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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The United States has recognized that the lower court got this case wrong and that the issues presented are important enough to warrant this Court's review. Although the United States ultimately recommends denial of certiorari because of vehicle issues, the State has already explained that those purported vehicle issues are immaterial. As explained in the petition (pages 15-18) and reply in support of the petition (pages 4-5), this case 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 court of appeals squarely addressed the main issue presented in the cert petition, which the Court expressly left open the last time this case was before it and which the State plainly raised in the court of appeals. And the court of appeals also squarely addressed the subsidiary issue that the United States suggests that this Court should expressly include in any grant, which the State indisputably raised in the court of appeals. The Court should grant the writ.

A. The circuits are split over the comparison class issue.

The United States rightly concedes that the circuits have divided over the appropriate comparison class to use in evaluating claims under the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4) ("the 4-R Act"). U.S. Br. 15-16. Justices Thomas and Ginsburg have recognized that

"[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 & 4 (2011) (Thomas, J., dissenting) (*CSX I*). The Seventh Circuit has acknowledged that the comparison class question "has divided the circuits," explaining that this Court "declined to resolve the split" in *CSX I*. *Kansas City So. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (7th Cir. 2011).

The United States cannot minimize the split by contending that the lower courts could change the comparison class on a case-by-case basis. U.S. Br. 16. That is not the best, or even a plausible, reading of those decisions. The Ninth Circuit held categorically "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 (9th Cir. 1996). Similarly, the Fifth Circuit has categorically held that a state could satisfy the 4-R Act "only by a more mechanical equality between its taxation of the railroads and its taxation of the class of 'other commercial and industrial' taxpayers generally." *Kansas City So. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). And the Seventh Circuit concluded that "the appropriate comparison class for subsection (b)(4)" was "the functional, middle group of all other commercial and industrial taxpayers." *Koeller*, 653 F.3d at 509. To the extent the Seventh Circuit left any room for a different comparison class, it contemplated only a "hypothetical" situation where "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. The Eleventh Circuit, Eighth Circuit, and others are on the other side of the split. *See* Pet. 13-15.

B. The petition fairly encompasses the United States' second "issue," but the Court could also expressly grant on that question.

The United States says that there are "two issues" that are "critical to determining whether a tax 'discriminates against a rail carrier' in violation of 48 U.S.C. § 11501(b)(4)." U.S. Br. at 10. The first "issue" is what comparison class courts should look to. The second or subsidiary issue is whether courts should evaluate a state tax in isolation or, instead, evaluate a state's tax structure holistically.

This case can be resolved entirely on the first comparison-class issue. *See also* Pet. 18-19. Under the appropriate comparison class comprising general commercial and industrial taxpayers, as outlined by Justices Thomas and Ginsburg, CSX cannot show discrimination under the 4-R Act. *Id.* at 18; *CSX I*, 131 S.Ct. at 1117 (Thomas, J., dissenting). That issue has split the circuits. And, if the Court rules in favor of the State on that issue, then there is no need to decide what aspects of a local government or state's tax system must be evaluated in a 4-R Act case.

Nonetheless, the question presented is broad enough to encompass the second "issue" as well as the first. The State sought certiorari on a broad question: "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 sale-and-use tax but grants exemptions from the tax to the railroads' competitors." *See* Pet. at i. In asking whether the tax at issue "discriminates against a rail carrier," the question presented necessarily includes the analysis that a court would need to undertake to make that determination.

As the United States explains, courts under the 4-R Act have "wrong[ly]" focused on the single tax at issue rather than evaluating the entire state tax structure. *See* U.S. Br. 18. Alabama and the United States agree that courts should consider the overall state tax scheme to determine whether a tax is discriminatory against railroads under the 4-R Act, not merely the tax at issue in the litigation. *See id.* This has been the consistent position of the United States over the years,[1] it was fully briefed and litigated in the courts below, and the court of appeals erred when it rejected it.

The State believes that this second or subsidiary question is fairly included within the broad question presented of whether the tax at issue here "discriminates" under the 4-R Act. Nonetheless, if the single question presented in the petition is not broad enough to encompass this issue, then the State agrees with the United States that the Court should also expressly grant on the subsidiary question:

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[1] For example, the last time this case was before the Court, the United States argued that, if "the Court were to find discrimination but find that maybe, you know, 50 percent of the tax was compensated by this other tax, . . . it should remedy the situation by only enjoining, the discriminatory portion of the tax." *See* Oral Arg. Tr. at 21:18-23. *See also* USA Amicus Br. in Support of Cert at 17 & n.8; USA Merits Br. at 26 n.8.

"Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the state's tax scheme rather than focusing solely on the challenged tax provision." U.S. Br. 23.

C. The United States rightly agrees that these questions are important.

The United States acknowledges that this case presents issues that are "important" and "have significance beyond the facts of this particular case." U.S. Br. 18. These issues are "critical to determining whether" a tax violates the 4-R Act. *Id.* at 9-10. Alabama faces the loss of millions of dollars in revenue, as well as refund claims. Pet. 14. And, as the United States recognized, other states with similar tax schemes face the same risk without guidance from this Court about how to proceed. *Id.*; U.S. Br. 18. For these reasons, this Court should grant Alabama's petition.

Respectfully submitted,

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