No. _____

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Three years ago, this Court granted certiorari in this case and held that a railroad could challenge certain state tax exemptions under the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11501(b)(4). This petition presents a question the Court expressly left open for the courts' consideration on remand. The Eleventh Circuit resolved it in a way that is contrary to the rule Justices Thomas and Ginsburg proposed in their separate opinion, and the circuits are now split 3-2 on this question. The question is as follows:

Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors.

PARTIES TO THE PROCEEDINGS

The caption identifies all parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

The Alabama Department of Revenue and its Commissioner, Julie Magee, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (CA11 2013), and reproduced at App. 1a-29a. The District Court's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 892 F. Supp. 2d 1300 (N.D. Ala. 2012), and reproduced at App. 30a-66a.

STATEMENT REGARDING JURISDICTION

CSX filed this action against the Department and Commissioner under the 4-R Act, which gives district courts subject-matter jurisdiction over these kinds of cases. *See* 49 U.S.C. §11501(c). The District Court entered final judgment in the Department and Commissioner's favor. *See* App. 67a-68a. CSX took a timely appeal, and the Eleventh Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). A divided panel entered final judgment reversing the District Court on July 1, 2013. *See* App. 1a-17a.

This Court has certiorari jurisdiction under 28 U.S.C. §1254(1). Supreme Court Rule 13 originally made this petition due on September 30, 2013. On September 19, Justice Thomas granted the Department and Commissioner an extension, up to and including October 30, 2013, to file the petition. *See* App. 94a. The Department and Commissioner are filing this petition on that date.

STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976 provides in relevant part:

49 U.S.C. §11501. Tax discrimination against rail transportation property.

. . .

(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.

INTRODUCTION

This Court reversed the Eleventh Circuit's previous decision in this matter two years ago, and the case now presents another question that is worthy of review. This matter arises under the Railroad Revitalization and Regulatory Reform Act of 1976, also known as the 4-R Act. This statute prohibits States from enforcing a sales or use tax that "discriminates against a rail carrier." 49 U.S.C. §11501(b)(4).

When this case first came to the Court, it presented a threshold question about whether a railroad can use the Act to challenge a tax because of exemptions granted to non-railroads. This Court answered the question in the affirmative. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1105 (2010). But rather than decide what standard a court should use to determine when these sorts of taxes "discriminate[]" in violation of the Act, the Court remanded to allow the lower courts to address that question in the first instance. *See id.* at 1107 n.5, 1109 n.8, 1114.

In a dissenting opinion, Justices Thomas and Ginsburg said they would have proceeded to set the standard. They reasoned that a State does not "discriminate[]" for the purposes of the Act unless its exemptions target or single out railroads as compared to the general class of commercial and industrial taxpayers as a whole. *See id.* at 1120 (Thomas, J., dissenting). These Justices noted that because the majority had not reached the issue, lower courts would be free to adopt their proposed rule. *Id.* at 1118. And these Justices noted that under this standard CSX could not possibly prevail in its challenge to Alabama's tax. *Id.* at 1117-18.

On remand, the Eleventh Circuit rejected Justices Thomas's and Ginsburg's proposed rule and exacerbated a preexisting circuit split. App. 11a n.3. The court held that a State "discriminates" against railroads under the Act when it exempts their competitors from paying a tax, even if the State does not exempt commercial and industrial taxpayers more generally. *Id.* at 11a-12a. The Eleventh Circuit held that under this standard, Alabama's tax violates the Act. *Id.* at 17a.

That decision warrants review. The Eleventh Circuit acknowledged that it was widening a circuit split and rejecting the view of Justices Thomas and Ginsburg. *Id.* at 7a-11a. Millions of dollars are at stake, for many other States offer similar exemptions. Particularly because this case has been to this Court once before, it is the optimal vehicle for resolving this important question.

STATEMENT OF THE CASE

A. The tax

This case involves a typical sales-and-use tax. Like many other States, Alabama taxes goods that businesses and people purchase or use in the State. *See* ALA. CODE §§40-23-2(1) & -61(a). As relevant here, Alabama charges 4% for diesel fuel that is used off-road—for instance, in farm equipment and trains. This litigation arose because the tax does not apply to two other types of fuel.

1. The motor-fuels exemption

First, for diesel fuel used *on* roads, Alabama imposes a motor-fuels tax of 19¢ per gallon instead. *See* ALA. CODE §40-17-325(b). Fuel that is subject to this tax is exempt from the sales-and-use tax. *See* ALA.

CODE §40-17-325(a). The motor-fuels tax helps fund road maintenance in the State. *See id.*

Trains do not operate on roads, so railroads pay the sales-and-use tax for their engines' diesel fuel. *See* App. 36a-39a. The District Court found that railroads often benefit from this arrangement. In recent years, railroads have paid lower taxes per gallon than truckers. *See id.* at 56a.

2. The interstate water carriers' exemption

Second, the Alabama Code specifically exempts interstate water carriers, such as barges, from paying the sales-and-use tax on diesel fuel. *See* ALA. CODE §§40-23-4(a)(10) & -62(12). This exemption has been around for more than 50 years—long enough that no one appears to know precisely why the legislature created it. *See* Br. of Resp'ts, *CSX Transp., Inc. v. Ala. Dept. of Revenue,* No. 09-520, 2010 WL 3806522, at *40 (Sept. 27, 2010) (citing ALA. ACT No. 1959-99). One possible explanation is that, as the Iowa Supreme Court once explained in analyzing a similar exemption, "[a]t one time barges in navigable waters were considered immune 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)).

B. Procedural history

Respondent CSX, a rail carrier, brought this action in the Northern District of Alabama against the Alabama Department of Revenue and its Commissioner. App. 30a-31a. CSX alleges that Alabama law violates the 4-R Act because rail carriers pay the

sales-and-use tax while motor and water carriers do not. *Id.* at 31a.

The 4-R Act, quoted above, contains four subsections prohibiting state and local tax authorities from discriminating against railroads. *See supra* at 2 (quoting 49 U.S.C. §11501(b)). The first subsection prohibits those governments from assessing railroad-property value at a ratio that is higher than the one used for "other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. §11501(b)(1). Correspondingly, subsection (b)(2) precludes those governments from levying and collecting taxes based on the assessments prohibited in subsection (b)(1). *Id.* §11501(b)(2). Subsection (b)(3) bars these governments from levying certain property taxes on railroads at a rate exceeding the one used for "commercial and industrial property in the same assessment jurisdiction." *Id.* §11501(b)(3). The final provision, subsection (b)(4), makes it illegal for governments to "[i]mpose another tax that discriminates against a rail carrier." *Id.* §11501(b)(4).

CSX is arguing that Alabama's sales-and-use tax discriminates against railroads in violation of subsection (b)(4). CSX's complaint seeks, among other things, an injunction prohibiting the Alabama Department of Revenue and its Commissioner from collecting the tax from CSX. App. 31a.

1. This Court's decision on the threshold question

The District Court initially dismissed the action in light of Eleventh Circuit precedent, which held that the Act does not support challenges to exemptions from sales-and-use taxes. *See Norfolk S. Ry. Co. v. Ala. Dep't of Revenue,* 550 F.3d 1306, 1314-15

(CA11 2008). On appeal, the Eleventh Circuit affirmed on the strength of that precedent. *See CSX Transp., Inc. v. Ala. Dep't of Revenue,* 350 F. App'x 318, 319-20 (CA11 2009).

This Court granted certiorari and reversed. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011). The majority emphasized the limited nature of its decision, explaining that it was not deciding whether "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114. This Court likewise reserved the question whether the lower courts "must compare the taxation of CSX not merely to direct competitors but to other commercial entities as well" in determining whether exemptions amount to "discrimination." *Id.* at 1107 n.5. This Court instead confined its holding to the threshold proposition "that CSX may challenge Alabama's sales and use taxes as 'tax[es] that discriminat[e] against . . . rail carrier[s]' under §11501(b)(4)." *Id.* at 1114 (alterations in original). This Court therefore remanded for the lower courts to determine the proper standard for gauging discrimination and whether, under that standard, Alabama's sales-and-use tax is illegal. *See id.*

Justice Thomas, joined by Justice Ginsburg, wrote a separate opinion. *See id.* at 1114-20 (Thomas, J., dissenting). Although these Justices agreed with the majority's answer to the threshold question, they dissented from the Court's decision to remand the case for further proceedings. *See id.* at 1114-15. They would have proceeded to address the question, left open by the majority, of the appropriate standard for gauging discrimination. They would have held that exemptions do not "discriminate[]" against a rail

carrier so long as they do not single out or target rail carriers as compared to the general class of commercial and industrial taxpayers as a whole. *See id.* at 1115-17. Because CSX did not allege that Alabama's tax works that way, these Justices would have held that CSX's complaint was due to be dismissed. *See id.* at 1117.

2. Proceedings on the discrimination question

On remand, the State defended the exemptions by noting, among other things, that motor carriers pay the motor-fuels tax. App. 70a-80a. The State also expressly preserved Justices Thomas's and Ginsburg's comparison-class point, arguing at trial that "the dissenting opinion in the Supreme Court, Justices Thomas and Ginsburg, got the standard as to whether the state has singled out the railroad for discrimination, which the state believes it has not." Doc. 65 at 12.

a. The District Court's decision

After conducting a bench trial, the District Court upheld the tax. App. 30a-31a. The court noted that due to the motor-fuels tax, "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a. The court also held that CSX had not established any "discriminatory effect as it relates to water carriers." *Id.* at 63a-64a.

b. The Eleventh Circuit's decision

On appeal, the Department and Commissioner defended the District Court's reasoning. *See* Br. of Appellees, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, CA11 No. 12-14611, at 21-35 (Nov. 13, 2012). They

also argued, in the alternative, that the Eleventh Circuit should uphold the District Court's judgment on Justices Thomas's and Ginsburg's rationale. *See id.* at 36-37 (citing *CSX Transp.*, 131 S. Ct. at 1115 (Thomas, J., dissenting)). The Eleventh Circuit turned away both arguments, holding that "exempting CSX's main competitors from the State's sales tax is discriminatory as to rail carriers." App. 2a.

The Eleventh Circuit began by rejecting the comparison class Justices Thomas and Ginsburg proposed. *Id.* at 7a-12a. The court noted that "[a]mong our sister circuits there are essentially two camps." *Id.* at 7a-8a. The first uses an approach like Justices Thomas and Ginsburg, comparing "the rail carriers to other 'commercial and industrial' taxpayers" and deeming an exemption unlawful if it applies to that general class of taxpayers but not the railroads. *Id.* at 8a-10a. In contrast, "the Eighth Circuit has endorsed the narrower 'competitive approach' model," which asks whether the rail carriers' competitors are exempt. *Id.* at 10a. If so, then the tax is unlawful even if other commercial and industrial businesses must pay it. *See id.* The Eleventh Circuit concluded that in light of the 4-R Act's purpose of ensuring "'financial stability'" for rail carriers, the "competitive" model was the correct one for assessing Alabama's tax. *Id.* at 11a.

The Eleventh Circuit found that the State had not justified its exemptions of the railroads' competitors. *Id.* at 12a-17a. The court refused to consider whether the motor-fuels tax could justify the exemption for on-road diesel because, the court said, the "fairness of those arrangements is too difficult and expensive to evaluate." *Id.* at 13a (internal quotation marks

omitted). The court held that because "[r]ail carriers pay the State's sales tax" and "motor and water carriers do not," the tax violates the 4-R Act. *Id.* at 16a-17a.

Judge Cox dissented. *Id.* at 19a-31a. He agreed with his colleagues "that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. But he would have held that the "exemption for interstate motor carriers" was lawful because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* Meanwhile, he believed that "the district court improperly placed the burden on CSX" to prove the water-carrier exemption's discriminatory effect, so he would have "remand[ed] for reconsideration as to interstate water carriers." *Id.*

REASONS THE COURT SHOULD GRANT CERTIORARI

The need for this Court's review is paramount. The Eleventh Circuit acknowledged that it was deepening an entrenched circuit split over what the 4-R Act means. In so doing, it erroneously rejected the approach Justices Thomas and Ginsburg advocated. Millions in state- and local-government revenues turn on the question. This Court should resolve it now.

A. The lower courts are divided on the question presented.

When this case was last before this Court, Justices Thomas and Ginsburg noted that "[t]he lower courts have split over the proper scope of the comparison class." *CSX Transp.*, 131 S. Ct. at 1118 n.3 (Thomas, J., dissenting). The split is deeper now, with one additional court on each side. Three circuits now agree that taxes unlawfully discriminate under subsection (b)(4) if they target railroads in comparison to commercial and industrial taxpayers as a whole. Meanwhile, the Eleventh Circuit joined the Eighth Circuit and Minnesota Supreme Court in holding that taxes may violate subsection (b)(4) when they are paid by commercial and industrial taxpayers as a general matter but not by railroads' competitors.

1. The Fifth, Seventh, and Ninth Circuits define the comparison class as commercial and industrial taxpayers.

Three courts of appeals have adopted the rule Justices Thomas and Ginsburg proposed.

Fifth Circuit. The first Court of Appeals to consider this question, the Fifth Circuit, rejected the

proposition that "a tax analyzed under §11503(b)(4) . . . should be compared with taxes against competitive modes of transportation." *Kan. City S. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (CA5 1987). Instead, the court held, "the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial' taxpayers." *Id.*

Ninth Circuit. The Ninth Circuit followed the Fifth Circuit and held "that the proper comparison class to use in analyzing discriminatory taxation of the railroads under the 4-R Act is 'all other commercial and industrial taxpayers subject to the taxes.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (CA9 1996). The Ninth Circuit therefore held that a district court "erred" when it "compared the treatment of the railroads with the treatment of their major competitors, motor carriers." *Id.* Citing the Fifth Circuit's decision in *McNamara*, the Ninth Circuit concluded that "the proper comparison class for determining whether the Arizona transaction privilege tax and use tax violate subsection (b)(4) of the 4-R Act is 'all industrial and commercial taxpayers who are subject to the tax.'" *Id.* at 441-42.

Seventh Circuit. More recently, the Seventh Circuit noted that "the proper approach toward defining the appropriate class for comparison under subsection (b)(4) has divided the circuits, and the Supreme Court's most recent decision in this area, *CSX Transportation,* declined to resolve the split." *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (CA7 2011) (citing *CSX Transp.*, 131 S. Ct. at 1107 n.5; *id.* at 1115, 1118 n.3 (Thomas, J., dissenting)). In an opinion by Judge Wood, the Seventh Circuit then sided with the Fifth and Ninth Circuits. It held that

"the appropriate comparison class for subsection (b)(4)" is the "group of all other commercial and industrial taxpayers." *Id.* at 509.

2. The Eighth and Eleventh Circuits and the Minnesota Supreme Court define the comparison class as railroads' competitors alone.

The Eleventh Circuit in this case embraced the contrary rule, which the Eighth Circuit and Minnesota Supreme Court previously had adopted.

Eighth Circuit. The Eighth Circuit, while acknowledging other courts' different view, held that in the context of a sales-and-use tax, "a comparison class of competitors is more appropriate." *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (CA8 1999). The Eighth Circuit later reaffirmed that rule. *See Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (CA8 2007).

Minnesota. The Minnesota Supreme Court has the same rule. *See Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993). Recognizing that other courts had looked to "other commercial and industrial taxpayers in general," the Minnesota court held that using "the railroad's competitors as the comparison class" is "the proper approach" when "the railroad is subject to a general tax but its competitors are not." *Id.*

Eleventh Circuit. With the Eleventh Circuit weighing in after this Court's decision—and, as noted above, the Seventh Circuit contemporaneously weighing in on the other side—the split is more pronounced now than it was when this Court flagged the issue two years ago. The Eleventh Circuit did suggest that it might use a different comparison class

when some other tax was at issue, *see* App. 11a-12a n.4, but that dictum cannot be squared with the way this Court has said statutory interpretation works. This Court has "forcefully rejected" any suggestion that judges can engage in the "interpretive contortion" of "giving the same word, in the same statutory provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (plurality opinion) (emphasis omitted). To do so, this Court has emphasized, "would render every statute a chameleon." *Clark v. Martinez,* 543 U.S. 371, 382 (2005). In light of these principles, future Eleventh Circuit panels will not be able to interpret subsection (b)(4) differently in different contexts.

It is important for this Court to resolve the split now. Alabama stands to lose what it understands to be at least $5 million each year in revenues, and may face refund claims exceeding $10 million, as a result of the Eleventh Circuit's decision. The state legislature cannot fix the problem easily, given that truckers already pay the separate, motor-fuels tax.

Although this question thus matters a great deal to Alabama, it is of nationwide significance as well. The validity of laws in many other States turns on the proper answer to the question presented. *See, e.g.*, *Ill. Cent. R. Co. v. Tenn. Dep't of Revenue*, No. 3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013) (using the Eleventh Circuit's approach to enjoin Tennessee law); *Kan. City S. Ry. Co. v. Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (using the Eighth Circuit's approach to enjoin similar Louisiana law); Br. of Multistate Tax Commission as *Amicus Curiae* in Support of Resp'ts, *CSX Transp., Inc. v. Ala. Dep't of Revenue*,

No. 09-520, 2010 WL 3934616, at *26 n.17 (Oct. 4, 2010) (documenting a large number States that exempt motor fuels from sales taxes). And the very presence of a split among five circuits shows that this question's importance goes far beyond any one State's borders. CSX rightly noted, when it previously sought certiorari in this case, that a State's power to tax "should not depend solely on the Circuit in which the State happens to be located." Pet. for Writ of Cert., *CSX Transp., Inc. v. Ala. Dep't of Revenue,* No. 09-520, 2009 WL 3550821, at *10 (Oct. 28, 2009). As was true then, "[t]his Court should grant review to resolve" a "fundamental and acknowledged conflict over the provision's scope." *Id.*

B. This case is an ideal vehicle for resolving this question.

This case is the right vehicle, for three reasons, to resolve this split.

1. This case presents this question cleanly.

First, the record is properly developed. The District Court conducted a trial and made detailed findings about these exemptions. App. 33a-41a. The Eleventh Circuit, at the State's request, squarely ruled on the question presented. *Id.* at 7a-12a. The court addressed both the split and Justices Thomas's and Ginsburg's contrary view. App. 8a, 11a n.3. So this question is cleanly before this Court.

That said, although the Eleventh Circuit squarely addressed the question, it also claimed that the State previously had "stipulated" in the District Court that "the proper comparison class for this case was CSX's competitors." App. 11a-12a. The Eleventh Circuit's

understanding was mistaken and should not stand in the way of this Court's review.

To the extent that the Eleventh Circuit was claiming that the State had formally "stipulated" to this matter in the District Court, that assertion was simply wrong. The parties submitted several "agreed and proposed facts and proposed conclusions of law" to the District Court before the bench trial, Doc. 63, and those stipulations did not include any agreed-upon provision defining the appropriate comparison class under subsection (b)(4). *See* Doc. 63 at 1-6 (agreed facts), 8-9 (agreed conclusions of law). To the contrary, while CSX proposed a stipulation that most courts had held that "the appropriate comparison class to determine whether discrimination exists is the class of competitive modes of transportation," the State did not agree to that stipulation. *Id.* at 10. Instead, the State proposed a stipulation noting that Justices Thomas and Ginsburg had stated that "the best way to read [§11501](b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers." *Id.* at 13-14 (alteration in original). The State likewise proposed a separate stipulation taking note of a district-court opinion holding "the proper comparison class to be other commercial and industrial taxpayers." *Id.* at 14 (citing *Burlington N. Santa Fe R. Co. v. Monroe*, No. 97-D-1754-N (N.D. Ala. Aug. 10, 1998)). CSX agreed with neither of those stipulations. So the Eleventh Circuit was wrong if it believed that these stipulations resolved the comparison-class question, and the District Court never said they did.

What the District Court did say, based on its reading of post-trial briefs that are included in the

appendix to this petition, was that "it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act." App. 45a (citing App. 70a-71a, 88a-89a). Yet the filings the District Court cited do not evince that purported agreement. The State's briefs did defend the competitors' exemptions. *See* App. 71a-80a, 89a-90a. But the State simultaneously noted Justices Thomas's and Ginsburg's finding that "'the best way to read [§11501](b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers,' and thus, [CSX's] challenge was correctly dismissed." App. 70a-71a, 88a. The State closed each of its briefs by arguing that "Alabama's sales and use tax on diesel fuel is *generally applicable* and is not 'another tax that discriminates against a rail carrier' in violation of the 4-R Act as it *does not single out or target railroads for discrimination*, but merely imposes a differently labeled tax on the same gallon of diesel fuel as that purchased by CSX[]'s competitors *and/or other commercial taxpayers*." App. 80a, 91a (emphasis added). And the State specifically argued at the bench trial that "the dissenting opinion in the Supreme Court, Justices Thomas and Ginsburg, got the standard as to whether the state has singled out the railroad for discrimination, which the state believes it has not." Doc. 65 at 12. The State thus consistently argued that it could win under *either* view of the comparison class.

Even if the State had not preserved this argument in this way, any legal positions it had advocated in the District Court would be irrelevant to the certiorari calculus in light of what happened in the

Eleventh Circuit. This Court has long noted that it is not "bound to accept" even the "stipulations" of a party when it comes to "questions of law." *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 51 (1939). And having prevailed in the District Court, the State was entitled, in the Eleventh Circuit, to "defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). The State's merits brief to the Eleventh Circuit therefore both defended the District Court's reasoning and urged the appellate court to affirm "on the alternative, broader theory, espoused by Justices Thomas and Ginsburg." Br. of Appellees, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, CA11 No. 12-14611, at 36 (Nov. 13, 2012). The Eleventh Circuit had a duty to consider this question of law regardless of what the parties had said in the District Court, and the Eleventh Circuit squarely addressed the matter. *See* App. 7a-12a. This question is thus squarely before this Court.

2. This case's outcome turns entirely on the question presented.

This petition also is the right vehicle to address the lower-court conflict because the split's resolution will be outcome-determinative in this particular case. CSX has never denied that if the relevant comparison class is "general commercial and industrial taxpayers," then it is due to lose. *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting). Indeed, the Eleventh Circuit acknowledged that comparing "CSX to all of the State's taxpayers, [CSX] is no worse off because most taxpayers pay the sales tax when they purchase diesel fuel." App. 7a. CSX prevailed in the Eleventh Circuit only by persuading that court to

adopt the competitor-focused standard. The case thus provides this Court with precisely the sort of concrete factual backdrop against which this question should be resolved.

3. The Eleventh Circuit's decision is wrong.

This case is also the right vehicle because the Eleventh Circuit is on the wrong side of the split. For the reasons Justices Thomas and Ginsburg have given, the term "discriminates" in subsection (b)(4) refers to disparate treatment of the railroads as compared to commercial and industrial taxpayers generally. *See CSX Transp.*, 131 S. Ct. at 1115-17. The Eleventh Circuit's contrary approach cannot be reconciled with the text, structure, and purpose of the Act.

The text and structure are straightforward. As multiple members of this Court have noted, "the word 'discrimination' is inherently" ambiguous. *Guardians Assoc. v. Civil Serv. Comm'n,* 463 U.S. 582, 592 (1983) (opinion of White, J.). The term's "precise contours" always "depend on its context." *CSX Transp.,* 131 S. Ct. at 1115 (Thomas, J., dissenting). And context here, in the form of the 4-R Act's structure, makes the appropriate comparison class clear. Subsections (b)(1), (b)(2), and (b)(3) forbid States from treating railroads unequally not in comparison to their competitors, but to "other commercial and industrial property" generally. 49 U.S.C. §11501(b)(1)&(3). The next, critical provision, subsection (b)(4), bars the State from enforcing "*another* tax that discriminates against a rail carrier." *Id.* §11501(b)(4) (emphasis added). This "residual clause" and its use of the word "another" can only be understood as referring to taxes that treat railroads differ-

ently in comparison to the same group of taxpayers referenced in the first three subsections. *CSX Transp.,* 131 S. Ct. at 1116 (Thomas, J., dissenting).

It is not a good response to maintain, as have the Eighth and Eleventh Circuits, that railroads' competitors must be the appropriate class because "Congress 'specifically chose to omit any reference to a comparison class in subsection [(b)(4)].'" App. 11a-12a n.4 (quoting *Atchison*, 78 F.3d at 445 (Nielsen, J., dissenting)) (alteration in original). Nothing in the statute suggests that Congress, by virtue of the language it used in subsection (b)(4), was signaling that courts should use a different comparison class. To the contrary, the phrase "*another* tax that discriminates" harkens back to the other three subsections and made it unnecessary to repeat the comparison-class language. 49 U.S.C. §11501(b)(4) (emphasis added). And even if there were some reason to think that another comparison class was appropriate for (b)(4) cases, no one has pointed to any text suggesting that competitors are that class. The courts on the Eleventh Circuit's side of this issue came up with that theory on their own.

The Eleventh Circuit's decision was so unmoored from the statute's text that, as noted above, the court left open the possibility of reading the word "discriminates" differently and thus using other comparison classes in different factual contexts. *See* App. 11a-12a n.3 & n.4. As also noted above, that reasoning was flatly inconsistent with the courts' "obligation to maintain the consistent meaning of words in statutory text." *Santos*, 553 U.S. at 523 (plurality opinion). Whenever a lower court justifies its interpretation of a statute by invoking a principle that seven Justices

have rejected as not simply erroneous but "dangerous," *Clark,* 543 U.S. at 386, it is exceedingly likely that the lower court's interpretation is wrong.

The Eleventh Circuit' reasoning about the statute's purpose was equally unpersuasive. Noting that one of the Act's goals was "ensuring 'financial stability' for rail carriers," the Eleventh Circuit concluded that "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" this goal. App. 11a. For reasons Justices Thomas and Ginsburg have already given, that has things precisely backwards. Congress passed the 4-R Act because railroads, due to their "nonvoting, often nonresident" status, had become "'easy prey for State and local tax assessors.'" *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting) (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (quoting *W. Air Lines, Inc. v. Bd. of Equalization,* 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, p. 3 (1969)))). Congress's solution was emphatically not to tie governments' treatment of the railroads to their treatment of other interstate shippers—a class of businesses that were equally "nonvoting," "nonresident," "easy prey" for local regulators. *Id.* Congress instead tied the railroads' fate to commercial and industrial taxpayers as a whole—a larger class with substantially more local sway. Justices Thomas's and Ginsburg's rule thus protects the railroads *more*, not less, than the Eleventh Circuit's. Indeed, when the Fifth Circuit first adopted this standard, it struck down a tax that would not have been deemed discriminatory if the comparison class had been limited to the railroads' competitors. *See McNamara*, 817 F.2d at 375.

The contrary approach taken by the Eighth and Eleventh Circuits has moved the 4-R Act far away from its text and its original purpose. This case is the right vehicle to get the statute back on track.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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