause read a little differently; it proscribed acts that "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." J.A. 25 Nearly identical language existed in then-§13(4) of the Interstate Commerce Act, which we reproduce *infra* at 4a-5a.

Section 13(4) granted the Interstate Commerce Commission the authority to proscribe *intra*state passenger fares otherwise set by States "when intrastate revenues fall short of producing their fair proportionate share of required total revenues, [and thus] work an undue discrimination against interstate commerce." *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Illinois*, 355 U.S. 300, 306 (1958). Section 13(4) allowed the ICC to "remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce." *Id.* In other words, §13(4) granted the ICC with the limited power to equalize the playing field between interstate and intrastate business—just as Congress granted courts limited authority to level the playing field between interstate rail carriers and the general mass of businesses in the State in §11501(c). *See infra* 37-39 (discussing §11501(c)'s remedial provision).

The similarities between then-§13(4) and §11501(b) are no coincidence. Congress borrowed the language when writing §11501. *See* S. Rep. No. 90-

1483, at 8-9 (1968); 1969 Hearings at 11; 1967 Hearings at 9, 25. That Congress transplanted §13(4)'s language regarding discrimination against interstate commerce into §11501 shows that Congress intended the provisions to proscribe the same problem: instances where States treat interstate businesses more harshly than local taxpayers.

As the AAR aptly stated in *ACF Industries*, "Section [11501] protects railroads from excessive and unfair state taxation *by tying their fate to that of local taxpayers*." *ACF Industries*, *supra*, Br. of Amicus AAR 26 (emphasis added). CSX's argument that §11501 is instead concerned with granting rail carriers with every tax benefit given their interstate competitors is irreconcilable with §11501's text and structure. Furthermore, CSX's argument strips §11501(b)'s phrase "discriminate against interstate commerce" of its natural meaning: "A State may not impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995). Giving an exemption to one interstate carrier, and not another interstate carrier, in no way "unduly burden[s] and discriminate[s] against interstate commerce," 49 U.S.C. §11501(b), in favor of local business.

* * *

In a nutshell, CSX argues that §11501 embodies two different statutes. The first, §11501(b)(1)-(b)(3),

is a well-defined, narrowly-tailored property tax statute that does nothing more than place rail carriers on equal footing with the general mass of commercial and industrial businesses. The second statute, §11501(b)(4), is an undefined, and thus infinitely broad, prohibition on non-property taxes that ensures that interstate rail carriers are placed on equal or better tax footing than any other carrier doing business in the State. As shown below, nothing in §11501(b)'s text supports a bipolar statute.

B. Nothing in §11501(b)(4)'s Text or Structure Supports a Different Definition of Discrimination for Sales and Use Taxes than It Does for Property Taxes.

CSX argues that, outside of §11501(b)(4), no part of §11501 matters when a rail carrier is challenging a non-property tax because everything else deals only with property taxes. Blue Br. 24. If CSX is correct, then subsection (b)(4)'s phrase "another tax that discriminates" takes on entirely different meanings depending on the type of tax being considered: property or non-property. But nothing in §11501's plain text suggests, much less mandates, morphing definitions.

In *Clark v. Martinez*, 543 U.S. 371 (2005), the Court rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," *id.* at 386, deeming the call "[t]o give the same words a different meaning . . . would

be to invent a statute rather than interpret one." *Id.* at 378. But inventing a chameleon statute is precisely what CSX desires: A statute that allows challenges to sales and use tax exemptions, while it precludes challenges to property tax exemptions.

The Court has previously applied the consistent-interpretation principle when interpreting §11501(b). In *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, the Court rejected an attempt to add an intent requirement to §11501(b) based on the type of tax practice being challenged:

> The Court of Appeals does not dispute that the other acts prohibited by the plain language of [§11501(b)], such as the use of facially discriminatory disparities in assessment ratio or the systematic undervaluation of other commercial and industrial property, are not subject to an intent requirement. *It does not explain how the same sentence can be interpreted in two such strikingly different senses depending upon whether the railroad's challenge is to the State's undervaluation of other commercial and industrial property or to the State's overvaluation of railroad property*.

481 U.S. 454, 463-64 (1987) (emphasis added). *Burlington Northern* teaches that §11501(b) should not be read in "strikingly different senses" depending on the state tax practice being challenged. *Id.* CSX points to nothing in §11501's plain language that upsets that principle when the challenged practice is the granting of tax exemptions.

In fact, the textual hurdle CSX faces is made even more insuperable by two additional considerations. First, as discussed in Part II.C, *infra*, taxation is a traditional state power that, if Congress wishes to preempt, "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks and citations omitted). CSX cannot satisfy this burden because it fails to point to any statutory language that clearly and unmistakably proves Congress intended to treat property tax exemptions and non-property tax exemptions differently.

Second, CSX cannot provide any conceivable explanation for why Congress focused squarely on discriminatory state property taxes for 15 years, then consciously chose to target property taxes more *narrowly* than any other type of tax—particularly a type of tax (sales and use) it never mentioned.

II. *ACF's* Other Considerations Compel The Conclusion That Exemptions From Generally Applicable Sales And Use Taxes Are Not Subject To Challenge Under §11501(b)(4).

Three "other considerations reinforce[d the Court's] construction of the statute" in *ACF Industries*: (1) the lack of a standard for judging exemption schemes, (2) Congress' silence despite the prevalence of property tax exemptions, and (3) principles of federalism. *ACF Industries*, 510

U.S. at 343-45. Each is fully applicable here, and each compels the same result as it did before.

A. CONGRESS FAILED TO PROVIDE A STANDARD OR REMEDY FOR INVALID EXEMPTION SCHEMES.

1. *Lack of a Standard*: Despite providing great detail on how to judge the legality of ad valorem property taxes, Congress failed to "provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* at 343. As the Court recognized in *ACF Industries*, the logical implication is that Congress provided no standard for distinguishing between valid and invalid exemption schemes because Congress did not deem exemptions to be discriminatory. *Id.*

If applied to both property and non-property taxes, *ACF Industries'* bright-line rule eliminates any confusion that would arise because Congress provided no standard: (1) If a state tax is generally applicable, then it cannot be challenged as discriminatory, but (2) if a state tax singles out interstate rail carriers, then the tax might be discriminatory. 510 U.S. at 340, 346-47.

Confusion only arises if §11501(b)(4) mandates a different rule for non-property taxes, a rule nowhere to be found in §11501's text. As the United States correctly notes, a ruling that exemptions from a generally applicable non-property tax may violate §11501(b)(4) would saddle lower courts with a host of

new questions. U.S. Br. 25-26. Here are some examples:

- What is the proper comparison class: the general mass of commercial and industrial taxpayers or individual direct competitors?

- If the class is the general mass of commercial and industrial taxpayers, what percentage of businesses must be exempted before the tax is deemed discriminatory: 25%, 50%, 75%?

- If the class is direct competitors, who is a "direct" competitor? Do courts apply a mathematical formula to decide?

- If a rail carrier has more than one direct competitor, how many competitors must be exempted before discrimination occurs: 25%, 50%, 75%, or just one?

- Are exemptions discriminatory *per se* or can the States justify the exemptions?

- If exemptions may be justified, can courts look to other parts of the State's tax code to notice complimentary taxes paid by the comparison class?

These questions need not be answered because courts should apply *ACF Industries*' simple rule to all challenges brought against tax exemptions under §11501(b)(4). That said, should the Court reach opposite conclusions in this case and *ACF Industries*,

these are just a handful of questions that might cause struggles in the lower courts.

2. *Lack of a Remedy*: Once the lower courts settle on a standard, a new problem emerges: §11501 provides no remedy for discriminatory tax exemptions.

Section 11501(c) greatly restricts federal courts' jurisdiction to enjoin state taxes:

> Relief may be granted under this subsection [*i.e.* subsection (b)] *only if* the ratio of assessed value of rail transportation property exceeds by at least five 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) (emphasis added). Applying the provision's text against the background of the Tax Injunction Act, federal courts can only enjoin States from overvaluing railroad property, or undervaluing other businesses' property, under subsections (b)(1)-(b)(2). Federal courts have no power to enjoin the granting of tax exemptions as a violation of subsection (b)(4), or, apparently, *any* violation of subsection (b)(4). The United States acknowledged this textual limitation in *ACF Industries*. *ACF Industries*, *supra*, U.S. Br. 26 ("[t]he statute could be read to permit injunctive relief in federal courts only for violations of the 'equal assessment ratio' requirements of subsections (b)(1) and (b)(2)").

If Congress intended to prohibit States from granting excise tax exemptions under subsection (b)(4), then Congress should not have left such a gaping hole in the remedial provision. Congress should have provided courts with instructions on how to differentiate between valid and invalid exemptions, as well as guidance on how to remedy the invalid ones. And these instructions should have been "unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460, just like the instructions Congress provided for judging assessment value ratios in §11501(c).

Granted, Congress' preclusion of a federal remedy for violations of subsection (b)(4) could be the result of poor draftsmanship. But any Congressional shortcomings must bow in the State's favor, given that §11501(c) was drafted as a narrow exception to the Tax Injunction Act, which otherwise bars federal courts from enjoining state taxes. *See Tully v. Griffin*, 429 U.S. 68, 73 (1976) ("the [TIA] has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations").

Even if the Court looks beyond §11501(c)'s text to its legislative history, CSX gets no relief. When drafting §11501(c), Congress rejected DOJ's advice to empower federal courts with the authority to strike down a state tax "in its entirety" because Congress felt "[s]uch a provision could cause economic hardship and inconvenience upon States and localities." S. Rep. No. 91-630, at 13 (1969). Instead, as the United States recognized in *ACF Industries*,

"Congress authorized injunctive relief under the 4-R Act only from 'the excessive portion of a State or local transportation property tax.'" *ACF Industries*, *supra*, U.S. Br. 26 (quoting S. Rep. No. 91-630, at 11); *see also infra* 37-39. When a state tax is generally applicable, there is no "excessive portion" to enjoin.

Again, in *ACF Industries*, the Court inferred that Congress' failure to provide standards for distinguishing valid from invalid exemption schemes reflected Congress' judgment that tax exemptions are not subject to challenge under §11501. 510 U.S. at 343. The Court should reach the same conclusion regarding Congress' failure to provide a remedy for a 'discriminatory' tax exemption.[6]

B. Given the Prevalence of Sales and Use Tax Exemptions When §11501 Was Passed, Congress' Silence on the Issue Reflects Its Decision That Such Exemptions Were Not Discriminatory.

Sales tax exemptions are as old as the sales tax itself. *See*, *e.g.*, Robert Haig & Carl Shoup, *The Sales Tax in the American States* 638-44 (1934) (outlining various sales tax exemptions of the 1930's); Due & Mikesell, *supra*, 50-82 (listing numerous sales tax exemptions of the late 1970's). The court of appeals

[6] Not only does §11501(c)'s lack of a remedy for a generally applicable tax shed light on the meaning of discrimination under §11501(b), it serves as an independent basis for affirmance. If CSX's claim does not entitle it to relief, then the district correct correctly dismissed the claim summarily. Tellingly, CSX omits the provision from its recitation of the statute. Blue Br. 1-2.

cited several sources containing historical sales tax exemptions, which we will not duplicate here. Pet. App. 30a (citing five books and articles listing pre-1976 sales and use tax exemptions). Instead, we focus specifically on exemptions for motor fuel purchases.

By the 1950's, "the most prolific source of exemptions from sales and use taxes [lay] in the field of interstate commerce … [due to] the constitutional limitations against burdening or interfering with the flow of commerce between the States." George D. Brabson, *Analysis of Sales and Use Tax Exemptions—with Comment as to More Uniform Applications*, 3 Vand. L. Rev. 294, 300 (1956). Relevant here, "[a]t one time barges in navigable waters were considered exempt from state taxation of fuel by virtue of the Commerce Clause." *Atchison, Topeka, & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983) (citing *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929)). While we admittedly cannot link the two together, we know that Alabama's exemption for interstate (but not intrastate) water carriers' purchase of diesel fuel dates back to at least 1959—nearly two decades before the 4-R Act was passed. *See* Ala. Act No. 1959-99 (amending Ala. Code 1940 Tit. 51, §789).

We are certain why motor carriers receive their sales and use tax exemption, however. As outlined in our statement of the case, *supra* at 13-14, Congress essentially forced the States to adopt a distinct motor fuels excise tax with the passage of the Hayden-Cartwright Act of 1934. By the time the

4-R Act became effective in 1979, all 50 States had adopted a motor fuels tax for on-road usage of motor fuels, Netherton, *supra*, 28, and 43 States granted an exemption from sales and use taxes to payers of the motor fuels tax to prevent double-taxation. Due & Mikesell, *supra*, 77.

Congress surely knew that sales and use exemptions existed when it passed the 4-R Act, including exemptions on the purchase or consumption of diesel fuel. Accordingly, the Court's statement regarding the prevalence of property tax exemptions in *ACF Industries* holds just as true in this case:

> Given the prevalence of [sales and use] tax exemptions when Congress enacted the 4-R Act, [§11501's] silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place.

ACF Industries, 510 U.S. at 344.

C. Principles of Federalism Again Compel a Limited Reading of §11501(b)(4).

One passage from *ACF Industries* provides CSX with an insurmountable obstacle: "The statute does not speak with any degree of particularity to the question of tax exemptions. Subsection (b)(4) . . . is, at best, vague on the point." *ACF Industries*, 510 U.S. at 343.

Taxation is a traditional state power, *id.* at 345, which in this case provides the lifeblood of Alabama's public school system. For Congress to pre-empt a traditional state power, "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. Put another way, "[the Court] must be *absolutely certain* that Congress intended" to preempt a State's ability to grant exemptions from its sales and use taxes. *Id.* at 464 (emphasis added).

Absolute certainty is a high hurdle, one that even the broadest of terms, including "any," often cannot clear. For example, under 47 U.S.C. §253, States cannot inhibit "the ability of *any entity* to provide any interstate or intrastate telecommunications services." (emphasis added). Applying the clear-statement rule, the Court has held that the term "any entity" in §253 does not encompass a State's political subdivisions because the term "is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." *Nixon*, 541 U.S. at 140-41.

The Court invoked the clear-statement rule in *ACF Industries*: "We will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'" *ACF Industries*, 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Earlier in the opinion, the Court acknowledged that

- "[t]he scope of subsection (b)(4) . . . is not as clear" as the scope of subsections (b)(1)-(3), *id.* at 337;

- "the statute does not speak with any degree of particularity to the question of tax exemptions," and "subsection (b)(4) . . . is, at best vague on the point" *id.* at 343; and,

- "Congress did not state whether exemptions are a form of forbidden discrimination against rail carriers, and further did not provide a standard for courts to distinguish valid from invalidation exemption schemes." *Id.* at 343-44.

In light of these facts, the Court held that "[p]rinciples of federalism support, in fact *compel*, our view" that §11501(b)(4) does not prohibit property tax exemptions. *Id.* at 345 (emphasis added).

The Court recently confirmed that *ACF Industries* rested in large part on the clear-statement rule. *See CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 21-22 (2007). In rejecting Georgia's argument that "[federal] court review of state valuation methodologies is not authorized by a clear statement in the [4-R] Act," *id.* at 21, the Court distinguished its invocation of the clear-statement rule in *ACF Industries*: "The States had provided such property tax exemptions for years. In the face of this widespread and historical practice, we

declined to read the 4-R Act to prohibit a type of tax exemption the text did not expressly mention." *Id.*

Congress has remained silent in the 16 years since the Court decided *ACF Industries*. Consequently, §11501's text still does not "expressly mention" a prohibition on tax exemptions, property or non-property. *Id.* History, of course, also remains unchanged: Congress realized in 1976 that States granted tax exemptions. *See supra* at 39-41. Thus, it is unsurprising that CSX, the United States, and the remaining *amici* have failed to cite a single instance of Congress expressing its intent to prohibit sales and use tax exemptions.

Accordingly, the same principles of federalism that compelled the Court to adopt a limited reading of §11501(b)(4) in *ACF Industries* compel the same limited reading in this case: §11501 does not "prohibit a type of tax exemption the text [does] not expressly mention." *CSX Transp.*, *supra*, 21.

III. SECTION 11501'S LEGISLATIVE HISTORY CONFIRMS CONGRESS' INTENT TO ALLOW EXEMPTIONS FROM A GENERALLY APPLICABLE STATE TAX WITHOUT SUBJECTING THE TAX TO CHALLENGE UNDER §11501(b)(4).

Section 11501's legislative history shows that Congress crafted the statute to ensure that interstate rail carriers were placed on equal footing with local businesses, not with individual competitors, largely because that is what the railroads asked for:

> In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers.

1972 Hearings at 356 (statement of AAR President Stephen Ailes). Similarly, Congress shielded tax exemptions from challenge because the States successfully fought to protect them.

A. THE RAILROADS ASKED CONGRESS FOR EQUAL FOOTING WITH LOCAL BUSINESSES "AND NOTHING MORE."

The railroads have no room to complain about §11501's limited scope; the AAR proposed §11501. *See* Doyle Report at 465-66. When the AAR first pitched §11501, it assured Congress that "[t]he proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers." *Id.* at 466. The proposal also made it clear that generally applicable taxes embodied the *goal* of §11501: "[§11501] has the obvious merit of insuring that such carriers would receive *equal treatment with other taxpayers subject to the same tax rates* in accordance with applicable State law." *Id.* (emphasis altered).

While the railroads' mantra has changed decades later, it remained constant throughout §11501's 15-year drafting process:

> I hope it is clear we are not here asking special tax favor from the States. We seek only the same treatment accorded other taxpayers—in other words, fairness, and nothing more.
>
> Our industry's just tax contributions have been an important cornerstone of State and local tax programs, and we expect to continue to pay our way and to contribute our fair share in assisting the States to meet their responsibilities to their residents.

State Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce, 91st Cong. 51 (1969) (hereinafter "1969 Hearing") (statement of AAR President Thomas M. Goodfellow).

Congress echoed the railroads' assurances that §11501 was only intended to place interstate carriers on equal footing with the general mass of taxpayers, not to grant favored status. *See, e.g.*, S. Rep. No. 90-1483, at 14 (1968) ("The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers."); S. Rep. No. 92-1085, at 7-8 (1972) ("[T]he measure *grants no favored status* to transportation property nor any windfall to carriers. It merely provides for equal treatment.") (emphasis added).

Congress' and the railroads' mutual understanding that "discrimination" was limited to taxes that treated railroads more harshly than local taxpayers is also reflected in their thoughts on §11501's scope and remedy. Both noted that only the "excessive" part of a state tax was "discriminatory," and thus subject to challenge, under §11501:

- "It is intended that only the tax resulting from the excessive portion of the assessment or rate shall be unlawful and subject to question," 1967 Hearings at 22 n.2 (statement of James Ogden on behalf of AAR);

- "This bill would declare unlawful that portion of the rate that is in excess of what is imposed generally upon property in the taxing district," *Id.* at 6 (Senator Frank Lausche);

In fact, the tax discrimination of "at least $50 million each year" cited by CSX at page 3 of its brief was not the amount of ad valorem taxes paid by rail carriers in the surveyed States; it was the amount of taxes the railroads would have saved if railroad property had been taxed in the same generally applicable manner as local property. *See infra* at 23a-25a (reproducing the relevant chart).

Simply put, generally applicable taxes—such as Alabama's 4% sales and uses taxes—give railroads everything they asked for, and all that Congress provided, in §11501.

B. CONGRESS NEVER INTENDED §11501'S COMPARISON CLASS TO BE INDIVIDUAL INTERSTATE COMPETITORS.

CSX claims that Alabama's sales and use taxes are discriminatory because they fail to put CSX on equal footing with two of its competitors. Blue Br. i, 13, 20-21. In other words, CSX claims that, when non-property taxes are involved, §11501(b)(4) grants rail carriers with most-favored-taxpayer status among interstate carriers because they are entitled to every tax exemption or benefit granted to another carrier. If this were true, no one would be more shocked than the railroads' competitors, who supported §11501 every step of the way.[7]

Congress rejected the original proposal to eliminate state taxes on railroads' and pipelines' rights-of-way, a proposal designed to equalize

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[7] CSX must focus on individual competitors because Alabama's generally applicable excise taxes on diesel fuel do not favor local over interstate businesses. Alabama's 4% sales and use taxes apply equally to any non-exempt business that powers its machinery or generators with diesel fuel. Alabama's 19¢ per gallon motor fuels excise tax applies equally to interstate and local truckers, as well as citizen motorists. Only Alabama's sales and use tax exemption for water carriers differentiates, and it does so by *favoring* interstate water carriers. Ala. Code §§40-23-4(a)(10), 40-23-62(12). The State acknowledges its suggestion during the preliminary injunction stage that CSX's competitors constitute the comparison class. Pet. App. 15a, n.3. As we stated at the petition stage, however, the text and history of §11501 clearly show that "the proper comparison class for subsection (b)(4) claims against property and non-property taxes is commercial and industrial taxpayers, not a hand-picked competitor." Supp. Br. of Respondents 3, n.1.

property taxation among interstate carriers. Doyle Report at 463-65. Congress brushed aside the AAR's re-introduction of the idea 14 years later. *See* 1975 Senate Hearings at 1006, 1837 (statement of AAR President Stephen Ailes asking for both §11501 and exemptions from right-of-way taxes); 1975 House Hearings at 570 (same).

Instead, Congress adopted the AAR's proposal that protected "*all* common carriers engaged in interstate commerce" from discriminatory tax treatment. Doyle Report at 466 (emphasis added). Congress sought equality between interstate carriers and local businesses because interstate carriers "are nonvoting, often nonresident, targets for local taxation." *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)); *see also* 1972 Hearings at 1244 (Rep. Brock Adams) ("The basic problem in the past has been these are out-of-State companies coming in, and it's easier to tax out-of-State companies because they are non-voters."); Br. of Amicus AAR 8 ("this structural impulse [to discriminate against interstate carriers] is unchecked by any effective political counterweight, because the tax does not have to be paid by in-state voters").

Tellingly, representatives of the rail, motor, and water carriers sat side-by-side before Congress to support the bill, believing that "cooperative efforts among the modes could be of benefit to all types of carriers." 1972 Hearings at 347 (joint appearance by representatives of the AAR, the Water Transport Association ("WTA"), the American Trucking

Associations ("ATA"), and America's Sound Transportation Review Organization). While the ATA and WTA opposed parts of the 4-R Act, *see* 1975 Hearings at 1165, 1473, the ATA openly supported §11501 before the House and the Senate more than a year *after* subsection (b)(4) was added by the House. *See* 1975 Senate Hearings at 1178 (Statement of Peter Beardsley, Vice President and general counsel of the ATA); 1975 House Hearings at 621 (same).

If Congress had intended §11501(b)(4) to grant interstate rail carriers most-favored-taxpayer status among interstate and local carriers, then Congress should have made its intention clear so that the rail carriers' competitors would have argued for, instead of against, their own interest.[8] Congress never made such a statement, however, because that was not its intent.

C. THE STATES WERE ASSURED THAT TAX EXEMPTIONS WOULD NOT BE SUBJECT TO CHALLENGE.

If the railroads' interstate competitors were hoodwinked, the States were too. For eight years, the States fought to protect their ability to grant tax exemptions free from the strictures of §11501. *See* Laronge, *supra*, 639-645. When Congress added "subject to a property tax levy" to the definition of "commercial and industrial property," 49 U.S.C. §11501(a)(4), thereby restricting the comparison

[8] To comply with CSX's reading of §11501(b)(4), a State could strip non-railroad carriers of pre-existing exemptions and refuse to grant them new ones.

class to "taxed property," the States succeeded. *See ACF Industries*, 510 U.S. at 339-343 (interpreting the restricted comparison class to shield property tax exemptions from challenge); *ACF Industries*, *supra*, U.S. Br. 20 n.24 (crediting the narrowed class as Congress' "response to lobbying by the States"). Or so we thought.

The prospect that state tax exemptions could be subject to challenge is perhaps most troublesome in light of the debate over H.R. 5385, a draft of §11501 that included subsection (b)(4). *See* H.R. Rep. No. 93-1381, at 5 (1974). Louisiana Representative Gillis Long asked, point-blank, if §11501 would prohibit the States from granting property tax exemptions and was given the following responses:

- *Representative Staggers*: "We certainly have no intention of banning that practice."

- *Representative Adams*: "I want to assure the gentleman, as the chairman has said, that this provision is not one that would change or affect the practice that the gentleman from Louisiana has outlined. The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation with a plus or minus 5 percent."

- *Representative Kuykendall*: "I will say to the gentleman from Louisiana (Mr. LONG) that such arrangements made in any State do not change the tax structure of that individual locality. They are exceptions to the structure. We are referring only to the structure in this legislation."

120 Cong. Rec. 38734 (1974). The Representatives unequivocally assured that States could continue granting tax exemptions under §11501, assurances this Court cited as refuting the Carlines' argument in *ACF Industries* that "Congress intended to prohibit exemptions in subsection (b)(4)." 510 U.S. at 345-46.

Granted, Representative Long's question specifically referred to exemptions from "ad valorem taxes," not sales and use taxes. 120 Cong. Rec. 38734 (1974). But we should not assume that the Congressmen were mistaken or told half-truths. If they believed there was a distinction between exempting property and sales and use taxes, they should have made that belief clear so the States could have argued to protect our sales and use tax exemptions as well.[9]

[9] Representative Long (La.) ultimately voted in favor of the 4-R Act. 122 Cong. Rec. 1358 (1976). No doubt he would have been surprised to learn that granting *non-property* tax benefits to interstate water carriers to re-energize Louisiana's seaports after disasters such as hurricanes or oil spills would violate §11501(b)(4) unless Louisiana extended the same benefits to land-based railroads.

D. CONGRESS HAD A SPECIFIC TARGET IN MIND WHEN IT WROTE §11501(B)(4): IN LIEU GROSS RECEIPTS TAXES.

CSX's legislative history argument is largely predicated on a research error. CSX argues that §11501(b)(4) must be read expansively because the Conference Committee rejected a "narrowly drawn" House version of §11501(b)(4) that "prohibit[ed] only 'the imposition of a discriminatory in-lieu tax'" in favor of the Senate's broad "imposition of any other tax" language. Blue Br. 19 (quoting S. Rep. No. 94-595, at 166 (1976) (Conf. Rep.)). But not only did both versions contain the same "any other tax" language, *compare* S Rep. 94-499 at 232 (1975) (S. 2718) *with* H.R. Rep. 94-725 at 19 (1975) (H.R. 10979), the Senate took its provision from the House version at the behest of the railroads. *See supra* at 8. The "in-lieu tax" language cited by CSX was the Conference Committee mimicking the House's *summary* of H.R. 10979, not the House bill itself. *Compare* S. Rep. No. 94-595, at 166 *and* H.R. Rep. No. 94-781, at 851 (1976) (Conf. Rep.) *with* H.R. Rep. No. 94-725, at 113 (1975) (summarizing H.R. 10979 and attaching the moniker "discriminatory in-lieu tax" to subsection (b)(4)); *see also* 121 Cong. Rec. 41404-29 (1975) (reciting the text of H.R. 10979).

CSX's error highlights a major flaw in its argument: Congress had a specific target in mind when it added §11501(b)(4), and it was not sales and use taxes or their exemptions. As the Court noted in *ACF Industries*, Congress and the railroads mentioned only one type of tax when discussing

§11501(b)(4): in lieu gross receipts taxes. 510 U.S. at 346.

Twice when the AAR charted discriminatory State property taxes for Congress, it noted that some States' figures were not included because the States imposed a gross receipts tax in lieu of an ad valorem property tax. *See* Doyle Report at 487; 1970 Hearings at 96; *see also* Dennis L. Thompson, *Taxation of American Railroads: A Policy Analysis* 70 (1981) (discussing States that exempted railroad property from ad valorem taxation and levied an "in lieu gross receipts tax" instead). As it became clear that subsections (b)(1)-(3) would end discriminatory ad valorem taxes, the railroads feared that States desiring to continue overtaxing railroad property would simply scrap their ad valorem taxes and impose heavy gross receipts taxes instead. *See* 1975 Senate Hearings at 1837 (AAR President Stephen Ailes asking the Senate to add "a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions"); 1883 (Stuart Johnson, on behalf of the New York Dock Railway, asking the Senate to add the House's version of §11501(b)(4) to protect his railway from New York's gross receipts tax). As the House versions of §11501 show, these in-lieu gross receipt taxes were §11501(b)(4)'s intended target. *See* H.R. Rep. No. 94-725, at 77 (referring to the target of subsection (b)(4) as the "so-called 'in lieu tax'"), 78 ("the Committee believes that discriminatory property and 'in lieu' taxation should be ended").

To be clear, we are not arguing that subsection (b)(4)'s "another tax" language is limited solely to in lieu gross receipts taxes. Frankly, we agree with the Carlines in *ACF Industries* that, with regard to whether §11501(b)(4) applies only to ad valorem property taxes or only to non-property taxes:

> [T]he language is not so very plain on either side that you can tell precisely what Congress meant, but what you can tell is what Congress' objective was here which was to avoid allowing railroads to be treated more harshly than the majority of other property within the State.

ACF Industries, *supra*, Oral Argument Tr. 36. As we stated *supra* at 24, even if sales and use taxes constitute "another tax" under §11501(b)(4), *generally applicable* sales and use taxes are not subject to challenge because they do not "discriminate against a rail carrier."

Our point is that Congress knew about the potential of States imposing in-lieu gross receipts taxes to sidestep subsections (b)(1)-(3) and explicitly stated that subsection (b)(4) would remedy the problem. On the other hand, Congress never mentioned that exemptions to a generally applicable sales and use tax would be subject to challenge under §11501(b)(4), despite Congress' knowledge of their prevalence. *See* Part II.B. This is further proof that Congress did not intend to prohibit exemptions from state sales and use taxes.

IV. LIMITING "DISCRIMINATION" TO TAXES THAT SINGLE OUT OR TARGET INTERSTATE RAIL CARRIERS DOES NOT RENDER §11501(b)(4) A NULLITY.

Reading §11501(b) to prohibit challenges to the granting of exemptions from a generally applicable tax does not render subsection (b)(4) a nullity. Congress and the courts have provided examples of taxes that could be subject to challenge under §11501(b)(4) because the taxes "singled out" or "targeted" railroads with a proportionately higher tax burden than other businesses. *ACF Industries*, 510 U.S. at 346-47.

Section 11501(b)(4) could proscribe the one tax that both Congress and the railroads discussed: a discriminatory in lieu gross receipts tax. Using the railroads' example to the Senate, §11501(b)(4) would bar a State from removing interstate rail carriers from its generally applicable ad valorem property tax structure and imposing a more expensive gross receipts tax in its stead. 1975 Senate Hearings at 1883 (statement of Stuart Johnson describing New York's gross receipts tax).

In *ACF Industries*, the Court cited *Burlington Northern Railroad Co. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), as providing an example of a tax that might violate §11501(b)(4) because it "singled out railroad property for discriminatory treatment." *ACF Industries*, 510 U.S. at 346-47. In that case, the Seventh Circuit struck down Wisconsin's occupational tax on the owners and

operators of iron ore concentration docks because, in practical effect, it applied to the docks owned by one rail carrier.

Lower courts have provided similar examples. In *Burlington Northern & Santa Fe Railway Co. v. Atwood*, a district court struck down Wyoming's "Coal Transportation Tax" because it "single[d] out railroads in that they are liable for more than 99% of the total Coal Transportation Tax." 271 F. Supp. 2d 1359, 1363 (D. Wyo. 2003). The tax was therefore "not generally applicable to other commercial and industrial taxpayers." *Id.* at 1367. The Washington Supreme Court similarly struck down a city's tax on the transfer of solid waste from trucks to trains because "the only activity subject to the tax is the transfer made by [the plaintiff's] employees at the rail yard." *Regional Disposal Co. v. Centralia*, 51 P.3d 81, 82 (Wash. 2002).

Using the Court's parlance, the common thread in these cases is that the state tax "singled out" or "targeted" rail carriers with a tax burden not shared by the general mass of commercial and industrial taxpayers. *ACF Industries*, 510 U.S. at 346-47. In *Burlington Northern v. City of Superior*, Judge Posner listed several other examples of state taxes that might violate §11501(b)(4) in the same manner: "a tax on operating rail crossing signals, on selling railroad passenger tickets, on loading tank cars, on hoisting containers from flat cars onto flatbed trucks—or on placing iron ore concentrates shipped by rail on wharves for further shipment." 932 F.2d at 1187.

In short, limiting §11501(b)(4) to the imposition of a tax burden on railroads that is not shared proportionately by local businesses does not render the provision a nullity. It limits §11501(b)(4) in the manner that the statute's text and legislative history provides.

V. IF THE COURT HOLDS THAT GENERALLY APPLICABLE SALES AND USE TAXES ARE SUBJECT TO CHALLENGE, THE COURT SHOULD DECLARE THAT, ON REMAND, THE DISTRICT COURT MAY CONSIDER BOTH OF ALABAMA'S EXCISE TAXES ON DIESEL FUEL.

As we explained in the petition stage, the railroads have predicated their diesel fuel lawsuits against seven States, at least in part, on the States' differentiation between excise taxes on off-road diesel fuel (sales and use taxes) and on-road diesel fuel (motor fuels taxes). Supp. Br. of Respondents 9-10; U.S. Br. Petition Stage 15-16. Playing this differentiation to their advantage, the railroads argue that district courts must cabin their "discrimination" inquiry to the sales and use tax statutes being challenged, thereby blinding courts to the motor carriers' payment of excises taxes found elsewhere in the code. *See* CSX Petition Stage Reply Br. 2-4 (arguing that courts should "focus solely on the particular tax at issue and forgo examination of a State's overall tax structure").

If the Court agrees with CSX that generally applicable sales and use taxes are subject to challenge under §11501, we ask the Court to declare

that district courts may take into account the taxes paid by the railroads' competitors on the same taxable event when judging the railroads' claim. In this case, the taxable event would be the purchase or consumption of diesel fuel, and the district courts could take into account payment of either of Alabama's excise taxes on diesel fuel: motor fuels (Chapter 17) or sales and use (Chapter 23).

The United States agrees with the State that "a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." U.S. Petition Stage Br. 17. So did the lone dissent in *ACF Industries*. *ACF Industries*, 510 U.S. at 352 n.4 (Stevens, J. dissenting) ("A State might, for example, be able to defend an exemption by showing that the exempted class was subject to an equivalent tax to which railroads were not."). In fact, forcing courts to wear blinders when viewing the State's tax code would strip the States' ability to justify facially discriminatory sales and use taxes with proof of a complimentary tax imposed on the exempt business. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (outlining the "compensatory/ complimentary" tax doctrine); U.S. Br. 25 ("Subsection (b)(4) prohibits 'discrimination,' not 'differentiation.' A state tax that treats a rail carrier differently than a similarly situated person 'discriminates against a rail carrier' only if the State cannot justify the differences in treatment.") (citations omitted). And contrary to CSX's petition-stage assertions, simply looking at the face of a state code to see that a railroad's competitor pays a flat

19¢ excise tax is not so difficult that it should deprive the States of millions of dollars in non-discriminatory tax revenues. CSX Petition Stage Reply Br. 2-3.

By taking this extra step, the Court might prevent years of unnecessary litigation based on the nationwide on-road versus off-road diesel fuel tax dichotomy, thereby preventing legitimate State tax revenues from being held in escrow pending a resolution of the issue.[10]

* * *

Section 11501 achieved the railroads' original objective: It forced the States to place interstate rail carriers on equal tax footing with other commercial and industrial taxpayers. *See* Ala. Code §40-8-1(b)(5) (requiring that, as of September 30, 1979, all "transportation property" subject to the 4-R Act be taxed at the generally applicable rate of 20%). If the railroads now desire the same tax benefits given to individual businesses, thereby elevating interstate rail carriers from equals to the State's most-favored-taxpayers, they need to ask Congress to re-write §11501.

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[10] For example, the lawsuit currently stayed in Tennessee pending resolution of this appeal is predicated solely on Tennessee's exemption for motor carriers that pay the State's motor fuels tax. *See Illinois Cent. R.R. v. Tennessee Dep't of Rev.*, No. 3:10-CV-197 (M.D. Tenn.) (Docket No. 1).

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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APPENDIX

49 U.S.C. § 11501

Tax discrimination against rail transportation property

(a) In this section--

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a

property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Former 49 U.S.C. § 13(4)[1]

Duty of Commission where State regulations result in discrimination.

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided,* That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of

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[1] The statute is reproduced as it was set out in *Public Service Commission v. United States*, 365 F. Supp. 6, 8-9 (S.D. W. Va. 1973) (three-judge court) (per curiam).

any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 11501: LEGISLATIVE HISTORY HIGHLIGHTS

Date	Description
June 26, 1961	Doyle Report is published. *See* S. Rep. No. 87-445 (1961). The report outlines two proposals: ▪ A statute preempting state and local taxation of railroad right-of-way property, *see id.* at 463, to ensure "equality of opportunity . . . between our Nation's transportation carriers," *id.* at 465. ▪ A statute, proposed by the Association of American Railroads (AAR), allowing interstate carriers to seek relief in federal court from excessive property assessments and taxes collected thereon. *Id.* at 465-66.
Aug. 7-8, 1967	Senate holds hearings on S. 927, which embraces the AAR proposal and adds a prohibition on excessive rates. Carrier property tax rates would be compared to those imposed on "any other property in the taxing district." *Discriminatory Taxation of Common Carriers: Hearing on S. 927 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 90th Cong. 2 (1967).

Date	Description
	▪ USDOT: Transportation carriers are discriminated against "as compared to other property taxpayers in the jurisdiction." *Id.* at 3. ▪ AAR: "We are really trying not to . . . put the railroads in a special class. We are trying to get out of being in a special class." *Id.* at 21. ▪ USDOJ: Section 11501 makes clear that "only the excessive portion of the tax is declared unlawful." *Id.* at 4. ▪ Sen. Lauche: "This bill would declare unlawful that portion of the rate that is in excess of what is imposed generally upon property in the taxing district." *Id.* at 6. ▪ AAR: "It is intended that only the tax resulting from the excessive portion of the assessment or rate shall be unlawful and thus subject to question." *Id.* at 22. n.2. ▪ AAR: Section 11501 "is not intended to interfere with or restrict State action in extending total or partial exemption to property of any class, such as churches, charitable institutions, homesteads, and the like." *Id.* at 82.

Date	Description
July 29, 1968	Senate Commerce Committee reports favorably on S. 927 (with amendments). *See* S. Rep. No. 90-1483 (1968). ▪ "[I]nterstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily their right-of-way and terminals." *Id.* at 2. ▪ Section 11501 "make[s] clear the intent that only the excessive portion of the tax is declared unlawful. *Id.* at 9-10. ▪ "[P]roperty totally or partially exempted is not intended to be taken as a measure of 'any other property'" for purposes of the excessive tax rate provision. *Id.* at 11. ▪ Conclusion: "The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers." *Id.* at 14.
July 30, 1969	Senate holds hearings on S. 2289. Section 11501 contains provisions analogous to present-day subsections (b)(1), (b)(2), and (b)(3). *State*

Date	Description
	Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce, 91st Cong. 1-2 (1969). ▪ AAR: The discrimination arises because the effective tax rate "differs for the railroads and is greater than that which is applied to property generally." *Id.* at 34. ▪ AAR: "[W]e are not here asking special tax favor from the States. We seek only the same treatment accorded other taxpayers—in other words, fairness, and nothing more. . . . [W]e expect to continue to pay our way and to contribute our fair share in assisting the States to meet their responsibilities to their residents." *Id.* at 51.
Dec. 20, 1969	Senate Commerce Committee reports favorably on S. 2289 (with amendments). *See* S. Rep. No. 91-630 (1969). ▪ The committee adopted an amendment that would provide a "5 percent tolerance factor to protect taxing districts from the issuance of an injunction or other restraining process in case of an insignificant variation in assessments." *Id.* at 14.

Date	Description
June 9, 1970	House holds hearings on S. 2289 and six "identical" bills. *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 1 (1970). ▪ Interstate Commerce Commission (ICC): Section 11501 will prevent State and local tax treatment of carrier property "on a different basis than other property in the same taxing district." *Id.* at 4. ▪ American Trucking Associations (ATA): "This legislation is essential to assure the regulated transportation industries of fair and impartial treatment in the taxation of these properties." *Id.* at 141. ▪ Maryland Department of Assessments and Taxation: "If [a] comparison is to be made, then for the sake of equality it should be between transportation property and all other commercial or business property." *Id.* at 143.

Date	Description
Nov. 4, 1971-Jan. 26, 1972	Senate holds hearings on various legislation which include §11501 as part of a larger set of reforms. *Surface Transportation Legislation: Hearings on S. 2362, Surface Transp. Act of 1971, S. 1092, S. 1914, S. 2365, S. 2841, S. 2842, and S. Con. Res. 56 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 92d Cong. (1972). ▪ Sen. Beall: "For the first time in my memory, the regulated modes of surface transportation have joined together to seek legislation which they believe will be beneficial to all regulated modes of transportation." *Id.* at 148. ▪ ATA: The bill will prohibit state taxation of transportation property at higher assessment ratios and rates than "other property generally." *Id.* at 182. ▪ AAR: "[W]hat we ask for is not to be set in a special class." *Id.* at 282. ▪ AAR: "Those subject to this legislation will pay the tax at the same rate as the States impose on everyone else, and on the same basis of valuation. . . . This simply says carriers pay as others pay, and are not to be singled out for discrimination." *Id.* at 285.

Date	Description
	▪ AAR: "[W]hat is burdensome is that tax which is paid by the railroads when they are singled out because they are railroads and told, you pay at three times what the other properties pay." *Id.* at 292. ▪ Sen. Beall: "[W]e don't want to move from discrimination to what appears to be favoritism. We want to move to fairness and equality of treatment." *Id.* at 296. ▪ Transportation Association of America (TAA): "We favor these carriers' being treated on the same basis as other property tax payers—no better and no worse." *Id.* at 323. ▪ ICC: "[W]e are interested in securing equality of tax treatment for carriers but would not support giving them a preference." *Id.* at 338.
March 27-May 12, 1972	House holds hearings on a number of "broad bills affecting surface transportation." *Transportation Act of 1972: Hearings on H.R. 11824, H.R. 11826, and H.R. 11207 (and All Identical Bills) Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 1 (1972).

Date	Description
	▪ AAR: "In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers." *Id.* at 356. ▪ ATA: "Common and contract carriers by rail, truck, and barge should no longer bear this burden of discriminatory tax treatment." *Id.* at 424. ▪ Rep. Adams: "The basic problem in the past has been these are out-of-State companies coming in, and it's easier to tax out-of-State companies because they are nonvoters." *Id.* at 1244. ▪ Rep. Adams: "All this bill is trying to do is just say treat interstate nonvoting people the same way that you treat local people, not to give them special treatment." *Id.* at 1305. ▪ Rep. Adams: "What we are trying to do is to prevent discrimination . . . . [w]e don't particularly want to put anybody into a favored position." *Id.* at 1317.
Sept. 1, 1972	Senate Commerce Committee reports favorably on S. 3945. *See* S. Rep. No. 92-1085 (1972). Section 11501 applies to all carriers. For the first time, §11501 requires comparison with "all other commercial

Date	Description
	and industrial property" (or "public utility property," if applicable). *Id.* at 2. ▪ Section 11501 would declare unlawful the "collection of that part of taxes based on discriminatory assessment." *Id.* at 3. ▪ "[T]he measure grants no favored status to transportation property nor any windfall to carriers. It merely provides for equal treatment." *Id.* at 7-8. ▪ "[T]he measure interferes to the least extent possible with State taxing systems." *Id.* at 8.
Mar. 26- July 3, 1974	House holds hearings on two related bills. For the first time, §11501 contains a clause similar to present-day subsection (b)(4). *Surface Transportation Legislation: Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694, and S. 1149 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 24 (1974). ▪ Water Transport Association: "Title II—*Provisions Relating to Discriminatory State Tax Practices*, is ready. It has the support of almost everyone." *Id.* at 496.

Date	Description
Sept. 26, 1974	House Interstate and Foreign Commerce Committee reports favorably on H. 5385 (with an amendment). *See* H.R. Rep. No. 93-1381 (1974). Section 11501 contains a clause analogous to present-day subsection (b)(4). *Id.* at 5. ▪ The Report describes the new clause as targeting the "so-called 'in-lieu tax'." *Id.* at 36.
Dec. 10, 1974	House Committee of the Whole considers H.R. 5385. *See* 120 Cong. Rec. 38,732-58 (1974). ▪ Rep. Long asks whether §11501 would preclude property tax exemptions a State might extend "to encourage economic development within the State." *Id.* at 38,734. ▪ Rep. Staggers: "[W]e do not touch on that in any way or prohibit it. . . . We certainly have no intention of banning that practice." *Id.* ▪ Rep. Adams: "[T]his provision is not one that would change or affect the practice [Rep. Long] has outlined." *Id.*

Date	Description
	▪ Rep. Adams: "The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation ." *Id.* ▪ Rep. Adams: Section 11501 "is directed only at certain abuses that have grown up in the country where a particular State or county, because it had somebody who was not a local citizen and did not vote there but was just passing through as an interstate carrier, would tax them more heavily than their local people because they did not vote." *Id.* ▪ Rep. Adams: "[T]his provision would not affect these specific exemption-type industrial development programs that [Rep. Long] has outlined." *Id.* ▪ Rep. Adams: "[W]e have tried to say in this bill with respect to transportation properties throughout the United States that we should tax them as we do other commercial and industrial properties." *Id.* at 38,755.

Date	Description
	▪ Rep. Staggers: "All we are trying to say is that the taxation for transportation property shall be the same as for any other commercial property within a State." *Id.* at 38,756.
July 15-24, 1975	House holds hearings on two bills containing §11501, each of which include the "any other tax" clause. *See Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 15-18 (1975); *id.* at 51-54. For the first time, one version applies only to railroads. *See id.* at 15-18. ▪ USDOT: Discriminatory state tax practices "place an unjust burden upon these carriers and contribute to their financial problems by taxing them at a higher rate than similar property of other businesses in the same taxing jurisdiction." *Id.* at 162. ▪ TAA: In response to opponents' "legitimate concerns," "the bill has been worded to make it perfectly clear that the railroads are not to be given preferential treatment, but treated on the same basis as other industrial and commercial taxpayers." *Id.* at 768.

Date	Description
Sept. 9-19, 1975	Senate holds hearings. Its versions of §11501 remain applicable to all carriers, and do not contain the "any other tax" clause. *Railroads-1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce (Part 4)*, 94th Cong. (1976). ▪ ATA: "We favor the provisions of S. 1876 and S. 2265 which would prohibit the discriminatory taxation of carrier property . . . ." *Id.* at 1166.
Oct. 20-30, 1975	Senate continues hearings. *Railroads-1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce (Part 5)*, 94th Cong. (1976). ▪ AAR: "We suggest that the bill be amended by adding a fourth provision, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions [currently in the draft]." *Id.* at 1837.

Date	Description
	▪ New York Dock Railway: Adding the "any other tax" clause "would be of material benefit to New York Dock Railway because it is subject to a New York City gross receipts tax applicable to public utilities. Rail gross receipts are taxed at a higher rate than other public utilities." *Id.* at 1883. ▪ TAA: "[C]arriers are not to be given preferential treatment, but treated on the same basis as other industrial and commercial taxpayers." *Id.*
Nov. 26, 1975	Senate Commerce Committee reports favorably on S. 2718. *See* S. Rep. No. 94-499, at 1 (1975). Section 11501 applies to all transportation modes. For the first time, the Senate's version of §11501 includes the "any other tax" clause. *Id.* at 232.
Dec. 4, 1975	Senate passes S. 2718. *See* 121 Cong. Rec. 38,492 (1975).
Dec. 12, 1975	House Committee reports favorably on H.R. 10979. *See* H.R. Rep. No. 94-725, at 1 (1975). Section 11501 applies to railroads and includes a clause similar to present-day subsection (b)(4). *Id.* at 19-20. ▪ Summary of provisions: The clause addresses "the imposition of a discriminatory 'in-lieu tax.'" *Id.* at 113.

Date	Description
Dec. 17, 1975	House Committee on the Whole considers H.R. 10979. *See* 121 Cong. Rec. 41,334-429 (1975). Section 11501 covers railroads only and contains a clause akin to present-day subsection (b)(4). *See, e.g., id.* at 41,413. ▪ Rep. Skubitz: Any state attempt "to impose a higher rate of tax than the true market value of the rail property, would be considered a burden on interstate commerce and, therefore, unconstitutional." *Id.* at 41,341. ▪ Rep. Adams: "We have had the proposition in the United States by which States have decided that they want to tax the non-voters, in other words, transportation companies coming through the States, at rates greater than those that apply to other commercial property. . . . What we are saying is that an industry is an industry and should be taxed within 5 percent up or down of how we are taxing the others in the State in order to avoid discrimination." *Id.* at 41,401.
Dec. 17, 1975	House passes H.R. 10979. *See* 121 Cong. Rec. 41,404 (1975).

Date	Description
Dec. 19, 1975	The conference committee files a report reconciling H.R. 10979 and S. 2718. *See* H.R. Rep. No. 94-768 (1975) (Conf. Rep.), *as reprinted in* 121 Cong. Rec. 41,888-41,940 (1975) [hereinafter "the first conference report"]. The Senate bill covered all interstate carriers while the House bill covered rail carriers. *See id.* at 41,926 (joint explanatory statement); *see also id.* at 41,413 (setting out the text of H.R. 10979). The conference substitute "follows the Senate bill" and would cover all interstate carriers subject to the Interstate Commerce Act. *Id.* at 41,926. ▪ In describing the "any other tax" clause, the report says it would forbid the "imposition of a discriminatory 'in-lieu tax.'" *Id.* at 41,926.
Dec. 19, 1975	Both the House and Senate agree to the first conference report. *See* 121 Cong. Rec. 41,967 (1975) (House passage); *id.* at 42,209 (Senate passage).

Date	Description
Jan. 20-21, 1976	The House and Senate adopt H. Con. Res. 527, vacating adoption of the first conference report and recommitting it to the conference committee. *See* 122 Cong. Rec. 285-86 (1976) (House), *id.* at 457 (Senate).
Jan. 23, 1976	The conference committee files a second report reconciling H.R. 10979 and S. 2718. *See* H.R. Rep. No. 94-781 (1976) (Conf. Rep.), *as reprinted in* 122 Cong. Rec. 812 (1976) [hereinafter "the second conference report"]. "The conference substitute . . . limited the provision to taxation of railroad property." *Id.* at 851. ▪ A third conference report, filed January 27, 1976, is identical in all relevant respects. *See* S. Rep. No. 94-595 (1976) (Conf. Rep.).
Jan. 28, 1976	Both the House and Senate consider and agree to the second conference report. *See* 122 Cong. Rec. 1334 (1976) (Senate consideration); *id.* at 1342 (Senate passage); *id.* at 1350 (House consideration); *id.* at 1359 (House passage).
Feb. 5, 1976	The President signs the Railroad Revitalization and Regulatory Reform Act of 1976. *See* 122 Cong. Rec. 2514 (1976).

[S. Rep. No. 92-1085, at 6 (1972)]

State	1970 railroad ad valorem taxes	Percent of value at which railroad property assessed 1970	Percent of value at which property of others assessed	Estimated reduction in railroad ad valorem taxes if railroad assessments had been made at the same percent of value as were the assessment of property of others	Percent of tax excessive
Alabama	$2,772,497	30.00	16.90	$1,210,749	43.67
Arizona	8,859,434	60.00	24.45	5,101,262	57.58
Arkansas	4,054,205	20.00	12.20	1,581,140	39.00

[State]	[1970 RR ad valorem taxes]	[% at which RR property assessed 1970]	[% at which property of others assessed]	[Estimated discriminatory tax]	[% of tax excessive]
Idaho	4,008,262	28.42	11.90	2,330,003	58.13
Kansas	12,864,848	30.00	20.00	4,287,854	33.33
Louisiana	4,362,340	30.00	17.10	1,875,806	43.00
Mississippi	3,303,716	30.00	13.50	1,817,044	55.00
Missouri	12,799,932	40.00	28.69	3,619,821	28.28
Montana	6,972,197	20.00	11.70	2,893,462	41.50
Nebraska	5,439,292	35.00	28.00	1,087,859	20.00
North Dakota . . .	3,386,019	33.33	21.10	1,242,667	36.69
Ohio	28,582,137	55.37	37.35	9,300,627	32.54
Oklahoma	6,276,953	35.00	17.57	3,125,922	49.80
Tennessee	6,517,322	45.00	30.00	2,172,223	33.33

[State]	[1970 RR ad valorem taxes]	[% at which RR property assessed 1970]	[% at which property of others assessed]	[Estimated discriminatory tax]	[% of tax excessive]
Utah	4,504,779	27.50	15.67	1,937,956	43.02
South Carolina . .	2,907,891	10.14	5.00	1,474,010	50.69
Total	117,611,824	. . . . .		45,058,405	38.31
5 other States in which there is material discrimination, but where the percentage of discrimination is less than 20%	50,445,459	. . . . .		8,708,533	17.26