No. 13-553

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

BRIEF IN OPPOSITION

ELLEN M. FITZSIMMONS
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 366-5221

JOEL W. PANGBORN
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 366-5221

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 783-8124

JAMES W. MCBRIDE*
BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, PC
920 Massachusetts Ave. N.W.
Washington, DC 20004
(202) 508-3400
jmcbride@bakerdonelson.com

STEPHEN D. GOODWIN
BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, PC
First Tennessee Building
Suite 2000
165 Madison Avenue
Memphis, TN 38103
(901) 577-2141

Counsel for Respondent

* Counsel of Record

December 16, 2013

QUESTION PRESENTED

Whether the court of appeals correctly held that Alabama's sales and use tax on fuel that requires rail carriers to pay the tax, but completely exempts motor and interstate water carriers who compete against the rail carriers, constitutes a type of discrimination that violates 49 U.S.C. § 11501(b)(4).

RULE 29.6 STATEMENT

CSX Corporation is the parent company of respondent. No other publicly held corporation has a 10% or greater ownership interest in respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

STATUTES

TABLE OF AUTHORITIES – continued

LEGISLATIVE HISTORY

INTRODUCTION

The petition for a writ of certiorari presents no question worthy of this Court's review. The petition rests on a purported "conflict" among the courts of appeals on the proper comparison class for determining whether a state non-property tax unlawfully discriminates against railroads in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"). There is no conflict. The decisions characterized by the petition as "conflicting" merely used different comparison classes to address different taxing schemes and forms of discrimination challenged in particular cases. The courts made clear that their choices of comparison classes were case-specific, and not categorical rules for all 4-R Act cases, and the choice of comparator class always has a common thread – protection of rail carriers from taxing schemes resulting in discriminatory treatment that would impair their survival in part by threatening their financial stability. Accordingly, the courts of appeals have not decided like cases differently, and there is no disagreement among them that warrants this Court's review.

Even if there were a conflict, this case would not be an appropriate vehicle for resolving it because – as the district court and court of appeals both found – petitioners Alabama tax authorities ("Alabama") agreed to the comparison class that it now seeks to challenge. Alabama therefore waived the issue it seeks to present to this Court. In all events, the decision below involving only a single State's particular taxing scheme does not raise a question of recurring or exceptional importance.

STATEMENT OF THE CASE

A. Statutory Background

Rail carriers were subject to discriminatory state and local taxation for decades prior to the 4-R Act's enactment in 1976. Congress first surveyed the nature and impact of the discrimination in 1961, see S. Rep. No. 87-445, at 449-66 (1961), and later found that rail carriers were "'easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). Congress quantified the impact of the discrimination to be "at least $50 million each year." H.R. Rep. No. 94-725, at 78 (1975); see also S. Rep. No. 91-630, at 1 (noting "long-standing burden on interstate commerce" created by discriminatory state taxation of railroads). Congress eventually concluded that the "temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents . . . made federal legislation in this area necessary." *W. Air Lines*, 480 U.S. at 131.

In the face of numerous railroads declaring bankruptcy, Congress enacted protective legislation as part of the 4-R Act. The 4-R Act's purpose is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Pub. L. No. 94-210, § 101(a), 90 Stat. at 33. Congress sought to "foster competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801(b)(2), and in particular to ban discriminatory state and local taxation of railroads.

Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, prohibits such tax discrimination, setting forth four forbidden taxing schemes deemed to "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first three schemes specifically concern property taxes. Subsection (b)(1) prohibits assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of "other commercial and industrial property." *Id.* § 11501(b)(1). Subsection (b)(2) prohibits levying a property tax based on such an assessment. *Id.* § 11501(b)(2). And subsection (b)(3) prohibits levying a property tax at a higher rate than the rate imposed on other "commercial and industrial property." *Id.* § 11501(b)(3). Those discriminatory practices were common prior to the 4-R Act. See S. Rep. No. 91-630, at 3.

Congress did not limit the reach of section 306 to those most obvious and blatant forms of existing tax discrimination. In subsection (b)(4), Congress also prohibited the States from "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." 49 U.S.C. § 11501(b)(4).[1] The provision came into being when Congress "realized near

---

[1] As originally enacted in 1976, section 306 prohibited the "imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad"; the amended text (also recodified) prohibits "*another tax* that discriminates against" a rail carrier. *Compare* Pub. L. No. 94-210, § 306(1)(d), 90 Stat. at 54, *with* Pub. L. No. 95-473, § 11503(b)(4), 92 Stat. 1337, 1446 (1978). The amendment and recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. at 1466; *see CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1105 n.1 (2011).

the end [of the legislative process] that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation," and "added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987). As one court described it, subsection (b)(4) "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

B. Proceedings Below

1. CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate commerce. Pet. App. 2a. CSXT operates in Alabama, and is subject to taxation by Alabama and its subdivisions. *Id.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code § 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The state sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, and use of diesel fuel in Alabama. Pet. App. 2a. Revenues from the state sales and use tax are deposited in the State's general revenue fund. *Id.* at 4a (citing Ala. Code § 40-23-35). Alabama law also permits counties and municipalities to impose additional sales and use taxes, which correspond to and parallel the sales and use tax imposed by the State itself. *Id.* at 35a-36a. The imposition of these county and municipal sales and use taxes results in CSXT paying in many areas much more than the four percent state sales and use tax. *Id.* at 36a. The railroads' principal competitors in Alabama, motor carriers and interstate water carriers, are exempt from state and local sales and

use taxes on the purchase and consumption of diesel fuel. *Id.* at 2a-3a.[2]

Water carriers benefit from an exemption from sales and use taxes for fuel used by vessels engaged in interstate or foreign commerce. Ala. Code §§ 40-23-4(a)(10), 40-23-62(12). Nearly all water carrier transport in Alabama is in interstate or foreign commerce. See *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, No. 2:08-cv-00285-HGD, 2008 WL 6515212, at *4, *14 (N.D. Ala. Apr. 9, 2008), *aff'd*, 550 F.3d 1306 (11th Cir. 2008), *abrogated by* 131 S. Ct. 1101 (2011).[3]

2. On April 14, 2008, CSXT filed this action in federal district court against Alabama. The complaint alleged that the 4-R Act prohibits the State of Alabama, and counties and municipalities within Alabama, from imposing sales and use taxes on CSXT's purchase and consumption of diesel fuel because the exemptions granted to motor carriers and interstate water carriers discriminate against CSXT within the meaning of § 11501(b)(4).

The district court initially dismissed CSXT's complaint, based on Eleventh Circuit precedent holding that an exemption to a generally applicable non-property tax could not be challenged under subsection

---

[2] Fuel used by motor carriers is subject instead to a fixed state motor fuel excise tax of 19 cents per gallon. Ala. Code §§ 40-17-2(1), 40-17-220(e). Under Alabama law, the proceeds from the motor fuel excise tax must be devoted to the construction, repair, and maintenance of public roads and bridges; to the costs of tax collection; and to pay the principal and interest on bonds previously issued to finance the building of roads. *Id.* §§ 40-17-13, 40-17-146, 40-17-222. Because motor carriers are subject to the excise tax and not to the sales and use tax, their tax burden does not fluctuate with the price of fuel.

[3] Fuel used by water carriers in interstate or foreign commerce is not subject to the motor fuel excise tax either.

(b)(4). See *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, 550 F.3d 1306 (11th Cir. 2008), *abrogated by* 131 S. Ct. 1101 (2011). The Eleventh Circuit in *Norfolk Southern* rested its analysis on this Court's decision in *Department of Revenue* v. *ACF Industries*, 510 U.S. 332 (1994), which held that subsection (b)(4) may not be invoked to challenge the imposition of a property tax on railroad property on the ground that certain non-railroad property is exempt from the tax. On appeal, the Eleventh Circuit affirmed on the basis of *Norfolk Southern. CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 350 F. App'x 318, 319 (11th Cir. 2009) (per curiam) (*CSXT I*).

This Court granted certiorari and reversed. *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011) (*CSXT II*). The Court held that "a state [non-property] tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier.'" *Id.* at 1109. It did not address, however, whether CSXT should prevail in its challenge here, leaving for the lower courts to decide "whether . . . Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114. Justices Thomas and Ginsburg dissented. They agreed that "a scheme of tax exemptions is capable of making a tax discriminatory," *id.* at 1115, but would have addressed the merits of CSXT's challenge. They would have rejected that challenge on the ground that a discriminatory tax within the meaning of subsection (b)(4) is "a tax – or tax exemption scheme – that targets or singles out railroads as compared to other commercial and industrial taxpayers," and that "CSX cannot prove facts that would satisfy that standard." *Id.*

On remand, the district court conducted a half-day bench trial and upheld Alabama's taxing scheme. In its opinion, the district court noted twice that Alabama agreed that the proper comparison class for the discrimination analysis was CSXT's competitors. Pet. App. 45a ("it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison"); *id.* at 51a ("the parties here agree on a different class for comparison purposes – the competitive mode class, not the 'all other comercial and industrial taxpayers' class"). Applying that comparison, the district court found that the sales and use tax is not discriminatory because, when considered along with the excise tax paid by motor carriers, "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a. It further found that CSXT failed to establish the tax's "alleged discriminatory effects as it relates to water carriers." *Id.* at 64a.

The court of appeals reversed. Pet. App. 1a-29a (*CSXT III*). It also noted twice that Alabama conceded that the proper comparison class for the discrimination analysis is CSXT's competitors. Pet. App. 8a ("In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers."); *id.* at 11a ("CSX and the State stipulated, and the district court agreed, that the proper comparison class for this case was CSX's competitors"). The court further stated that it agreed that the competitor comparison class is proper "in the context of a state's sales tax on diesel fuel," but emphasized that it was not adopting a "bright-line rule for [the comparison class for] § 11501(b)(4) cases." *Id.* at 11a-12a & n.4. Applying this comparison, the court of appeals held that Alabama's sales and use tax is

discriminatory because "[r]ail carriers pay the Sales tax – motor and water carriers do not." *Id.* at 16a.

Judge Cox dissented. He agreed that "the appropriate comparison class consists of the stipulated competitors," Pet. App. 18a, but he would have considered the separate excise tax imposed on motor carriers. In his view, the sales and use tax exemption for motor carriers is not discriminatory because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* He would have remanded for reconsideration as to interstate water carriers because "the district court improperly placed the burden on CSX to provide evidence of the exemption's discriminatory effect," *id.*, thereby opening another possibility of impermissible discrimination.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CREATE OR WIDEN A CIRCUIT SPLIT.

The principal ground on which the petition rests is a supposed conflict among the circuits on the proper comparison class for subsection (b)(4) cases under the 4-R Act. Pet. 11-15. Alabama asserts that the decision below "deepen[s]" this "entrenched circuit split." *Id.* at 11. This is incorrect. There is no "entrenched" conflict, and the decision below did not create one or deepen one.

To be sure, the decisions that Alabama cites show that lower courts have used different comparison classes in different cases to resolve claims that state taxing schemes discriminated against railroads in violation of subsection (b)(4). But this does not pose a "conflict." Instead, it simply shows that railroads have brought different types of discrimination chal-

lenges against different state taxing schemes, and that courts have employed different comparisons as appropriate to address the specific taxing schemes and discrimination claims under consideration. Indeed, the courts of appeals, including the Eleventh Circuit below, expressly stated that they were *not* adopting categorical rules to define the proper comparison class for all subsection (b)(4) cases; instead, the courts limited their analyses to the facts presented to them and made clear that they might employ different comparison classes in different circumstances. Thus, the circuits are not using conflicting legal standards to reach inconsistent results in like cases; instead, they have properly recognized that "discrimination" can apply differently in multiple settings, and that different cases call for different comparisons. What they share in common is fidelity to Congress's fundamental purpose in enacting (b)(4) to protect railroads against pernicious forms of non-property taxation, no matter the form of discrimination. Nothing in the lower court decisions warrants this Court's intervention.

1. Alabama acknowledges that the decision below is in harmony with a group of lower court decisions that have invalidated as discriminatory substantially similar state sales and use taxes paid by railroads that exempted the railroads' competitors. Pet. 13-15; *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007) (Minnesota sales and use tax on transportation fuel that exempted motor and air carriers); *Burlington N. Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999) (Missouri sales and use tax on diesel fuel and gasoline that exempted trucks and barges); *Burlington N. R.R.* v. *Comm'r of Revenue*, 509 N.W.2d 551 (Minn 1993) (Minnesota sales and use tax on railroad rolling stock and repair parts that

exempted barges, airplanes and motor carriers); *Kan. City S. Ry.* v. *Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (Louisiana sales and use tax on transportation fuel that exempted motor carriers and water carriers); *Ill. Cent. R.R.* v. *Tenn. Dep't of Revenue*, No. 3:10-cv-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013), *appeal pending*, No. 13-6348 (6th Cir. filed Oct. 16, 2013) (Tennessee sales and use tax on diesel fuel that exempted motor carriers).[4]

In each of these cases, the sales and use taxes were applicable to a wide variety of purchasers and consumers, including commercial and industrial taxpayers (but not the railroads' competitors). Accordingly, the railroads did not claim that the taxes discriminated against them as compared to other commercial and industrial businesses. Instead, the railroads' claim was that the taxes discriminated against them as compared to their direct competitors. See, *e.g.*, *Lohman*, 193 F.3d at 985; *Union Pac.*, 507 F.3d at 694; *Burlington N.*, 509 N.W.2d at 553.

The courts uniformly agreed that such claims by railroads that their competitors receive preferential tax treatment are cognizable under subsection (b)(4) of the 4-R Act, and therefore used competitors as the comparison class for analyzing, and ultimately invalidating, the sales and use taxes at issue. The Eighth Circuit's analysis in *Lohman* is illustrative. As a matter of statutory construction, the court reasoned that Congress's failure to specify a comparison

---

[4] Courts have also employed the competitor comparison class when enjoining taxes on railroad diesel fuel imposed under schemes other than a general sales and use tax. *See Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338, 346 (Iowa 1983); *Burlington N. R.R.* v. *Triplett*, 682 F. Supp. 443, 445-46 (D. Minn. 1988).

class in (b)(4), when it specified one in the three property tax provisions in (b)(1)-(3), was "intended," and showed that "the purpose of the catchall was to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques." 193 F.3d at 985-86. The court further concluded that recognizing claims of discrimination based on preferential treatment of competitors is consistent with the 4-R Act's "broader purpose" of "restor[ing] the railroads' financial stability," which cannot be achieved "without making the railroads competitive." *Id.* at 986; see also *Burlington N.*, 509 N.W.2d at 553 (using competitors as the comparison class "is in keeping with the purpose of the 4-R Act: to revitalize the railroad industry by making it competitive").

Notably, in using competitors as the comparison class to resolve the particular claims before them, several of the courts expressly noted that their adoption of this comparison class was case-specific and that other comparison classes might be appropriate in different circumstances. See *Lohman*, 193 F.3d at 986 ("the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case"); *Burlington N.*, 509 N.W.2d at 553 (adopting competitors as the proper comparison class "here," and distinguishing cases using a broader comparison class on the ground that those cases did not "deal[] with the situation where the railroad is subject to a general tax but its competitors are not"); *Ill. Cent.*, 2013 WL 4521013, at *5 (finding competitors to be the "more appropriate" comparison "with respect to Tennessee's sales and use taxes at issue here"). The two other courts adopted competitors as the proper comparison class for the case-specific reason that the parties had stipulated to its use. See *Union Pac.*, 507 F.3d at 695

("[t]he Railroads and the State agree that for purposes of this appeal the competitive mode class is the proper comparison class"); *Bridges*, 2007 WL 977552, at *7 (same). Accordingly, none of the courts adopted a categorical rule that competitors are the proper comparison class for all subsection (b)(4) cases and all circumstances. Instead, the courts left open the possibility that they will use other comparison classes in future cases.

The Eleventh Circuit's decision is consistent with all of these rulings. Faced with a state sales and use taxing scheme that is substantially similar to the ones at issue in the foregoing cases, the Eleventh Circuit used the same comparison class (competitors of railroads) to reach the same result: invalidating the taxing scheme as a violation of the 4-R Act. The court of appeals reasoned that "in the context of a state's sales tax on diesel fuel," the competitive model "best serves" the 4-R Act's "purpose of ensuring 'financial stability' for rail carriers." Pet. App. 11a. The court also relied upon the fact that the parties had agreed to the use of this comparison class. *Id.* The court emphasized, however, that its ruling did not "create[] tension" with other decisions that have employed a broader comparison class because it was not adopting "a bright-line rule." *Id.* at 11a-12a n.4 (citing *Kan. City S. Ry.* v. *Koeller*, 653 F.3d 496 (7th Cir. 2011)). Instead, the court of appeals expressly held that "the language and purpose of § 11501(b)(4) require that 'the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.'" *Id.* (quoting *Lohman*); see also *id.* at 11a n.3 (noting that the broad comparison class "might be appropriate in certain situations," but that it "fails to address discriminatory taxes that

place rail carriers at a significant disadvantage vis-à-vis their competitors").

Given the courts' express acknowledgements that different comparison classes are appropriate in different subsection (b)(4) cases, the decision below and the other sales and use tax decisions simply do not conflict with decisions that have employed different comparison classes in a way that warrants this Court's review. In all events, the three circuit decisions that Alabama relies upon pose no conflict, as shown below.

2. Alabama contends that the decision below and the sales and use tax cases that are consistent with it conflict with the decisions of three courts of appeals that have employed a broader comparison class – all commercial and industrial taxpayers – in subsection (b)(4) cases: *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 78 F.3d 438 (9th Cir. 1996); and *Kan. City S. Ry.* v. *Koeller*, 653 F.3d 496 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 885 (2011). See Pet. 11-13. None of these decisions poses a conflict.

a. *McNamara* involved a railroad's challenge under subsection (b)(4) to Louisiana's Transportation and Communication Utilities ("T & C") tax, which taxed 2% of the intrastate gross receipts of "'public utilities'" in Louisiana, including railroads, motor freight lines, boat lines, telephone and telegraph companies, and pipe lines. 817 F.2d at 370 & n.1. The railroad's discrimination claim was that this industry-specific tax improperly burdened railroads and a small group of other utilities relative to "'all other commercial and industrial taxpayers.'" *Id.* at 374. Thus, in contrast to the sales and use tax cases, the railroad in *McNamara* argued that the proper comparison class was all commercial and industrial taxpayers. Louisiana, on the other hand, *defended* the

statute on the ground that it was not discriminatory because it also applied to the railroad's main competitors. *Id.* at 374-75. Thus, it was the State in *McNamara* that argued for a narrower comparison class consisting of the railroad's competitors. *Id.*

The court of appeals agreed with the railroad's theory of discrimination and held that Louisiana's tax that applied only to railroads and other utilities violated the 4-R Act. It reasoned that a central objective of the 4-R Act is "to tie [railroads'] tax fate to the fate of a large and local group of taxpayers," and that "[t]he class of taxpayers subject to the T&C tax is simply too small and too foreign to fulfill this function," even if it also imposed an "unfair burden" on the other transportation companies subject to the tax. *Id.* at 375. As the court explained, a State cannot be permitted to discriminate against railroads "by simply making sure that only a few powerless business taxpayers" pay the same tax. *Id.* at 375 n.13.

This ruling poses no conflict with the decision below or the other decisions that are in accord with it. The Fifth Circuit's use of a broad comparison class in *McNamara* was prompted by, and appropriate to, the taxing scheme at issue and the railroad's challenge to it. Indeed, CSXT has no quarrel with the Fifth Circuit's use of a broad comparison class (which the railroad had proposed) or with its conclusion that Louisiana's tax discriminated against railroads in violation of the 4-R Act. The Fifth Circuit, however, simply did not reach the question whether other comparison classes might be appropriate in other circumstances. In particular, *McNamara* did not involve any differential treatment of a railroad and its competitors, so the court had no occasion to consider whether competitors are the proper comparison class for addressing a tax that applies to commercial and

industrial businesses, but exempts railroad competitors. In sum, *McNamara* is distinguishable on its facts and provides no basis for concluding that the Fifth Circuit would have reached a different result if presented with this case.[5]

b. The same is true of *Koeller*. *Koeller* involved a challenge by two railroads under subsection (b)(4) to a new assessment imposed by an Illinois drainage district that would have increased their annual assessments by 4800% and 8300%, respectively, while other property owners in the district, including commercial and industrial businesses, faced increases of only a fraction of these percentages. 653 F.3d at 502. The railroads claimed that this grossly unbalanced tax structure violated the 4-R Act and the Seventh Circuit agreed. The court found that the new assessment scheme improperly "targeted" the railroads and that this discriminatory treatment was intentional. *Id.* at 510-12; *id.* at 511 (citing "glaring evidence" that the "discriminatory result" was "exactly what the [drainage district] meant to do").

The Seventh Circuit found that the proper comparison class for evaluating the railroads' claim was "all other commercial and industrial taxpayers," rather than the railroads' competitors. *Id.* at 508-10. One of its principal reasons for doing so, however, was that the drainage assessment did not apply to any of the railroads' competitors. *Id.* at 509 ("there are *no* competitors of the railroads . . . that [the drainage

---

[5] Notably, although Louisiana is in the Fifth Circuit, the district court in *Bridges* did not hesitate to use the competitor comparison class, and did not feel constrained by any notion (advanced by Alabama here) that *McNamara* precludes such a comparison class. In fact, the *Bridges* court relied heavily upon and frequently cited *McNamara* in its decision. Louisiana did not appeal the *Bridges* decision.

district] is trying to tax") (emphasis in original). Accordingly, the court found that a broader comparison class was the only way to conduct a "meaningful analysis." *Id.* at 510. In addition, the Seventh Circuit explained that its adoption of the broader comparison class was not "incompatible with the Eighth Circuit's *Lohman* decision, which compared the railroads to their direct competitors," because it agreed with the Eighth Circuit that "'the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.'" *Id.* at 509 (citing *Lohman*, 193 F.3d at 986); *id.* (selecting broad comparison class "for now" and leaving "later case[s]" for "another day").

Koeller thus does not pose a conflict. Like the Fifth Circuit's ruling in *McNamara*, the Seventh Circuit's use of a broad comparison class in *Koeller* appropriately resolved the particular discrimination claim presented in that case. Moreover, the Seventh Circuit expressly disavowed any "incompatib[ility]" between its approach and that of the courts that have used competitors as the comparison class because it agreed that the choice of the proper comparison class is a case-specific inquiry.

c. The Ninth Circuit's decision in *Atchison Topeka* likewise does not pose a conflict. In this 2-1 decision, the Ninth Circuit addressed a railroad's challenge under subsection (b)(4) to Arizona's transaction privilege tax (which "is similar to a sales tax") and use tax, which applied to "most businesses in Arizona," but exempted motor carriers. 78 F.3d at 439. The majority held that the proper comparison class consisted of "'all industrial and commercial taxpayers who are subject to the tax.'" *Id.* at 442. It then rejected the railroad's claim that the taxing scheme's exemption for motor carriers was discrimin-

atory because it concluded that under this Court's decision in *ACF Industries*, the railroad's challenge to the exemption was not cognizable under subsection (b)(4). *Id.* at 442-43; see also *id*. at 442 (finding that "the discriminatory exemption argument fails" under *ACF*). The dissenting judge would have used the railroad's competitors as the comparison class and would have struck down the tax. *Id.* at 444-46.

Atchison Topeka is no longer good law because its conclusion that the tax exemption could not be challenged under subsection (b)(4) was overruled by this Court in *CSXT II*. See *CSXT II*, 131 S. Ct. at 1107 n.4 (citing *Atchison Topeka* as one of the cases comprising the circuit split that prompted the Court's review). Given the Ninth Circuit's erroneous view that the railroad's claim of discrimination based on a tax exemption for its principal competitor was not cognizable at all under subsection (b)(4), its conclusion that railroad competitors were not the proper comparison class has no precedential value. In any event, as shown above, the more recent sales and use tax cases uniformly have declined to follow the Ninth Circuit's approach to the comparison class issue. In addition, no court in the Ninth Circuit has applied or cited *Atchison Topeka* in the 17 years since it was decided.

3. No doubt recognizing that its claim of a circuit split is doomed by the lower courts' express rejection of categorical rules on the comparison class issue, Alabama contends that the Eleventh Circuit – and presumably several other courts – have violated principles of statutory construction by finding that different comparison classes are appropriate in different subsection (b)(4) cases. See Pet. 13-14, 20-21 (asserting that the Eleventh Circuit's reasoning "was flatly inconsistent with the courts' obligation to main-

tain the consistent meaning of words in statutory text") (internal quotation marks omitted). This argument really goes to the merits, not whether the petition should be granted, since it is just another form of Alabama's contention that the Eleventh Circuit's decision is "wrong" because the sole or exclusive comparison class permitted by subsection (b)(4) is all commercial and industrial taxpayers. *Id.* at 19-22.

Space constraints preclude a full presentation on the merits, but what is fundamental for purposes of certiorari is that the Eleventh Circuit's standard is fully consistent with established principles of statutory construction. Subsection (b)(4) broadly prohibits "discriminat[ion]," a term that the 4-R Act does not define but that encompasses conduct that can take many forms. Subsection (b)(4) also does not specify a comparison class, even though "Congress demonstrated that it knew how to provide for a specific comparison class when it wanted one as demonstrated by the three property tax provisions." *Lohman*, 193 F.3d at 985. Under these circumstances, the Eleventh Circuit hardly violated any textual limitation in holding that subsection (b)(4) does not direct the use of a single comparison class. Indeed, even courts that have used the broader comparison class (all comercial and industrial taxpayers) have expressly disavowed the notion that this comparison is the *only* one permitted by subsection (b)(4). *Koeller*, 653 F.3d at 509 (citing *Lohman*). Accordingly, Alabama's effort to manufacture a circuit split fails.

II. THIS CASE DOES NOT IN ANY EVENT PRESENT AN APPROPRIATE VEHICLE FOR REVIEW.

Even if there were a circuit conflict on the proper comparison class for resolving subsection (b)(4) claims, this case is not an appropriate vehicle for

reaching it. Alabama conceded at every stage of the proceedings below that competitors were the proper comparison class for resolving this case, and litigated this case by drawing that very comparison. It therefore waived any argument that use of this comparison class was "wrong," see Pet. 19-22, and this Court should not review that issue. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (declining to reach issue that "was not raised below" and, therefore, "waived"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (same); see also *Freytag* v. *Comm'r*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (parties cannot "suggest[] or permit[], for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claim[] that the course followed was reversible error").

As Alabama acknowledges, both the district court and the court of appeals held that the State agreed that competitors were the proper comparison class for resolving this case. The district court – which received briefing from the parties and presided over the bench trial – found this twice in its opinion. Pet. App. 45a ("it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act"); *id.* at 51a ("the parties here agree on a different class for comparison purposes – the competitive mode class, not the 'all other commercial and industrial taxpayers' class"). The court of appeals – which received briefing and heard oral argument – likewise found this twice in its opinion. *Id.* at 8a ("In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers."); *id.* at 11a ("CSX and the State stipulated, and the district court agreed, that the proper comparison class for this case

was CSX's competitors"). Indeed, as noted, the court of appeals expressly relied upon Alabama's concession on the proper comparison class as one of its rationales for using that comparison class in this case. *Id.* at 11a.

Alabama contends that the district court and court of appeals judges who heard this case – all four of them – were "mistaken" and "wrong" about what it argued. Pet. 15-17. But the record, including the very submissions that Alabama relies upon, belies this contention. In the district court, Alabama consistently asserted that competitors were the proper comparison class, and litigated its case by making that comparison. For example, Alabama points to references in its post-trial briefs to the proposed test that Justice Thomas articulated in his dissent in *CSXT II*, 131 S. Ct. at 1120, which would "prohibit[] taxes that target or single out railroads as compared to general commercial and industrial taxpayers." See Pet. 17 (quoting Pet. App. 71a-72a, 89a). In both instances, however, Alabama fails to quote the sentences surrounding these references, in which the State articulated its view that "targeting/singling out" is the correct test, *but that competitors are the correct comparison for making that determination*. See, *e.g.*, Pet. App. 72a ("In order to determine if the Department has targeted or singled out railroads for discrimination, the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to both the railroads and their competitors must be analyzed*") (emphasis added); *id.* at 89a-90a ("The only way to determine if the Department has targeted or singled out railroads for discrimination, is to look at the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to both the railroads and*

their competitors") (emphasis added). Consistent with this standard, the remainder of Alabama's post-trial briefs focus on comparing the fuel taxes imposed upon CSXT and its competitors. *Id.* at.72a-81a; *id.* at 90a-92a. Of course, Alabama lost that issue below and has chosen not to seek this Court's review of the question actually decided by the lower courts, viz., whether the disparate treatment of the railroads and their competitors constituted actionable discrimination in violation of subsection (b)(4).

Alabama's other pleadings and advocacy in the district court consistently identified and employed competitors as the comparison class. For example, Alabama's pre-trial brief similarly referenced Justice Thomas' "targeting/singling out" test, and then stated that in order to apply that test, the tax structure "as compared to both the railroads and their competitors must be analyzed." Defendants' Response to Plaintiff's Pretrial Brief, at 5 (Apr. 12, 2012) (Dkt. 62); *id.* at 6 (taxes "paid on the purchase and consumption of diesel fuel by the railroads and their competitors" must be analyzed). In addition, Alabama asserted the following in its opening statement at trial: "[T]o make the comparison as to whether the department is indeed discriminating, it must be looked at, the taxes paid by other motor carriers who I don't think CSX would disagree is their major competitor, and the sales taxes paid by CSX." Trial Tr. at 12 (Apr. 25, 2012) (Dkt. 65). Alabama then stated – as it notes in the petition, Pet. 17 – that it agreed that Justice Thomas "got the standard" as to "whether the state has singled out the railroad for discrimination," but Alabama did not make any mention of the broader comparison class that Justice Thomas identified. Trial Tr. at 12. And again, the entire focus of Alabama's pre-trial brief and its trial presentation

was to compare Alabama's tax treatment of CSXT and its transportation competitors. Accordingly, the district court's findings that Alabama agreed that competitors are the proper comparison class were fully supported by Alabama's pleadings and other aspects of the record.[6]

The Eleventh Circuit's identical findings are also fully supported by the record. As an initial matter, despite its assertion in the petition that the district court erred in finding that the State conceded the comparison class issue, Pet. 16-17, Alabama never challenged or contested the district court's finding on appeal. To the contrary, Alabama affirmatively argued in its appeal brief that competitors were the proper comparison class and that it had conceded this in the district court. See, *e.g.*, Br. of Appellees at 19, *CSX Transp., Inc.* v. *Ala. Dep't of Revenue,* No. 12-14611 (11th Cir. Nov. 13, 2012) ("Alabama 11th Circuit Br.") (the court must determine a comparison class and "[h]ere, this means considering the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to railroads and their competitors*) (emphasis added); *id.* at 27 (relevant comparison is taxes paid on diesel fuel "by the railroads and their competitors"); *id.* at 23

---

[6] At the very least, any error on the part of the district court in construing Alabama's position on the comparison class issue was caused by the confusing nature of Alabama's pleadings – which referenced Justice Thomas' test, but then articulated it in a way that uses competitors as the relevant comparison class. This Court typically does not come to the aid of parties who invite the errors of which they complain. *See City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted in part because "there would be considerable prudential objection to reversing a judgment because of [jury] instructions that petitioner accepted, and indeed itself requested").

(distinguishing *McNamara*'s use of the broader class consisting of all commercial and industrial taxpayers "[b]ecause the parties agreed on a much smaller class below"). Accordingly, the Eleventh Circuit's findings that Alabama conceded the comparison class issue were hardly "mistaken" or "wrong." See Pet. 16. Those findings were compelled by Alabama's own representations to the court.[7]

The record is clear that Alabama consistently conceded below that competitors are the proper comparison class, and therefore waived any argument to the contrary. For this reason, the petition is not an appropriate vehicle for addressing the question that Alabama raises.

III. THE DECISION BELOW DOES NOT RAISE A QUESTION OF EXCEPTIONAL IMPORTANCE.

Alabama and its *amici* attempt to characterize the tax issue presented in this case as one of nationwide significance, but their efforts are unavailing. See Pet. 4 ("many other States offer similar exemptions"); Br. of *Amicus Curiae* Multistate Tax Commission, at 9-11 (asserting that the tax regime at issue "is common throughout the states" and that "[t]he potential economic impact to the states" of the court of appeals' ruling below is "enormous"); Br. for American Trucking Associations, Inc., at 7-8. As an initial matter, the

---

[7] Alabama notes that in its appeal brief, it briefly asserted Justice Thomas' test and the broader comparison class as an alternative ground for affirming the district court's ruling. Pet. 18 (citing Alabama 11th Cir. Br. at 36-37). This alternative argument does not save Alabama from its waiver problem. Alabama consistently conceded below the propriety of using competitors as the comparison class and therefore waived the argument it seeks to put before this Court – that use of that comparison class was error.

fact that no other State has filed a brief in support of the petition speaks volumes and belies any argument that the States as a whole, or even particular States, have a substantial interest in this dispute between CSXT and Alabama. In addition, the participation of American Trucking Associations (ATA) makes plain that the true stakes here concern the competitive landscape of the transportation industry.[8]

The silence of the States hardly is surprising because – contrary to the assertions of Alabama and its *amici* – Alabama's taxing scheme is not common and very few States would be affected by the issue presented here. Unlike Alabama, most States that have sales and use taxes exempt diesel fuel used by railroads. Of the 23 jurisdictions (including the District of Columbia) in which CSXT operates, only six impose any sales and use tax on railroad diesel fuel. Several of these jurisdictions that do impose their sales and use taxes on fuel used by railroads, such as New York and Illinois, similarly impose these taxes on fuel used for highway purposes. Accordingly, only a handful of States continue to impose a sales and use tax on railroad diesel fuel while exempting motor carriers. The petition therefore does not present a recurring issue that has nationwide significance.[9]

---

[8] ATA's assertion that the decision below "results in a serious competitive disadvantage to motor carriers operating in Alabama," ATA Br. at 3, ignores that the Alabama legislature is free to revise its tax scheme to comply with the 4-R Act.

[9] MTC asserts (at 11) that the potential revenue loss to the States of the decision below is $83.6 million annually with respect to CSXT, but this is demonstrably wrong. MTC assumes that the States in which CSXT operates "apply a use tax at an average 5% rate" on its diesel fuel, *id.*, but as shown, most of

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ELLEN M. FITZSIMMONS
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 366-5221

JOEL W. PANGBORN
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 366-5221

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 783-8124

JAMES W. MCBRIDE*
BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, PC
920 Massachusetts Avenue, N.W.
Washington, DC 20004
(202) 508-3400
jmcbride@bakerdonelson.com

STEPHEN D. GOODWIN
BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, PC
First Tennessee Building
Suite 2000
165 Madison Avenue
Memphis, TN 38103
(901) 577-2141

Counsel for Respondent

* Counsel of Record

December 16, 2013

---

those States do not impose *any* sales or use tax on railroad diesel fuel.