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

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petition for Certiorari filed by Petitioners Alabama Department of Revenue and Julie Magee, Commissioner of the Alabama Department of Revenue.[1] The Commission urges this Court to accept certiorari to finally resolve a decades-long conflict among the circuits as to the correct test for "discrimination" under 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act").

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia are members of the Commission.

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Alabama. Finally, this brief is filed with the consent of the parties.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Multistate Tax Compact, Art. I.

The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.,* H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax).

Preserving state tax sovereignty under our vibrant federalism remains a key goal of the Compact and the Commission. The Commission's interest in this case arises from our goal of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is permitted under the U.S. Constitution and the clear mandate of Congress.

The ongoing uncertainty over the interpretation

and scope of the 4-R Act's prohibition of "another tax that discriminates" has already imperiled a significant source of revenue for the states, and this uncertainty may be extended to other tax impositions as well if not resolved now. But beyond these important fiscal concerns, the decision of the Eleventh Circuit below carries significant implications for state sovereignty if federal courts may adjudicate whether state laws should be preempted as "discriminatory" without reference to the guidance found in the statute itself. The use of a judicially-created comparison class of "railroad competitors" will inevitably involve the federal courts in a myriad of state tax policy decisions to a degree which was never contemplated by Congress.

The meaning of § 11501(b)(4)'s prohibition of "another tax that discriminates" should be determined with reference to the principles of federalism and the unique importance of state taxing powers in preserving sovereignty, as this Court previously held in *Dep't of Rev. of Or. v. ACF Indus., Inc.,* 510 U.S. 332, 345 (1994). Congress instructed the federal courts to resolve the question of "discrimination" for property tax purposes by asking whether the railroads' taxing burden was equivalent to that generally borne by other commercial and industrial taxpayers in the jurisdiction. 49 U.S.C. § 11501(b)(1)-(b)(3). Congress chose this comparison method because it involved the least amount of intrusion into state tax policy matters. It should be assumed that Congress was similarly mindful of state tax sovereignty respecting other types of taxes as well.

The Eleventh Circuit's decision has deepened the split between the circuits as to Congress' intended rule for determining whether a state taxing system is "discriminatory." The question is now clearly presented for the Court's determination, and the Commission urges the Court to grant certiorari to resolve that dispute.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve the conflict among five federal circuits (and the highest court of Minnesota) as to the proper application of the 4-R Act's prohibition against "another tax that discriminates" in 49 U.S.C. § 11501(b)(4). A grant of certiorari is appropriate and essential in this case because: the issue is ripe for review and squarely presented in this case; there are significant fiscal and policy implications for the states; and the decision of the Eleventh Circuit is manifestly in error. The dispute between the circuits should be resolved by holding that the proper test for determining if a tax "discriminates" against railroads is whether the tax is also generally imposed on other commercial and industrial taxpayers in the state. This test is the only one supported by the structure and intent of the 4-R Act and by the principles of federalism.

ARGUMENT

Under Alabama's taxing structure—a structure common throughout the states now and at the time of the passage of the 4-R Act—a generally applicable

sales and use tax of 4% is imposed on most purchases or uses of tangible property, including diesel fuel,[2] with a corresponding exemption for diesel fuel purchased for highway use, as those purchases are subject to two separate state taxes totaling 19 cents per gallon.[3]

Although the sales and use tax on purchases of fuel by railroads is identical to the burden placed generally on all taxpayers in Alabama, the taxpayer in this case insists that the correct comparison should be limited to whether two select businesses providing different means of transportation—trucks and barges—pay not just a similar tax rate on their purchases of fuel, but also pay the identical type of tax.

When this case was previously before the Court in 2010, it held that the 4-R Act's prohibition of "discriminatory" state and local taxes could be implicated either by discriminatory impositions of excise taxes or discriminatory *exemptions* from such taxes. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, __U.S. __, 131 S.Ct. 1101, 1114 (2010).[4] But the Court declined to answer the central question of how "discrimination" should be determined for non-

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[2] *See* ALA. CODE §§ 40-23-2(1);40-23-61(a)

[3] *See* ALA. CODE § 40-17-325(a)(exemption); § 40-17-2(1); § 40-17-220(e).

[4] In so holding, the Court distinguished its previous ruling in *Dep't of Rev. of Or. v. ACF Indus., Inc.,* 510 U.S. 332 (1994) that §11501(b)(4)'s prohibition of "another tax that discriminates" did not encompass challenges to *property tax* exemptions.

property taxes under § 11501(b)(4): by using a comparison class of all other commercial and industrial taxpayers, or of only those so-called railroad "competitors," such as barge lines and trucking companies.

Because the question of how discrimination should be determined had not been fully addressed below, the Court remanded the case, instructing that the issue of whether Alabama's sales tax on fuel was "discriminatory" hinged on whether the state could demonstrate "a sufficient justification for declining to provide the exemption at issue to rail carriers." *CSX,* 131 S.Ct. at 1109, fn. 8.

Two justices dissented from that holding, arguing that the question of proper comparison classes must be settled before the "justifications" for the exemption should be considered. *CSX*, 131 S.Ct. at 1114-1120. (Thomas, J., *dissenting*.) The dissent argued that if the correct comparison class of taxpayers was considered—industrial and commercial taxpayers who were also generally subjected to the same sales and use taxes—it was unnecessary and improper to consider whether the tax exemption was "discriminatory" with respect to how "competitors" were treated. *Id.* at 1117. The dissent noted that using the broader comparison class, "settles the ambiguity in the word 'discriminates' by reference to the rest of the statute and gives subsection (b)(4) a reach consistent with the problem the statute addressed." *Id.* at 1115.

On remand, the Eleventh Circuit held that the

correct comparison class should be "railroad competitors", even though that concept cannot be found within the text of the 4-R Act. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 720 F.3d 863 (11th Cir. 2013) ("*CSX II*"). The correctness of this 11th Circuit holding is the very question this Court held open for decision in *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S.Ct. 1101 (2010). Whether an excise taxing scheme that imposes the identical tax burden on a railroad as is borne by almost all commercial and industrial taxpayers in the state "discriminates" against railroads within the meaning of 49 U.S.C. § 11501(b)(4) of the 1976 4-R Act is now appropriately before the court for review.

A. There is a Split among the Circuits as to the Interpretation of a Significant Provision of Federal Law.

The Eleventh Circuit has now joined the Eighth Circuit and the Supreme Court of Minnesota[5] and two lower courts[6] in striking down long-standing tax systems relied upon by the states without a single textual reference to the 4R-Act mentioning "competitors" in the context of state taxation. Compounding matters, each of these courts has further held that compensatory highway excise taxes

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[5] *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999); *Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993).

[6] *Ill. Cent. R. Co. v. Tenn. Dep't of Revenue*, No.3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27 2013); *Kan. City S. Ry. Co. v. Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007).

borne by the railroads' principal "competitors" could not be considered as a justification for the "discriminatory" tax treatment. The Eleventh Circuit reached the conclusion that Alabama's excise tax discriminated against railroads even though the district court found—and the finding was not challenged on appeal—that motor carriers actually paid a higher tax on fuel than the railroads. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 892 F.Supp.2d 1300, 1312 (N.D. Ala. 2012) (*Appendix*, p. 56a.).

In contrast to the decisions of the Eighth and Eleventh Circuits, the Fifth, Seventh and Ninth Circuits have held that the proper test should be whether the tax is generally imposed on commercial and industrial taxpayers. [7] These courts have recognized that the use of the broader class is appropriate because it is the class chosen by Congress for measuring whether state property taxes "discriminate" against railroads. In *Atchison, Topeka & Santa Fe Ry. Co. v. Ariz.*, 78 F.3d 438, 442 (9th Cir. 1996), the court noted that:

> [T]he purpose of the 4-R Act was not to grant railroads preferential treatment. [citation omitted.] Rather, in adopting the 4-R Act, Congress' purpose was to remedy discrimination against the railroads and place them on an even playing field with other state

[7] *Kan. City S. Ry. Co. v. McNamara* 871 F.2d 368 (5th. Cir. 1987)*; Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996); *Burlington B. R.R. v. City of Superior,* 932 F.2d 1185, 1187 (7th Cir. 1991); *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011).

taxpayers. [citation omitted.].

> The comparison class of "commercial and industrial taxpayers subject to the tax" must be used in analyzing the Arizona tax scheme because a narrow comparison class, comprised only of "motor carriers," would result in preferential treatment for the railroads.

Use of the broader class not only implements congressional intent to place railroads on an equal basis with other taxpayers, but the broader comparison class also allows for a meaningful application of the 4-R Act where it is alleged that a state tax disparately burdens *all* transportation companies, *Kan. City S. Ry. Co. v. McNamara,* 871 F.2d 368 (5th Cir. 1987), or where there are no "competitors" in the taxing jurisdiction. *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011).

Thus, there is a profound split among the circuits as to how discrimination should be measured in the context of taxes other than property taxes for purposes of the 4-R Act's "another tax that discriminates" clause.

B. The Issue is of Vital Importance to the States.

The tax regime CSX seeks to challenge as "discriminatory" in this case is common throughout the states. Forty-five of the fifty states (and the District of Columbia) impose a general sales tax on

tangible personal property purchases or use. [8] Purchases of fuel for highway use, however, are exempt from taxation in forty-three states. JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION (Urban Inst. Press 2d ed. 1994) (1983). In virtually all of those states,[9] the exemptions for highway use fuel were in place well before passage of the 4-R Act in 1976. Highway use fuel is subject to a separate excise tax in every state, with a low of 8 cents per gallon in Alaska to a high of 51.2 cents in Connecticut, with the great majority of states imposing a highway fuel tax in excess of 20 cents per gallon. [10] The States' long-standing and nearly-universal taxing regime was presumably well known to Congress in 1976, yet the system of sales tax

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[8] FED. OF TAX ADMIN., STATE SALES TAX RATES http://www.taxadmin.org/fta/rate/sales.pdf.

[9] Arkansas, ARK. CODE ANN. § 26-55-208 (1941); Connecticut, CONN. GEN. STAT. § 12-412(15) (1947); Kentucky, KY. REV. STAT. ANN. § 139.470(18) (1960); Massachusetts, MASS. GEN. LAWS ch. 64H § 6(g) (1967); Minnesota, MINN. STAT. § 297A.68(19)(1) (1967); Nebraska, NEB. REV. STAT. § 77-2704.05 (1967); Nevada, NEV. REV. STAT. § 372.275 (1955); New Mexico, N.M. STAT. § 7-9-26 (1969); Pennsylvania, 72 PA. CONS. STAT. § 7204(11) (1953); South Dakota, S.D. CODIFIED LAWS § 10-45-11 (1939); Utah, UTAH CODE ANN. § 59-12-104(1) (1933); Wisconsin, WIS. STAT. § 77.54(11) (1969). *See also, e.g.*, Arizona, ARIZ. REV. STAT. ANN. § 28-5606; District of Columbia, D.C. CODE § 47-2301; Delaware, 30 DEL. CODE ANN. § 5110; Florida, FLA. STAT. ANN. § 206.41; Iowa, IOWA CODE ANN. § 452A.3; Idaho, IDAHO CODE ANN. § 63-2402; Illinois, 35 ILL. COMP. STAT. 505/17; Kentucky, KY. REV. STAT. ANN. § 138.220; Louisiana, La. Rev. Stat. Ann. § 47:802; Maine, 36 ME. REV. STAT. ANN. § 2903.

[10] FED. OF TAX ADMIN., STATE MOTOR FUELS TAX RATES (2013), http://www.taxadmin.org/fta/rate/mf.pdf.

exemptions for purchases subject to separate highway taxes were never mentioned in fifteen years of legislative hearings and study preceding the Act.

The potential economic impact to the states from the Eighth and Eleventh Circuit's sweeping interpretation of the 4-R Act's preemptive effect would be enormous. CSX alone spent $1.672 billion on diesel fuel in 2012.[11] If these Circuits' holding were extended to all states in which CSX operates, and assuming the states apply a use tax at an average 5% rate, the revenue loss to those states could be as high as $83.6 million annually for this single railroad, with no offset for the amounts its primary "competitor" paid in compensating highway taxes.

C. The Lower Court's Decision Was Erroneous and Warrants Reversal.

1. The Same Comparison Class Should Be Used for Determining "Discrimination" in Property and Excise Tax Cases.

The structure of the 4-R Act's prohibition of discriminatory state taxes does not support use of a comparison class other than "all industrial and commercial taxpayers." Sections 11501(b)(1) though (b)(3) outline detailed rules for determining whether a state or locality's property tax system "discriminates" against railroad properties relative

[11] CSX 2012 ANNUAL REPORT, p. 33, *available at* http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Nov. 22, 2013)

to all other commercial and industrial property. Section 11501(b)(4) prohibits "another tax that discriminates." There is no rationale for re-interpreting "discrimination" in (b)(4) to mean something other than what it meant in (b)(1) – (3).

Had Congress been concerned with the tax burdens on railroads relative to its "competitors", it presumably would have addressed those concerns in the property tax arena as well, by including an additional prohibition against more favorable treatment of other "transportation property", either through exemptions or rates. But Congress made no such effort to address different property tax burdens for "competitors." In fact, in 49 U.S.C. § 11501(a) Congress exempted "other transportation property" (and agricultural property) from the scope of commercial and industrial property subject to comparison with railroad property burdens.

Since Congress selected the average tax burden imposed on all "commercial and industrial" properties subject to assessment for purposes of determining property tax discrimination, it follows that Congress intended to use that same comparison class for its more general prohibition of "another tax that discriminates" in § 11501(b)(4). In both instances, the political power of the broad class of taxpayers subject to the same tax impositions provides adequate protection against excessive taxation.

2. Principles of Federalism Require that Congressional Intent to Interfere With State Taxing Powers be Narrowly Construed; the Use of a Broad Comparison Class Requires Less Interference with State Policy Choices While Still Protecting Railroads.

The controversy over the proper "comparison class" for determining whether a state taxing system "discriminates" has profound implications for state and federal relations.

As this Court recognized in *ACF Industries*, Congress' limitation of the comparison class for property tax discrimination to "assessed" properties signaled its reluctance to unduly interfere with state policy choices. 510 U.S. at 344-345. Congress was aware that state property tax systems often included exemptions for particular commercial and industrial enterprises in order to favor economic development or other social purposes, such as exempting pollution control systems. *Id.* If Congress included those exempted properties in the comparison base, it would result in the railroads receiving more favorable treatment than the bulk of commercial and industrial taxpayers, or would pressure states to eliminate the exemptions it had previously granted

Because Congress was aware of the state practices regarding property tax emptions, yet had not explicitly prohibited the practice, principles of federalism thus "compelled" a reading of Section (b)(4) to avoid that result. *ACF Industries* at 345. "[I]f Congress intends to alter the usual

constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress should make its intentions 'clear and manifest' if it intends to preempt the historic powers of the States"); *See also*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Gregory v. Ashcroft,* 501 U.S. 452 (1991).

If the holdings of the Eighth and Eleven Circuits are allowed to stand, federal courts in those jurisdictions would be far more deeply involved in state tax policy decisions, because it would be necessary to: (1) determine what industries (*e.g.*, trucks, airlines, barges, pipelines) actually compete with railroads within a jurisdiction;[12] (2) determine which state and local taxes and exemptions could have a direct or indirect disparate effect on these industries; (3) determine whether other taxes might offset or compensate for the disparate taxes; (4) determine whether the state or locality has

[12] It should not be assumed that railroads actually "compete" with trucks and barges for transportation services in every instance, since the relationship among these different modes of transportation may be symbiotic, not competitive. In 2012, 38% of CSX's traffic volume consisted of intermodal shipping, "combin[ing] the superior economics of train transportation with the short-haul flexibility of trucks…." *CSX 2012 Annual Report* (p. 17). In the same *Annual Report*, CSX lists among its business concerns: "…the challenges associated with labor, *fuel* and other costs at *trucking companies,* which today are partnering with us for longer-haul movements." *Id.*, p. 6. (emphasis supplied.)
http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Nov. 22, 2013).

sufficiently justified that disparate treatment; and (5) determine whether the state or locality's remedy eliminates any "discrimination" found. Each of these steps must be undertaken without any guidance from Congress. As a result, the federal courts will be required to make these decisions on an *ad hoc* basis, engaging in what should be a legislative function, all but guaranteeing inconsistent application.

By contrast, under the approach endorsed by the Fifth, Seventh and Ninth Circuits, the scope of inquiry is far narrower. The sole question presented for determination is whether the tax imposition on the railroads is also generally imposed on the bulk of commercial and industrial taxpayers in the state. If so, it should be presumed, absent evidence to the contrary,[13] that the political power of those citizens has protected the railroads from undue economic burdens. This inquiry is far more straightforward and does not involve the federal courts in complex economic analysis or second-guessing state policy-making decisions.

Where congressional legislation "impinges upon or pre-empts the states' traditional powers, we are hesitant to extend the statute beyond its evident scope." *ACF Industries* at 345. "This presumption against preemption leads…to the principle that express preemption statutory provisions should be

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[13] As the Court noted in *ACF Industries, supra* at 346-7, Congress surely would have been concerned with *any* taxing scheme which imposed a generally applicable tax but then exempted everyone except the railroads from its reach. That scenario is not presented by the facts of this case.

given a narrow interpretation," *Gordon v. Virtumundo, Inc.* 575 F.3d 1040, 1060 (9th Cir. 2009) (quoting *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation and Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005)). *See also*, *Cipollone v. Liggett Group Inc.,* 505 U.S. 504, 533 (1992) and *Maryland v. Louisiana,* 451 U.S. 735 (1981).

The same federalism concerns support the conclusion that Congress did not intend to upset the states' well-established pattern of sales tax exemptions of fuel subject to a separate highway tax in adopting § 11501(b)(4). Railroads, trucking companies, airlines, barge companies and pipeline companies are not identically-situated taxpayers. They perform different—although sometimes complimentary—transportation functions, operate under different regulatory structures, receive different forms of government assistance and subsidies, and impose different societal costs and benefits. Those differences in regulatory structure, operation and function have inevitably been reflected in differences in how taxes are imposed. Congress was aware of these differences in taxing systems in 1976 but made no attempt to address them in the 4-R Act.

Instead, Congress sought to protect the railroads from taxes that singled them out for tax extractions not shared by local commercial and industrial taxpayers as a whole.

Principles of federalism strongly suggest that without clear legislative guidance, the federal courts

should not immerse themselves in determining whether any differences in the taxing structures applicable to these different industries are justifiable. But adoption of a "competitive class" comparison group under the 4-R Act would have just such an effect.

3. Failure to Consider the States' Compensating Tax System in Assessing Whether a Tax Statute "Discriminates" Defeats Congressional Intent to Put Railroads on an Equal Footing With Other Commercial and Industrial Businesses.

Both the Eighth and Eleventh Circuits recognized that the motor transportation competitors paid substantial amounts of motor fuel taxes in lieu of use taxes. Yet both courts refused to undertake an analysis of the effects these taxes had on ability of railroads to compete with motor carriers, because they were contained in separate tax statutes. *CSX II,* 720 F.3d at 871; *Burlington N., Santa Fe Ry. Co. v. Lohman,* 193 F.3d 984, 986 (8th Cir. 1999)("A state's overall tax structure need not be examined under the 4–R Act even if fair taxing arrangements exist, such as taxing one business with property taxes and another with sales taxes, 'because the actual fairness of those arrangements is too difficult and expensive to evaluate'", *quoting Trailer Train Co. v. State Tax Comm'n,* 929 F.2d 1300, 1303 (8th Cir. 1991).).

Eliminating the states' sales and uses tax on railroad fuel while retaining the excise tax burden

on highway fuel would simply create "discrimination" against trucking companies, rather than alleviating discrimination against railroads. This was not Congress' intent in passing the 4-R Act.

If Congress had intended for the courts to undertake a "comparison class" approach for determining discrimination, Congress would have expected the courts to look at a state's entire compensating tax structure, not components in isolation. As this Court announced in *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981), "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." Under this Court's compensatory tax doctrine used to determine if state taxes "discriminate" against interstate commerce, where two taxes are imposed on "substantially equivalent event[s]", they should be considered together in determining whether discrimination has occurred. *Id.* at 769.

By the same token, once the lower courts determined that it was appropriate to compare the railroads' tax burdens to the burdens imposed on other industries engaged in transportation activities, it would have been appropriate to compare tax burdens on the purchase of fuel for those "substantially similar" activities. As the dissent noted in *Trailer Train Co. v. State Tax Comm'n,* 929 F.2d at 1304: "I do not believe Congress has broadly eliminated taxation of the railroads without a demonstration of a discriminatory result by comparison to other taxes and taxpayers under

subsection (d). I believe such a demonstration is still necessary lest Congress be openly called a fool." (Gibson, J., *dissenting*.)

The Eleventh Circuit's justification for failing to undertake a comparative tax analysis—that the expense and trouble would be excessive where the use tax burden might exceed the fuel excise tax burden in some months but not others—is plainly an insufficient one. *CSX II,* at 870-71. The case of *Assoc. Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994), is instructive in that regard. Missouri imposed an "additional use tax" on goods purchased out of state, which when combined with state and local sales and use taxes had the effect of imposing a higher burden on out-of-state purchases in some counties but not in others. This Court held that the appropriate remedy was to adjust the combined tax burden in each county to ensure interstate sales were treated equally with intra-state sales. 511 U.S. at 654. The Court rejected the taxpayers' arguments that the entire "additional use tax" should be stricken because of the burden of the county-by-county inquiry, *Id.* at 655, or because of the possibility that future changes in tax rates could once again result in discriminatory treatment, noting, "[W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Id.* at 654.

This Court cautioned that "discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately

justified." 131 S.Ct. at 1114. The court below failed to adequately address the state's justification for its dissimilar but roughly equal treatment of purchases by different industries. The "excessive cost" analysis is just one more judicial construct found nowhere in the text of the 4-R Act, and a very problematic construct given the millions of dollars of revenues at stake in Alabama and elsewhere.[14]

CONCLUSION

The Court should accept certiorari in this case to resolve the deep split between the circuits as to the correct comparison class for determining whether a state taxing system "discriminates" against railroads. But the Court should also take this case to return 4-R Act jurisprudence to the fundamental rule that federal legislation purporting to preempt state tax choices should be construed narrowly under principles of federalism. It should not be presumed that Congress intended to empower the federal courts to create a new basis for evaluating discriminatory taxes under the 4-R Act.

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[14] That the state could prospectively "remedy" what the Eleventh Circuit held was a discriminatory tax merely by eliminating the sales tax exemption and decreasing the fuel excise tax by a similar amount, without affecting the actual tax burden on either "competitor", is more evidence of the lack of actual discrimination. *Cf., McKesson Corp v. Div. of Alcoholic Beverages & Tobacco of Florida,* 496 U.S. 18 (1990)(identifying means to remedy discrimination).

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