No. 09-520

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

Respondents.

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

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

COURT RULES

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The American Trucking Associations, Inc. ("ATA") is the national trade association of America's trucking industry.[1] ATA urges affirmance of the decision below. The Court granted certiorari on the question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. §11501(b)(4) as 'another tax that discriminates against a rail carrier.'" ATA answers "No."

ATA is a District of Columbia non-profit corporation with its headquarters and principal place of business in Arlington, Virginia. ATA has approximately 2,500 motor carrier company members and, in cooperation with State trucking associations and affiliated national trucking conferences, represents the interests of tens of thousands of motor carriers. ATA's membership includes every type of motor car-

[1] In compliance with Supreme Court Rules 37(3)(a) and (6), ATA states: (a) Petitioner (on June 22, 2010) and Respondents (on June 30, 2010) filed with the Clerk of the Court consents to the filing of amicus briefs in this case in support of either or neither party and the case is before the Court for oral argument; (b) no counsel for a party authored this brief in whole or in part; (c) no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and (d) no person other than the ATA, its members, or its counsel, made any such monetary contribution.

rier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA members operate in interstate commerce to, from, within, and through the State of Alabama. ATA members purchase, store and consume diesel fuel in Alabama.

The ATA has two interests in this case: (1) the practical economic interests arising from the complex relationships between the rail industry and the trucking industry in the American economy, which are affected by Alabama taxes and exemptions, and (2) the relationship between the Federal statute that prohibits States from imposing taxes that discriminate against railroads (49 U.S.C. §11501(b)(1), (2), (3) and (4)) and the Federal statute that prohibits States from imposing taxes that discriminate against motor carriers (49 U.S.C. §14502(b)(1), (2), and (3)), which has direct parallels to subsections (b)(1), (b)(2), and (b)(3) of the railroad statute (but not to subsection (b)(4)), both of which were enacted for the same purpose.

In evaluating arguments in this case, the Court should bear in mind the complexity of the motor carrier industry and the fact that motor carrier operations are generally as interstate in nature as those of the railroads. The parties stipulated that "[t]he principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ('motor carriers') and carriers of property in interstate commerce by ships, barges and other vessels ('water carriers')." Joint Appendix ("J.A."), 44.

Interstate motor carriers, like interstate rail carriers, are the protected class under federal law, and

it is discrimination against them in favor of local business interests generally that the provisions of sections 11501 and 14502 of title 49 are designed to prohibit. The interstate nature of motor carrier operations is reflected by the fact that some motor carriers compete with rail carriers in interstate commerce in Alabama, because shippers have the ability in some situations to choose between a rail carrier and a motor carrier in shipping property through Alabama. Other motor carriers in interstate commerce in Alabama are customers of rail carriers for trailer-on-flatcar movements. Some motor carriers are co-operators with rail carriers, because they transport property from the railhead to the ultimate destination, such as a warehouse or retail facility. Motor carriers can even be subsidiaries of railroads; for example, Petitioner CSXT's parent CSX Corporation owns motor carrier CSX Intermodal, Inc.[2]

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[2] CSX Corporation describes its trucking subsidiary, CSX Intermodal, Inc. as "a stand-alone, integrated intermodal transportation provider linking customers to railroads via trucks and terminals," claims that the trucking subsidiary "combines the superior economics of rail transportation with the short-haul flexibility of trucks, offers a competitive cost advantage over long-haul trucking," notes that the trucking subsidiary "serves all major markets east of the Mississippi and transports mainly manufactured consumer goods in containers," and reports that "[f]or 2009, Intermodal accounted for approximately 13% of the Company's total revenue and 33% of volume." CSX Corporation Annual Report Pursuant to the Securities Exchange Act of 1934 (2009)(SEC Form 10-K), Item 1. The CSX trucking subsidiary provides service at terminals in Bessemer, Alabama and Mobile, Alabama. *Id.*, Item 2.

SUMMARY OF ARGUMENT

Subsection (b)(4) of the railroad statute (49 U.S.C. 11501(b)(4)) states:

> (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: . . . (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.[3]

The plain text of §11501(b)(4) permits challenges to a "tax" – not a "tax exemption." In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994) ("*ACF Industries*"), a case involving a State property tax, the railroad interest involved attempted to persuade the Court to construe subsection (b)(4) as if it said "impose another tax or grant a tax exemption that discriminates against a rail carrier providing transportation," but the attempt failed. The Court examined the text and structure of the statute, the background of historic and widespread exemption-granting conduct by States, and the principle that the Court will interpret a statute to pre-empt traditional state powers only if that result is the clear and manifest purpose of Congress. The Court concluded that subsection (b)(4) did not meet the "clear and manifest" standard with regard to the prohibition of property tax exemptions. *Id.* at

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[3] The reference to the "Board" is to the "Surface Transportation Board." 49 U.S.C. §10102(1). The reference to "this part" is to Part A. (Rail) of subtitle IV (Interstate Transportation) of title 49, United States Code.

345. The Court should reach the same conclusion with respect to subsection (b)(4) in this case involving non-property (sales and use) exemptions, because the statute also fails to demonstrate the necessary clear and manifest purpose of Congress, or unambiguous congressional mandate, to preempt Alabama law with respect to non-property tax exemptions.

To the extent that rail carriers profess concern that construction of §11501(b)(4) in this case not to apply to a State's exemption-granting conduct would allow a wayward State to circumvent §11501(b)(4) by imposing a tax on everyone and then granting exemptions from the tax for everyone but the railroads, the Court has already identified in ACF Industries the correct path for handling such a concern. Under §11501(b)(4) the rail carriers should only have a claim in those circumstances in which the exemption-granting conduct becomes tax-imposing conduct, and the court should look to the entire class of property, persons or transactions which are reasonably within the State's tax base – not just competitors – to determine if the rail carriers are being singled out.

Following that path, the general rule should be that exemption-granting conduct does not give rise to a cause of action under §11501(b)(4), with one narrow exception. The exception would be if and only if the railroad interest shows at the threshold, by clear and convincing evidence, that the State has granted exemptions to everyone but the rail carriers, either alone or as part of some isolated and targeted group, such that the State's conduct is in substance tax-imposing conduct subject to examination under §11501(b)(4) rather than exemption-granting conduct

which is not subject to examination under §11501(b)(4).

ARGUMENT

I. SECTION 11501(b)(4) PROHIBITS CERTAIN STATE TAX-IMPOSING CONDUCT, BUT NOT STATE EXEMPTION-GRANTING CONDUCT

Subsection (b)(4) of the railroad statute (49 U.S.C. 11501(b)(4)) states:

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

Because the conduct of Alabama challenged in this case – the granting of exemptions from taxes of general applicability that apply to rail carriers and others – does not violate §11501(b)(4), the Court should affirm the judgment below.

"We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every

> State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Congress validly exercised its power under the Commerce Clause "To regulate Commerce . . . among the several States" in enacting §11501(b)(4), as is plain from the text of §11501(b) declaring acts enumerated in that section to "unreasonably burden and discriminate against interstate commerce."[4] If the Alabama law does what §11501(b)(4) prohibits, then §11501(b)(4) preempts the Alabama law. The central

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[4] Views vary whether Congress, in enacting §11501(b)(4), also validly exercised power under section 5 of the Fourteenth Amendment to enforce by appropriate legislation that Amendment's provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Compare Judge Garth, dissenting in *Wheeling & Lake Erie Railway Co. v. Public Utilities Commission of Pennsylvania*, 141 F. 3d 88, 98-100 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999)("after *Seminole Tribe*, and in the absence of any other legitimate constitutional grant of power, the Congressional intent to abrogate the States' sovereign immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of power") with the opposite views of four circuits. *CSXT v. New York State Office of Real Property Services*, 306 F. 3d 87 (2d Cir. 2002)(Congress validly overrode State's Eleventh Amendment immunity by enacting railroad statute pursuant to Section 5 of the Fourteenth Amendment and separately court had power, without contravening Eleventh Amendment, to enjoin future violations of statute under doctrine of *Ex Parte Young*, 209 U.S. 123 (1908)); *Burlington Northern & Santa Fe Railway Co. v. Burton*, 270 F. 3d 942 (10th Cir. 2001), *cert. denied* 536 U.S. 959 (2002); *Union Pacific Railroad Co. v. Utah*, 198 F. 3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie Railway Co. v. Public Utilities Commission of Pennsylvania*, 141 F. 3d 88, 98-100 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); and *Oregon Short Line Railroad v. Department of Revenue*, 139 F. 3d 1259 (9th Cir. 1998).

issue in this case, then, is whether §11501(b)(4) prohibits exemption-granting conduct.

Under a web of Alabama tax laws affecting diesel fuel, rail carriers, such as CSXT, generally pay 4% sales and use taxes on the diesel they use, but generally do not pay a 19-cent excise tax on that diesel; conversely, motor carriers generally pay the 19-cent excise tax on the diesel they use, but generally do not pay the 4% sales and use taxes.[5] See *Norfolk Southern Railway Company v. Alabama Department of Revenue*, 550 F. 3d 1306, 1307-1309 (11th Cir. 2008). CSXT sued the Alabama Department of Revenue and, in official capacity only, its head under §11501(b)(4) "seeking to restrain and enjoin defendants . . . from assessing, levying, or collecting from plaintiff Alabama sales and use taxes on plaintiff's purchase or consumption of diesel fuel and gasoline used for rail transportation purposes in Alabama." J.A., 17, Complaint, ¶ 1.

A. Section 11501(b)(4) Says "Tax," and Not "Tax Exemption," and Therefore Reaches Tax-Imposing, and Not Exemption-Granting, State Conduct

The plain text of §11501(b)(4) answers the question posed by the Court: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as 'another tax that discriminates

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[5] The State of Alabama Department of Revenue has noted that "railroads have received preferential treatment by paying less tax per gallon of diesel fuel than their direct competitors." Brief in Opposition to Petition for Writ of Certiorari,1.

against a rail carrier.'" On its face, §11501 prohibits State imposition of taxes. It does not prohibit State granting of exemptions from taxes. And the granting of an exemption is not the imposition of a tax.

No matter how many times Petitioner CSXT and the Solicitor General say that "another" means "any other" and the word "any" is a word of broad meaning, Brief for Petitioner at 15-17 and Brief for the United States as Amicus Curiae at 12-13, in §11501(b)(4) the word "another" modifies the word "tax" and an exemption is not a "tax." Similarly, no matter how many times the Solicitor General invokes constitutional cases dealing with "discrimination" among taxpayers that involve both taxes and exemptions, Brief for the United States as Amicus Curiae, 14-15, the word "discriminates" is a verb specifically tied to the subject "tax" in §11501(b)(4)("tax that discriminates"), and an exemption is not a "tax." CSXT has come into court with a claim under §11501(b)(4) – which prohibits certain taxes and does not prohibit any exemptions. CSXT has made no claim under any other Federal statute or under any clause of the Constitution.

This Court said in *ACF Industries* that "[w]e will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'" 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) ("[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest pur-

pose of Congress.'") (citations omitted). The Court has made clear that "we are not to conclude that Congress legislated the ouster" of a State statute "in the absence of an unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47, *reh'g denied*, 374 U.S. 858 (1963). Section 11501(b)(4) shows no "clear and manifest" purpose, nor any "unambiguous congressional mandate," to prohibit exemption-granting conduct by the States.

The Court concluded in *ACF Industries* that the subsection (b)(4) involved in that case (which is the substantively identical predecessor to §11501(b)(4) at issue in this case) does not meet this "clear and manifest" standard with regard to the prohibition of property tax exemptions. *Id.* at 345. Section 11501(b)(4) also does not meet the standard of a "clear and manifest purpose" to pre-empt with regard to the prohibition of non-property tax exemptions, as the text of §11501(b)(4) does not distinguish between property taxes and non-property taxes. Accordingly, our view is that State exemption-granting conduct is not challengeable under §11501(b)(4). "Principles of federalism support, in fact compel, our view." *ACF Industries*, 510 U.S. at 345.

B. Congress Legislated Against a Background of Widespread and Historical Practice of Granting Exemptions from Non-Property Taxes in States

In *ACF Industries*, the Court examined the text of the railroad statute and considered principles of statutory construction and other considerations – including compelling principles of federalism and the longstanding practice of States granting exemptions

in the face of which Congress was silent – and concluded that property tax exemptions do not give rise to a claim of discrimination under subsection (b)(4). That conclusion does not logically carry a negative implication that non-property tax exemptions do give rise to such a claim.

Indeed, the Court's conclusion in *ACF Industries* that Congress acted with knowledge and silent acceptance of the longstanding practice of States to grant property tax exemptions applies as well with respect to the longstanding practice of States to grant State non-property tax exemptions. 510 U.S. at 344 ("Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, §11503'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."); see *Norfolk Southern Railway v. Alabama Department of Revenue*, 550 F. 3d 1306, 1315 (11th Cir. 2008) (". . . as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted, and thus benefit from the same presumption that Congress' silence reflects a determination to leave such exemptions in place."); *id.* at 1315 n.13 ("In 1976 and before, most states exempted various entities and goods from sales taxes."). The States have had, since before enactment of §11501(b)(4), a widespread and historical practice of granting exemptions from sales and use taxes, in the face of which the Court should not read §11501(b)(4) to "prohibit a type of tax exemption the text did not expressly mention." *CSX Transportation, Inc. v.*

Georgia State Board of Equalization, 552 U.S. 9, 21 (2007).[6]

Petitioner CSXT quotes approvingly the Solicitor General's view that "[a] rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4)." Brief for Petitioner, 22. Petitioner appears to be of the view that the grant of a tax exemption should be treated as if it were the imposition of a tax, but at a rate of zero, and then the rate the railroad pays should be compared to zero. Such a misconstruction of §11501 would take away much of a State's traditional power to grant exemptions in establishing its taxation policies. At all events, the grant of an exemption is not the imposition of a zero-rate tax – the grant of an exemption is not a tax at all.

Because §11501(b)(4) prohibits only imposition of taxes, and not the granting of exemptions, a State's exemption of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel does not subject the taxes to challenge under 49 U.S.C. §11501(b)(4) as "another tax that discriminates against a rail carrier."

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[6] In fact, the Alabama exemption challenged here by CSXT was enacted in 1951, ten years before Congress began addressing the rail carriers' concern with discriminatory state taxation. There is no indication in the extensive legislative history covering the fifteen years before initial enactment of what became §11501 that amicus Association of American Railroads objected to the Alabama exemption or similar exemptions existing in other states.

C. Exemption-Granting Conduct Should be Actionable Under Section 11501(b) Only if a State Singles Out Rail Interests for Taxation While Exempting In-State Commercial and Industrial Taxpayers from the Impact of the Challenged Tax

The Court in *ACF Industries* acknowledged that there may be a circumstance in which exemptions granted by the State are so widespread that the exemption-granting conduct becomes tax-imposing conduct and may be challengeable under §11501(b)(4). 510 U.S. at 346-47. Only by improperly limiting the discrimination claim to comparison with the class of rail competitors can CSXT make plausible its argument that exemption-granting conduct is actionable. Brief for the United States as Amicus Curiae at 22 ("To be sure, petitioner's contention that the challenged taxes 'discriminate[] against . . . rail carrier[s],' 49 U.S.C. 11501(b)(4), ultimately depends on the fact that its competitors are exempt.") ATA submits that proper consideration of whether Congress intended to prohibit state exemption-granting conduct under subsection (b)(4) should begin with consideration of what is the appropriate comparative class for purposes of assessing whether the rail carriers have, in fact, been singled out. If, as ATA believes, the comparative class is in-state commercial and industrial taxpayers "logically within the tax base," see *ACF Industries*, 510 U.S. at 347 (quoting J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 973 (5th ed. 1988)), the Congress could not have reasonably intended that the exemptions challenged here provide the basis for a claim of discrimination. As described below, there are fundamental problems with utilizing railroads'

competitors as the comparative class for determining whether discrimination under subsection (b)(4) has occurred.

When Congress has prohibited State discrimination in taxes, it has prohibited States from favoring in-State businesses over out-of-State businesses and has not picked winners and losers among out-of-State interests. The railroad statute (49 U.S.C. §11501) is but one statute in the broad structure of Federal laws that limit tax-imposing conduct by States. In enacting that broad structure of statutes, Congress has focused on prohibiting States from favoring in-State interests over out-of-State interests, and not on competition among out-of-State competitors.[7] In addition to the railroad statute, Congress enacted statutes protecting, from discriminatory State taxes, trucking (49 U.S.C. §14502), air carriers (*id.* §40116), and electricity (15 U.S.C. §391), each of which protects an interstate

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[7] Because petitioner's claim relies solely upon the exemption of the railroad's competitors, petitioner argues that looking to competitors as the comparative class is consistent with congressional intent. Brief for Petitioner, 20. As support, petitioner cites the Eighth Circuit's opinion in *Burlington Northern Santa Fe Railway v. Lohman*, 193 F. 3d 984 (8th Cir. 1999). ATA believes the Eighth Circuit misconstrued the purpose for enactment of what is now §11501. As petitioner and amicus Association of American Railroads note, proposals to prohibit discriminatory taxation of railroads were considered for fifteen years prior to enactment as part of the Railroad Revitalization and Regulatory Reform (4-R) Act. The 4-R Act, admittedly, had a broader purpose to restore financial stability and competitiveness, which was accomplished through six enumerated methods, Pub. L. No. 94-210, §101(a)(1)-(6), but limiting State taxation authority was not one of those methods. Rather, the purpose for enacting what is now §11501 is more accurately characterized by amicus AAR, as discussed below.

business from State efforts to favor in-State interests over out-of-State interests.

Amicus Association of American Railroads (the principal institution that lobbied for enactment of the initial statutory predecessor to §11501) essentially recognizes that it was not the purpose of §11501 to prohibit a State from affecting the relative competitiveness of interstate railroads and their interstate competitors (such as elements of the trucking industry) when AAR says "[t]axing interstate railroads to benefit local constituents is a difficult potion to resist" and that "[i]t was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501." Brief of Amicus Curiae AAR In Support of Petitioner, 8. Exempting railroad competitors, such as trucking, from a generally applicable State sales and use tax neither "benefit[s] local constituents" nor pursues a "parochial state interest." Indeed, Congress was worried about State taxes discriminating against trucking just as it was about State taxes discriminating against railroads. See 49 U.S.C. §14502. In looking at State tax discrimination broadly, railroads and trucking conceptually belong side-by-side in the class of statutorily-protected entities, to be compared to in-State businesses, rather than in two separate classes to be compared to each other.

In deciding whether the railroads have been singled out via a pervasive exemption scheme, a court should consider the taxation of all in-state commercial and industrial taxpayers within the State's tax base – not just interstate transportation competitors.

II. THE COURT HAS IDENTIFIED THE PROCEDURE FOR HANDLING THE RARE CASE IN WHICH PLAINTIFF RAIL INTEREST CLAIMS STATE EXEMPTION-GRANTING CONDUCT IS REALLY TAX-IMPOSING CONDUCT: THE PLAINTIFF BEARS A HEAVY BURDEN AT THE THRESHOLD

To the extent rail carriers claim that a state tax scheme challenged under §11501(b)(4) has crossed the line from exemption-granting conduct to tax-imposing conduct, the Court has already identified in *ACF Industries* the correct path for effectively handling such a claim.

Following the path marked by *ACF Industries*, the general rule should be that, when a railroad interest alleges discrimination under §11501(b)(4), the railroad interest must show at the threshold that the State has granted exemptions to everyone but the rail carriers, either alone or as part of some isolated and targeted group, such that the State's conduct is in substance tax-imposing conduct which is subject to examination under §11501(b)(4) rather than exemption-granting conduct which is not subject to examination under §11501(b)(4). See *Burlington Northern and Santa Fe Railway Co. v. State Tax Commission of Missouri*, 188 F. 3d 1039, 1042 (8th Cir. 1999) (" . . . our inquiry here turns on whether the State singles out railroad property for taxation because it exempts all or nearly all other personal property from taxation under" the statute at issue); *Burlington Northern Railroad Company v. Wisconsin Department of Revenue*, 59 F. 3d 55, 58 (7th Cir. 1995) ("The railroads can only succeed by

showing that the actual tax levied is a general tax in name only and is in fact a tax on railroads.").

The railroad interest should have the burden of persuasion of establishing that a state, via exemptions, has singled it out for discriminatory tax treatment, both because that burden traditionally falls upon the plaintiff, *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2345-46 (2009) ("Where a statute is 'silent on the allocation of the burden of persuasion,' 'the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.'"), and because of the presumption of regularity that attaches to the State legislation challenged. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

Further, a heightened "clear and convincing evidence" standard for the railroad interest's burden of persuasion is appropriate because, in attempting to invoke the exception for exemption-granting conduct that amounts to tax-imposing conduct, the railroad interest seeks to deprive the State of the protection afforded by the Tax Injunction Act (28 U.S.C. §1341) ("TIA") to the State's exemption-granting conduct. The rail carrier seeks to have exemption-granting conduct treated as tax-imposing conduct, because the latter, but not the former, falls within the override of the TIA in §11501(b). The TIA prohibition on Federal injunctions interfering with State taxation is a strong Federal policy, and Federal courts should construe exceptions to that policy narrowly. *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 827 (1997) ("Given

the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text."). Further, the comity doctrine counsels that Federal district courts resist engagement in cases attempting to invoke the narrow exception, for exemption-granting conduct that is in substance tax-imposing conduct, out of respect for state functions in our Federal system. See *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010). Finally, as the State defends against a railroad that challenges the State's exemption-granting conduct as if it were tax-imposing conduct, the State has the benefit of the presumption of regularity to which the acts of a State legislature are entitled, *Evans v. Buchanan*, 582 F. 2d 750, 778 (3d Cir. 1978) (in banc), *cert. denied,* 446 U.S. 923, *reh'g denied,* 447 U.S. 916 (1980) (presumption of regularity and constitutionality for State statutory solution).

The "clear and convincing evidence" standard for the railroad interest's burden of persuasion in invoking the narrow exception to dismissal of challenges to exemption-granting conduct properly serves two strong Federal interests: non-interference by Federal courts with State taxation (as reflected in the Tax Injunction Act and the comity doctrine) and respect for the legislatures of the States in the Federal system (as reflected in the presumption of regularity).

CONCLUSION

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

Respectfully submitted.

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