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 FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE*

Amicus American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

ATA has a direct interest in this case because many of its members operate in interstate commerce to, from, within, and through the State of Alabama. ATA members purchase, store, and consume diesel fuel in Alabama. These members compete with railroad carriers in interstate commerce in Alabama, because shippers have the ability in many cases to choose between a rail carrier and a motor carrier when they ship property to, from, or through Alabama. As the district court concluded, under

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* After timely notification, the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Alabama's challenged tax arrangements, both motor carriers and railroads pay a substantially similar tax rate on diesel fuel. ATA's members depend on this level tax playing field to compete fairly with railroads in the provision of shipping services, and the preferential treatment CSX has obtained here amounts to a substantial and unfair advantage.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this case was last before the Court, it held only that a tax paid by rail carriers, but not by its competitors, was subject to challenge under the tax discrimination provision of the Railroad Revitalization and Regulatory Reform (4-R) Act, 49 U.S.C. 11501. *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1109 & n.8 (2010). Nothing in that decision, however, suggested that in assessing the merits of such a challenge, courts should look only to how the State treats railroad competitors (rather than how it treats commercial and industrial taxpayers generally) and only to the effect of the specific tax challenged (rather than the burden of the State's overall tax treatment on the transactions at issue). On remand, the Eleventh Circuit did just that, effectively rendering tax exemptions granted to a railroad competitor a *per se* violation of Section 11501(b)(4).

Petitioners have explained in detail the division of the lower courts on the question presented by this case, and why this case presents a suitable vehicle for addressing that question. ATA submits this brief to explain further why this issue merits Supreme Court review, and why the decision below is at odds with the text and purpose of Section 11501(b).

1. The decision below results in a serious competitive disadvantage to motor carriers operating in Alabama. Alabama exempts purchases of on-road diesel from its general sales and use tax because it subjects it to a separate motor fuels tax of similar burden. The decision below gives railroads an exemption from Alabama's general sales and use tax, while motor carriers remain subject to the motor fuels tax. Because fuel represents a major cost for motor carrier operations, the impact on fair competition in interstate commerce is substantial.

2. There is no reason to think that Congress enacted Section 11501 in order to ensure that railroads could purchase fuel at a substantial discount compared to its primary competitors. Section 11501 was one of several measures enacted by Congress to stop States from unfairly shifting their tax burdens onto the backs of interstate carriers. Section 11501 does not, however, give railroads the "most-favored-taxpayer" status they have achieved with the decision below.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary Because the Decision Below Erroneously Puts Motor Carriers at a Serious Competitive Disadvantage to Railroads.

A. Alabama Treats On-Road and Off-Road Diesel Differently to Avoid Subjecting Motor Carriers to Double Taxation.

1. Alabama law imposes a general 4% tax on the sale and use of tangible goods. See Ala. Code §§ 40-23-2(1), 40-23-61(a), By default, that tax applies to purchases and use of diesel fuel by individuals or

businesses. In addition, several Alabama municipalities and counties impose additional sales and use taxes. See Pet App. 35a-36a.

Diesel fuel sold for use on roads or highways, however, is treated differently. Alabama law subjects on-road diesel to an excise tax of 19 cents per gallon. Ala. Code § 40-17-325(a). Alabama exempts fuel subject to the motor fuel excise tax from the general sales and use tax, to avoid double taxation. See Ala. Code § 40-17-325(b).

2. Alabama's practice of treating on-road and off-road diesel follows a pattern established in Federal law, and which has been widely adopted by the States. Federal law itself maintains that distinction, levying a 24.3 cent per gallon excise tax on on-road diesel, 26 U.S.C. 4081(a)(2)(A)(iii), and requiring that off-road diesel (which is exempt from that tax) be dyed to facilitate the detection of excise tax evasion, 26 U.S.C. 4082(a)(2).

In 1934, Congress conditioned receipt of Federal highway construction funds on States' use of motor vehicle fees and taxes—including gasoline taxes—for highway expenses. See Hayden-Cartwright Act, 48 Stat. 993 § 12 (1934). As a result, every State employed an on-road motor fuels tax to fund their highway programs. See Jerry L. Marshall, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 8 (1973). Congress eventually repealed that requirement in 1998. See IRS Restructuring & Reform Act of 1998, 112 Stat. 685 § 1226 (1998). Nevertheless, all 50 States and the District of Columbia continue to impose a distinct on-road motor fuels excise tax. See Federation of Tax Administrators, *State Motor Fuels*

Tax Rates, available at http://www.taxadmin.org/fta/rate/mf.pdf (collecting state motor fuel tax rates as of Jan. 1, 2013) (last visited Nov. 18, 2013). And to prevent the problem of double-taxation, most States exempt fuels subject to their motor fuels excise tax from sales tax. See John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration*, 85 (2d ed. 1994).

3. This differential treatment has tended to result in higher taxes for on-road diesel than for off-road diesel. Presumably with this in mind, Alabama law prohibits the use of off-road diesel for on-road purposes without paying the 19-cent motor fuels excise tax. Ala. Code § 40-17-350(l)(4)(d). To ATA's knowledge, there is no mirror-image prohibition against using on-road diesel for off-road purposes, presumably because generally there has been no financial incentive to do so. In other words, historically, motor carriers have typically borne a higher per-gallon diesel-fuel tax burden, and Alabama's differential treatment has if anything amounted to *preferential* treatment for railroads compared to motor carriers. See also Pet App. 56a-57a (district court's finding that, during most of the period encompassed by this lawsuit, railroads paid lower taxes on diesel than motor carriers). Section 11501(b)(4) leaves the term "discriminates" undefined, but it is peculiar indeed to conclude that it protects railroads from an arrangement that amounts to, on average, a *lower* tax burden than its motor carrier competitors bear.

B. The Decision Below Means That Railroads in Alabama Will Pay Significantly Less for Diesel Fuel than Their Primary Competitors.

Though railroads have not historically paid more tax to Alabama for diesel than motor carriers, Respondent CSX Transportation, Inc. (CSXT) in this lawsuit seeks far more than to ensure that it never has to do so. Rather, it seeks to ensure that it (and other railroads) will pay *far less* than its principal competitors when they purchase or use diesel fuel in Alabama.

1. If ensuring only that it would never pay *more* in diesel taxes than motor carriers were CSXT's goal, it could have done so in a number of ways. First, as noted above, there appears to be no prohibition on purchasing on-road diesel—for which the 19-cent per gallon motor fuels has been paid, and which is exempt from sales and use tax—and using it to power their locomotives. Second, CSXT could have sought to enjoin Alabama's sales and use tax only to the extent that it might exceed the 19 cents per gallon motor fuels excise tax. In either case, CSXT could continue to enjoy its advantage over motor carriers during periods when diesel prices are low enough to make sales and use tax less onerous than the flat motor fuels tax, with the assurance that the tables would never turn on it.[1]

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[1] To be sure, neither approach would put CSXT on the same footing as interstate water carriers, who are exempt from Alabama diesel taxes altogether. See Ala. Code §§ 40-23-4(a)(10), 40-23-62(12). However, as the district court found, CSXT has offered no evidence of the purported discriminatory effect of a tax exemption relevant to only a

2. Instead, CSXT sought to enjoin Alabama from collecting *any* tax on its diesel fuel. Pet App. 31a. The upshot of the decision below, then, is a guarantee that CSXT and other railroads will consistently pay 19 cents less than motor carriers pay for every gallon of diesel. That, in turn, translates into an enormous competitive advantage for railroads.

Fuel costs are a major component of motor carrier operations, accounting for up to 20 percent of operating costs. See Federal Highway Administration, *Evaluation of U.S. Commercial Motor Carrier Industry Challenges and Opportunities* § 6, available at http://www.ops.fhwa.dot.gov/Freight/publications/eval_mc_industry/index.htm#6 (last visited Nov. 18, 2013). Like any operational cost inputs, increased fuel costs are ultimately reflected in increased prices for a carrier's services. Effectively requiring motor carriers to pay 19 cents more than railroads per gallon of diesel in Alabama thus represents a significant competitive disadvantage.

And because, as discussed above, most States treat on-road and off-road diesel similarly, the issue presented in this case is not limited to Alabama's borders. Indeed, in the wake of CSXT's victory in the court below, another railroad quickly obtained an injunction against Tennessee's similar practices. *Ill. Cent. R. Co.* v. *Tenn. Dep't of Revenue*, No. 3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013). That case is now pending before the Sixth Circuit. See No. 13-6348 (6th Cir.). And railroads have successfully employed Section 11501(b)(4) to

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very small fraction of competing freight movements. Pet App. 64a.

invalidate similar practices elsewhere.[2] This recurrent issue affects fairness and competition in the interstate transportation sector nationwide, and thus strongly merits this Court's review.

II. Section 11501(b) Protects Railroads from States That Seek to Prey Upon Nonresident Businesses, but Does Not Offer Them "Most-Favored-Taxpayer" Status.

Section 11501(b) was enacted as part of a wider effort to address the fact that many States were taking advantage of interstate carriers by subjecting them to higher property taxes than in-state taxpayers bore. To put a stop to this phenomenon, Congress passed a number of measures intended to tie the tax fate of interstate carriers to that of the in-state taxpayers who could hold the States accountable. Properly understood, these measures—including Section 11501(b)—prevent States from preying on out-of-state industries. They do not, however, offer any particular class of carrier a leg up on its competitors, much less promise the most-favored-taxpayer status that CSXT has effectively obtained for railroads in this case.

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[2] See, *e.g.*, *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999); *Kan. City S. Ry. Co.* v. *Bridges*, No. 04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007); *Burlington N. R. Co.* v. *Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338 (Iowa 1983).

A. Congress Has Repeatedly Protected Interstate Carriers by Tying Their Tax Treatment to That of In-State Commercial and Industrial Interests.

It took Congress some fifteen years from acknowledging that States were taking advantage of interstate railroads, see *National Transportation Policy*, S. Rep. No. 87-445 at 483-487 (1961), until it passed the 4-R Act in 1976. For nearly all of that period, Congress contemplated measures comprising only what were to become subsections (b)(1) to (b)(3) of Section 11501, prohibiting States from subjecting railroads to property taxes that were out of line with those paid by commercial and industrial entities generally. See Samuel Eckman, *A State-Centered Approach to Tax Discrimination under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051, 1063-1064 (2012). What was to become subsection (b)(4) was proposed only shortly before the 4-R Act's passage. See *id.* at 1064.

1. When Congress has prohibited discriminatory State taxes against interstate carriers, it has focused on prohibiting States from succumbing to the "temptation to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987). As Justice Thomas put it, "§ 11501(b) responded primarily to what its text describes—property taxes that soaked the railroads." *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J. dissenting). Congress took the same approach to property tax discrimination against motor carriers in the Motor Carrier Act of 1980 (49 U.S.C. 14502); and to property tax discrimination against air carriers in the Airport and

Airway Improvement Act of 1982 (49 U.S.C. 40116). Indeed, because of the shared need to protect *all* interstate carriers from this kind of predation, the trucking industry supported the inclusion of Section 11501 in the 4-R Act. See, *e.g.*, *Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1166, 1178 (1975) (statement of Peter Beardsley, ATA Vice President and general counsel); *Railroad Revitalization, Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Interstate and Foreign Commerce*, 94th Cong. 618, 621 (1975) (same).

Congress's purpose in enacting these protections has not been to pick winners and losers among the interstate carrier interests it sought to protect, but simply to "place them on an even playing field with other state taxpayers." *Atchison, Topeka, and Santa Fe Ry. Co.* v. *Arizona,* 78 F.3d 438, 442 (9th Cir. 1996). In each case, Congress achieved its purpose by directly tying the railroads' (and other interstate carriers') "tax fate to the fate of a large and local group of taxpayers." *Kan. City S. Rwy. Co.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). That tie establishes a substantial political check on States, because it means that in order to "overtax" rail, motor, or air carriers, States would have to similarly "overtax" resident businesses in general—resident businesses with the ability to hold the legislature accountable.

The text of the statutes make explicit that this is the strategy employed by the first three subsections of 11501(b), and in the parallel protections for motor and air carriers. Absent any indication in the text or legislative history to suggest that Congress departed

radically from that consistent approach when it added 11501(b)(4) to the 4-R Act at the eleventh hour, the latter provision "should be understood to tackle the issue of systemic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence." *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting). See also *Kan. City S. Ry. Co.* v. *Koeller*, 653 F.3d 496, 509 (7th Cir. 2011) (discussing "the need to read subsection (b)(4) 'in light of the approach taken in the first three subsections' * * *, which all directly or indirectly look to other commercial and industrial property") (quoting *Burlington N. Ry. Co.* v. *Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991)).

2. To be sure, the 4-R Act *as a whole* had more than one purpose, and its purposes expressly included restoring railroads' financial stability and competitiveness. See*, e.g.*, *CSX*, 131 S. Ct. at 1105 (citing 4-R Act § 101(a), 90 Stat. 33); *Burlington Northern, Santa Fe Railway Co.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) (4-R Act was intended to benefit railroads by ensuring their "financial stability"). A number of individual provisions of the Act were aimed directly at furthering that goal. See, *e.g.*, 45 U.S.C. 801(a) (listing, *inter alia*, "ratemaking and regulatory reform," expedited merger procedures, and "financing mechanisms" for rehabilitation and improvement of facilities as measures intended to "restore the financial stability of the railway system of the United States" and promote its revitalization).

It does not follow from this, however, that every miscellaneous provision of the Act—including Section 11501—was intended by Congress to

promote the interests of the railroads over those of its transportation competitors. Quite the contrary, Congress's "revitalization" goal must be reconciled with another express goal of the Act, to "foster competition among all carriers by railroads *and other modes of transportation*." 45 U.S.C. 801(b)(2) (emphasis added). "[T]he Act makes clear that a vibrant rail industry is a critical component of such competition [among transportation modes]; nevertheless, it is a means to an end rather than the end itself." Eckman, *A State-Centered Approach*, 1061. Moreover, the fact that Congress also protected motor carriers and air carriers from state tax discrimination (see pp. 9-10, *supra*) is a sure sign that the 4-R Act's tax discrimination provision was not intended to give railroads more favorable state tax treatment than its competitors receive. The decision below, and the blow it imposes on fair competition among different modes of transportation, cannot be squared with Congress's overall goals.

3. CSXT recognized as much when this case was last before this Court. Then, CSXT explained that Congress enacted Section 11501 because it 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.'" Pet. Br., *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, No. 09-520, at 3 (Aug. 12, 2010) (quoting *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987), quoting S. Rep. No. 91-630 at 3 (1969)). Similarly, the Association of American Railroads (AAR)—arguing as amicus in support of CSXT—recognized that this was the purpose of Section 11501(b), not to bolster the relative competitiveness of the railroads vis-à-vis other modes of transportation. See Br. of

AAR as Amicus Curiae in Support of Pet., *CSX Transp. Inc.* v. *Ala. Dep't of Revenue*, No. 09-520, at 7-10 (Aug. 19, 2010). As AAR explained, "[t]axing interstate railroads to benefit local constituents is a difficult potion to resist," and that "impulse is unchecked by any effective political counterweight." *Id.* at 8. "It was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501." *Ibid.* (citing S. Rep. No. 94-499, at 2-3 (1975); H.R. Rep. No. 94-725, at 53 (1975)).

B. The Decision Below Upends Congress's Strategy by Instead Granting Railroads "Most Favored Taxpayer" Status.

Alabama's decision to exempt motor carriers from sales and use tax on diesel—for the entirely sensible reason that they pay a *different* tax that is "substantially similar" in burden, Pet App. 57a—presents no risk that the State is trying to soak the railroads for a disproportionate share tax revenue. With the decision below, CSXT has taken what Congress intended as a shield against exploitation of interstate carriers and turned it into a sword by which to obtain treatment *more* favorable than both its motor carrier competitors and Alabama taxpayers generally. They have, in other words, achieved the "most-favored-taxpayers" status that this Court expressly recognized was not the goal of Section 11501. *CSX Transp.*, 131 S. Ct. at 1109 n.8.

The Eleventh Circuit could have—and should have—avoided granting CSXT (and other railroads) most-favored-taxpayer status by following the suggestion of Justices Thomas and Ginsburg to focus the inquiry under Section 11501(b)(4) on whether "a tax exemption scheme * * * target[s] or single[s] out

railroads *by comparison to general commercial and industrial taxpayers*. *Id.* at 1115 (Thomas, J., dissenting) (emphasis added). Its erroneous decision to instead compare CSXT's treatment only to that of its competitors—and to narrowly focus only on the challenged tax without considering whether their overall tax treatment was even-handed—merits this Court's review because it turns the purpose of Section 11501(b) on its head, at great cost to fair play and competition among interstate transportation industries.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the Court should grant the writ.

Respectfully submitted.

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