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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.*
Alabama Solicitor General
*Counsel of Record
Andrew L. Brasher
Deputy Ala. Solicitor Gen'l

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

Mark Griffin
Chief Legal Counsel
Margaret Johnson McNeill
Keith Maddox
Ass't Ala. Attorneys Gen'l

STATE OF ALABAMA
DEP'T OF REVENUE
P.O. Box 32001
Montgomery, AL 36132
(334) 242-9690

December 30, 2013

Counsel for Petitioners

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ARGUMENT

As Justices Thomas and Ginbsurg put it when this case previously was before this Court, "[t]he lower courts have split over the proper scope of the comparison class." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1118 n.3 (2011) (Thomas, J., dissenting). On this point and all the others, CSX is burying its head in the sand.

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

Justices Thomas and Ginsburg are not the only ones who have perceived a lower-court split on this question. Here is what Judge Wood said for a unanimous Seventh Circuit, two years ago: "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). The Eleventh Circuit in this very case acknowledged that "[a]mong our sister circuits there are essentially two camps: the functional approach and the competitive approach." Pet. App. 7a-8a. And in a 1999 decision adopting CSX's proposed rule, the Eighth Circuit effectively acknowledged that it was parting ways with the Ninth Circuit. *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984, 986 (CA8 1999) (citing *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 446 (CA9 1996) (Nielsen, J., dissenting)).

CSX presumably believes that all these jurists were simply mistaken about the current status of lower-court jurisprudence. These decisions are con-

sistent with each other, the railroad says, because they involved different kinds of taxes. *See* BIO 8-18. In other words, the word "discriminates" in the 4-R Act can mean one thing—disparate treatment by comparison to competitors—in the context of one tax, yet mean another thing—disparate treatment by comparison to a more general class of taxpayers—when a different tax is at issue.

The certiorari petition explains why that argument makes no sense. *See* Pet. 13-14 (citing *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (plurality opinion); *Clark v. Martinez,* 543 U.S. 371, 382 (2005)). As this Court has held, lower courts must ascribe meaning to a statute's language in a coherent way, lest the statute become a "chameleon." *Clark*, 543 U.S. at 382. And chameleonic statutes create unacceptable instability for everyone involved. If CSX is right, for example, consider what a state or local legislature is supposed to do when someone proposes a new tax exemption for a railroad competitor. Does that tax "discriminate" in violation of the 4-R Act? Under CSX's view, the legislature cannot know the answer until the federal courts announce which comparison class happens to apply to the new tax.

That cannot be what Congress had in mind, and no judge outside the Eleventh Circuit has held that the statute could work that way. The rule Justices Thomas and Ginsburg proposed, for example, categorically holds that the word "discriminates" refers only to tax-exemption schemes that "target or single out railroads by comparison to general commercial and industrial taxpayers." *CSX Transp.*, 131 S. Ct. at 1115 (Thomas, J., dissenting). In the other recent

appellate decision on the matter, the Seventh Circuit adopted a bright-line rule "endors[ing] reference to other commercial and industrial users" when reading the word "discriminates," "rather than an ill-defined 'all the circumstances' type of test." *Koeller*, 653 F.3d at 509;* *see also* Pet. App. 11a n.4 (Eleventh Circuit majority opinion acknowledges that the Seventh Circuit's decision "established a bright-line rule"). And, as CSX effectively acknowledges, the Ninth Circuit's rule from *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, does not change when the factual context does. *Cf.* BIO 17 (contesting the conflict as to that decision only by asserting, erroneously, that the Ninth Circuit's decision is no longer good law).

To be sure, the Eleventh Circuit did say it was reserving the right to make the statute a chameleon in some future case. *See* Pet. App. 11a-12a n.4. But the eyebrow-raising nature of that reservation just bolsters the already compelling case for certiorari. Professor Llewellyn, in compiling his exhaustive list of

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* CSX is misreading *Koeller* when it asserts that the Seventh Circuit held that "the choice of the proper comparison class is a case-specific inquiry." BIO 16. The Seventh Circuit categorically held that "the appropriate comparison class for subsection (b)(4)" is "the functional, middle group of all other commercial and industrial taxpayers." *Koeller*, 653 F.3d at 509. The court said it would opt for a different comparison class only under the unlikely hypothetical in which "rail carriers in a later case so dominate the economy that the group of all commercial and industrial taxpayers would overlap almost entirely with that of railroads." *Id.* at 509. The court did not say that it would deviate from the comparison class merely because a different tax was at issue.

dueling interpretive canons, did not see fit to include one calling for courts to read the same word, in the same statute, differently in different factual contexts. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). The Eleventh Circuit's reasoning on this point is so untenable that even CSX has distanced itself from it—claiming, implausibly, that the Eleventh Circuit did not actually adopt that reasoning. *See* BIO 18. Yet the Eleventh Circuit's opinion speaks for itself. Its reliance on this proposition makes the need for this Court's intervention imperative.

B. This case is the right vehicle for resolving the split.

CSX has no valid vehicle-based objection to review. CSX does not try to defend the result the Eleventh Circuit reached, and the amici have explained why the result is wrong. *See* Brief of *Amicus Curiae* Am. Trucking Assoc. 8-14; Brief of *Amicus Curiae* Multistate Tax Commission 11-17. With millions at stake for state and local governments, the right time for review is now.

CSX's baseless assertion of waiver need not detain this Court for long. The State has already explained why CSX is mischaracterizing the contentions the parties made when they were before the trial court. *See* Pet. 15-18. But even if CSX's contrary reading of the trial-court materials were the only possible one, the railroad has glossed over the far more critical consideration: *The State won in the trial court*. Having done so, it was entitled, on appeal, to

urge the Eleventh Circuit to adopt any legal theory that would lead to affirmance. *See* Pet. 18 (citing *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982)). The State unambiguously followed that course here, telling the Eleventh Circuit that if it disagreed with the trial court's ruling for the State under the narrower comparison class, the Court should affirm on the alternative basis that, as the State wrote, "'complaints such as CSX's should be dismissed for failing to state a "discriminat[ion]" claim under §11501(b)(4) when they do not allege that railroads are targeted or singled out compared to commercial and industrial taxpayers generally.'" Ala. 11th Cir. Br. 37 (quoting *CSX Transp.*, 131 S. Ct. at 1118 (Thomas, J., dissenting)).

CSX defies credibility when it asserts that the State did not adequately preserve this point on appeal. *See* BIO 22-23 (citing Ala. 11th Cir. Br. 19, 23, 27). In so doing, CSX is selectively quoting portions of the State's brief that set out its argument for affirmance under the trial court's rationale. CSX is not quoting those portions of the State's brief that put forth the alternative theory endorsed by Justices Thomas and Ginsburg. *See* Ala. 11th Cir. Br. 36-37. The State unambiguously made this argument, and the Eleventh Circuit did not say otherwise. Indeed, it was precisely because the State had made this argument that the court had no choice but to address it. *See* Pet. App. 7a-12a.

This case therefore presents fully "developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The panel's opinion binds every state and local government within

the Eleventh Circuit. CSX's cry of waiver cannot insulate the Eleventh Circuit's important and erroneous opinion from review.

C. This case is important.

CSX is blinking reality throughout its opposition, and nowhere is this more apparent than in its claim that this question is somehow unimportant. *See* BIO 23-24. Exhibit A on this front, the railroad says, is "the fact that no other State has filed a brief in support of the petition." *Id.* at 24. The very name of one amicus, the Multistate Tax Commission, speaks volumes to the contrary. *See* Brief of *Amicus Curiae* Multistate Tax Comm'n Br. 9-11. So, too, does the Commission's representation that its members include "forty-seven states and the District of Columbia." *Id.* at 1. The plethora of decisions that gave rise to this 3-2 circuit split further undermines CSX's contention that "very few States would be affected by the issue presented." BIO 24. And it is telling that CSX has failed to support its claim of practical insignificance with even a single citation to a legal authority. CSX instead relies exclusively on undocumented and unverifiable representations about its own experience in the particular States where it does business. *See* BIO 24.

CSX's own litigation maneuvers show that it knows that this issue is, in reality, of tremendous significance to governments and taxpayers alike. CSX thought that these taxes were of sufficient importance to ask this Court to grant review in this very case four years ago. *See* 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). The

United States thought that these taxes were sufficiently important to support CSX's petition. *See* Brief *Amicus Curiae* of the United States, No. 09-520, *CSX Transp. v. Ala. Dep't of Revenue*, 2010 WL 1954258, at *11-*17 (May 14, 2010). And this Court thought these taxes sufficiently important to warrant review. This Court should take the same action now.

Respectfully submitted,

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.*
Alabama Solicitor General
*Counsel of Record
Andrew L. Brasher
Deputy Ala. Solicitor Gen'l

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

Mark Griffin
Chief Legal Counsel
Margaret Johnson McNeill
Keith Maddox
Ass't Ala. Attorneys Gen'l

STATE OF ALABAMA
DEP'T OF REVENUE
P.O. Box 32001
Montgomery, AL 36132
(334) 242-9690

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