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No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

1. 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 sales and use tax but grants exemptions from the tax to the railroads' competitors.

2. 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.

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INTEREST OF THE UNITED STATES

This case concerns Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (49 U.S.C. 11501), which bars States and their subdivisions from imposing discriminatory taxes on rail carriers. The Department of Transportation is charged with, *inter alia*, overseeing rail safety, 49 U.S.C. 20103, and administering various railroad financial-assistance programs. The Surface Transportation Board (STB)—an independent federal agency with responsibility for the economic regulation of the Nation's railroads, 49 U.S.C. 721—is charged with fostering economic conditions that allow rail carriers to earn adequate revenues. At the invitation of the Court, the United States

filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the 4-R Act 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." § 101(a), 90 Stat. 33; see *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1105 (2011) (*CSX*); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of the 4-R Act targets discriminatory state taxation as a particular cause of the rail industry's difficulties. See § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); see also *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007) (*Georgia State Bd.*).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate

[1] Section 306 has been repeatedly recodified and rephrased without substantive change. See *CSX*, 131 S. Ct. at 1105 n.1. It was originally codified at 49 U.S.C. 26c (1976). In 1978, as part of the enactment into positive law of Title 49, it was recodified with slight alterations at 49 U.S.C. 11503 (1994). See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1445-1446. Those alterations "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466; see *Burlington N. R.R.*, 481 U.S. at 457 n.1. In 1995, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission (ICC) and created the STB, the provisions of Section 11503 were again reenacted without substantive change but were renumbered as Section 11501. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. This brief generally refers to the current codification of Section 306 at 49 U.S.C. 11501.

against interstate commerce." 49 U.S.C. 11501(b). To protect those important channels of commerce, Congress authorized federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c); see *CSX*, 131 S. Ct. at 1105.

Section 11501(b) identifies the types of taxation that are prohibited. Subsections (b)(1)-(3) bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property relative to "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3); see 49 U.S.C. 11501(a)(4) (defining "commercial and industrial property" as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy"). Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *Georgia State Bd.*, 552 U.S. at 16, 18; *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as "untenable" the view that a claim under Subsection (b)(1) requires proof of intentional discrimination).

A separate catch-all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States and their subdivisions from "[i]mpos[ing] another tax that discriminates against a rail carrier."[2] That is the provision at issue here.

2. Alabama imposes four-percent sales tax and use tax on the retail sale, storage, use, or consumption in

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[2] That language dates from the 1978 recodification. See 92 Stat. 1446. As originally enacted, the 4-R Act forbade "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." 90 Stat. 54; see *CSX*, 131 S. Ct. at 1107 n.6 (deeming "another tax" and "any other tax" to be "synonymous").

Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (sales tax); *id.* § 40-23-61(a) (use tax).[3] Although the sales tax and use tax are generally applicable, state law exempts fuel used by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (exemption from sales tax); *id.* § 40-23-62(12) (exemption from use tax). Water carriers engaged in such commerce therefore typically do not pay tax to Alabama on their motor fuel. Pet. App. 3a, 62a-63a.

Alabama also imposes primary and additional excise taxes on the receipt of motor fuel, including excise taxes totaling "[n]ineteen cents per gallon on diesel fuel." Ala. Code § 40-17-325(a)(2).[4] Motor fuel subject to those taxes is exempt from "any other excise tax," *id.* § 40-17-325(b), a category that includes sales and use tax. On-road motor carriers therefore typically pay motor-fuel excise taxes of 19 cents per gallon of fuel to Alabama and do not pay the four-percent sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama's motor-fuel excise taxes. That is because dyed diesel fuel—which is what locomotives

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[3] Alabama's sales tax and use tax are both four percent, but property subject to the former is not also subject to the latter. Ala. Code. § 40-23-62(1); see *Ex parte Fleming Foods of Ala., Inc.*, 648 So. 2d 577, 579 (Ala. 1994) (describing the taxes as "complementary"), cert. denied, 514 U.S. 1063 (1995).

[4] At the time of the district court's decision in this case, the motor-fuel excise taxes were codified at Ala. Code §§ 40-17-2 and 40-17-220. See Pet. App. 38a-39a & nn.6-7. In October 2012, Alabama enacted the Alabama Terminal Excise Tax Act, No. 2011-565, § 45, 2011 Ala. Laws Reg. Sess. 1141-1142, which modified the motor-fuel tax scheme. The modifications are not material here. See Pet. App. 3a n.2.

burn—is exempt from those taxes. Ala. Code § 40-17-329(a)(3). Railroads therefore typically pay sales and use tax of four percent to the State on their fuel and do not pay motor-fuel excise taxes.[5]

3. Respondent, a rail carrier providing transportation subject to the jurisdiction of the STB, sued petitioners Alabama Department of Revenue and its Commissioner in federal district court under the 4-R Act. Respondent contended that, by requiring rail carriers to pay sales and use tax from which motor carriers and interstate water carriers are exempt, petitioners had discriminated against respondent in violation of 49 U.S.C. 11501(b)(4).

a. The district court dismissed respondent's suit, and the court of appeals affirmed. 350 Fed. Appx. 318. Both courts relied on an earlier Eleventh Circuit decision holding that rail carriers could not invoke Section 11501(b)(4) to challenge a generally applicable tax on the ground that other entities were exempt from the tax. *Id.* at 319-320; see *Norfolk S. Ry.* v. *Alabama Dep't of Revenue*, 550 F.3d 1306, 1316 (11th Cir. 2008).

b. This Court granted respondent's petition for a writ of certiorari, limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable

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[5] The foregoing describes only the state-level tax scheme. Certain subdivisions of Alabama are also authorized to levy and collect taxes. See, *e.g.*, Ala. Code §§ 11-3-11(a)(2), 11-3-11.2, 11-51-200. Pursuant to that authority, several Alabama counties and municipalities impose additional sales and use tax on dyed diesel fuel, see Pet. App. 35a-36a, as well as additional excise taxes on undyed diesel fuel, see *id.* at 57a. In addition, federal motor-fuel taxes are collected on on-road diesel fuel, but not on off-road dyed diesel such as that used by railroads. See 26 U.S.C. 4081, 4082; 26 C.F.R. 48.4082-1.

sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as 'another tax that discriminates against a rail carrier.'" 560 U.S. 964. After briefing and argument, the Court answered that threshold question in the affirmative. *CSX*, 131 S. Ct. at 1114.

i. The Court held that the term "another tax" in Section 11501(b)(4) refers to "any form of tax a State might impose, on any asset or transaction, except the taxes on property previously addressed in subsections (b)(1)-(3)." *CSX*, 131 S. Ct. at 1107. Accordingly, "[a]n excise tax, like Alabama's sales and use tax, is 'another tax' under subsection (b)(4)." *Ibid.* The Court further held that "'[d]iscrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored,'" *id.* at 1108 (quoting *Black's Law Dictionary* 534 (9th ed. 2009)), and that a tax with an exemption "discriminates" if the exempt and nonexempt "groups are similarly situated and there is no justification for the difference in treatment," *id.* at 1109. In so holding, the Court declined to "limit the prohibited discrimination to state tax schemes that unjustifiably exempt local actors, as opposed to interstate entities" because, "[c]onsistent with the Act's purpose of restoring the financial stability of railroads (not of interstate carriers generally)," the 4-R Act distinguishes "between railroads and other actors, whether interstate or local." *Ibid.*

The Court declined to "consider any issues concerning whether [the challenged Alabama] exemptions actually discriminate against" respondent. *CSX*, 131 S. Ct. at 1107 n.5; see *id.* at 1109 n.8, 1114. In particular, the Court declined to decide (i) whether a "court

must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well," and (ii) whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." *Id.* at 1107 n.5. The Court left those issues "to the trial court." *Ibid.*; see *id.* at 1110 n.8 ("Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers.").

ii. Justice Thomas, joined by Justice Ginsburg, dissented. *CSX*, 131 S. Ct. at 1114-1120. The dissenting Justices agreed with the Court's resolution of the threshold question. They would have further held, however, that "a tax exemption scheme" violates Section 11501(b)(4) only if it "target[s] or single[s] out railroads by comparison to general commercial and industrial taxpayers." *Id.* at 1115.

4. On remand, the district court held a bench trial and ultimately found "no discrimination under the 4-R Act." Pet. App. 66a; see *id.* at 30a-65a. The court defined the appropriate comparison class as the rail carrier's "competing transportation modes" (*i.e.*, motor carriers and interstate water carriers), after noting that "both parties" had "agree[d]" that the "'competing mode' comparison is appropriate." *Id.* at 44a-45a; see *id.* at 51a. The court then examined "whether [petitioners] adequately justifie[d] the sales and use tax exemptions for [the] rail carrier's principal competitors." *Id.* at 54a.

The State had pointed to the "separate tax on the fuel used by motor carriers" to "justify the sales and use tax 'exemption' provided to motor carriers." Pet.

App. 55a-56a. The district court found that "justification sufficient" because "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a; see *id.* at 50a-51a, 54a. The court explained that "motor carriers actually pay a higher rate" of state tax on such fuel and that, "when factoring [in] the local (city and county) sales and use taxes imposed on rail carriers'[] diesel fuel," rail carriers and motor carriers "paid similar rates per gallon of diesel fuel from January 2007 through December 2009." *Id.* at 56a-57a. The court further noted that "these calculations fail to account for the local excise taxes imposed on motor carriers per gallon purchased of undyed diesel fuel." *Id.* at 57a.

With respect to the claim of disparate treatment as compared to interstate water carriers, the district court found no "discriminat[ion]" for "two reasons." Pet. App. 63a. First, respondent had offered "no evidence regarding the purported discriminatory effect as it relates to" interstate (as opposed to intrastate) water carriers. *Id.* at 64a. Second, the possibility that an exemption for water carriers may have been needed to avoid "commerce clause scrutiny" meant that rail carriers are not "the same in all relevant respects." *Ibid.*

5. The court of appeals reversed and remanded. Pet. App. 1a-17a.

a. The court of appeals began by addressing a "first-order question that [this] Court left untouched" in *CSX*: "against what do we compare the railroads?" Pet. App. 7a. The court noted that "the question of the proper comparison class ha[d] not been the central inquiry of this appeal," and that "the district court and

the parties [had] adopted the competitive approach" in the proceedings below. *Id.* at 8a; see *id.* at 11a. The court of appeals nevertheless felt "obliged to say a few words" about the matter. *Id*. at 8a. It ultimately concluded that, "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" the 4-R Act's "goal" of "ensuring 'financial stability' for rail carriers." *Id.* at 11a; see *id.* at 11a n.3 (explaining that different comparison class "fails to address discriminatory taxes that place rail carriers at a significant disadvantage vis-à-vis their competitors"). In so ruling, the court observed that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," *id.* at 12a n.4 (internal quotation marks omitted), and that a comparison class of "all commercial and industrial taxpayers" may "be appropriate in certain situations," *id.* at 11a n.3.

The court of appeals further held that the challenged tax was discriminatory. Pet. App. 12a-17a. The court stated that respondent had "established a prima facie case of discrimination" because its "competitors do not pay the State's sales [and use] tax." *Id.* at 12a; see *id.* at 2a n.1. Turning to petitioners' justification for the disparate treatment, the court declined to examine "all the taxes paid on diesel-fuel purchases" and instead "look[ed] only at the sales and use tax with respect to fuel to see if discrimination has occurred." *Id.* at 12a-13a (internal quotation marks omitted). The court stated that a broader inquiry would impose the "Sisyphean burden of evaluating the fairness of the State's overall tax structure." *Id.* at 16a; see *id.* at 13a.

b. Judge Cox dissented. Pet. App. 18a-29a. He "agree[d] that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. He disagreed, however, with the majority's conclusion "that a tax exemption for interstate motor carriers discriminates against interstate rail carriers when motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Ibid.*; see *id.* at 25a (characterizing as "bizarre" the holding that a rail carrier suffers discrimination from a tax that puts it "at no discernable disadvantage").

SUMMARY OF ARGUMENT

This case now presents the two issues arising from 49 U.S.C. 11501(b)(4) that this Court left open in *CSX Transporation, Inc.* v. *Alabama Department of Revenue*, 131 S. Ct. 1101 (2011): whether a court may "compare the taxation of [respondent]" to the taxation of its "direct competitors" without including "other commercial entities" in the comparison class, and whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." *Id.* at 1107 n.5. The Court should answer both questions in the affirmative.

A. As the court of appeals correctly held, the appropriate comparison class in a Section 11501(b)(4) suit may vary depending on the type of discrimination that a railroad alleges, and a comparison class of competitors was appropriate in this case. Section 11501(b)(4) forbids States and localities from imposing a tax that "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). Under that provision, a tax "discriminates" if it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation

marks omitted). For purposes of that analysis, the identity of the allegedly "favored" group may shift depending on the nature of the tax scheme in question. That reading is reinforced by the structure of Section 11501(b), which includes a specific comparison class in Subsections (b)(1)-(3) but not in Subsection (4), and by an examination of Congress's purposes in enacting the anti-discrimination provision. Here, because the alleged discrimination was the exemption of motor carriers and interstate water carriers from a sales and use tax to which railroads are subject, the court of appeals correctly approved a comparison class of respondent's competitors.

B. The court of appeals erred in restricting its analysis to the challenged sales and use tax and refusing to consider the State's alternative and comparable motor-fuel taxes on diesel fuel. Under Section 11501(b)(4), a State can justify differential treatment of railroads with respect to a particular tax by showing that the comparison class is subject to alternative and comparable state taxes that are not levied against railroads. That conclusion is dictated by the text of the anti-discrimination provision, especially as read against the backdrop of the complementary-tax doctrine that applies in other areas of federal tax-discrimination law, and it avoids "bizarre" results (Pet. App. 25a (Cox, J., dissenting)). Contrary to the court of appeals' ruling (*id.* at 13a), any expense or difficulty associated with examination of an alternative tax is not a basis for declaring that examination outside the competence of the courts. See *CSX*, 131 S. Ct. at 1114.

C. In the government's view, the appropriate disposition in this case is a remand. As to the claim that the State discriminates against respondent in favor of motor carriers, the court of appeals' finding of discrimination

omitted an important aspect of the Section 11501(b)(4) analysis. That court should have the opportunity to consider, in the first instance, the significance of the motor-fuel taxes as a justification for differential treatment of railroads and motor carriers under the sales and use tax. And while resolution of respondent's claim of discrimination vis-à-vis interstate water carriers does not turn on the existence of an alternative and comparable state tax, the court of appeals failed to evaluate the reasons the district court gave for rejecting the claim, and a remand for fuller consideration is therefore appropriate.

ARGUMENT

A. Under Section 11501(b)(4), The Appropriate Comparison Class May Vary Depending On The Type Of Discrimination That A Railroad Alleges

In *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, 131 S. Ct. 1101 (2011), this Court declined to resolve whether, in adjudicating a claim of unlawful discrimination under Section 11501(b)(4), a "court must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well." *Id.* at 1107 n.5. In the remand proceedings, the court of appeals held that the comparison class may vary depending on the type of discrimination alleged, and that a comparison class consisting of respondent's direct competitors was appropriate in this case. Pet. App. 7a-12a. That holding was correct. Treating commercial and industrial taxpayers as the only possible comparison class for determining whether a state tax violates Section 11501(b)(4), as petitioners urge (Pet. Br. 21-44), would be inconsistent with the statute's text and structure and would not fully effectuate Congress's purposes.

1. Section 11501(b)(4) bars States and localities from imposing any tax that "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). A tax "discriminates" when it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted); see *ibid.* ("To charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter.").

The identity of the group that is alleged to be more "favored" than a railroad may differ depending on the tax scheme at issue. A tax that "targets or singles out railroads as compared to other commercial and industrial taxpayers" is indisputably a form of discrimination under Section 11501(b)(4). *CSX*, 131 S. Ct. at 1115 (Thomas, J., dissenting); see, *e.g.*, *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). But a tax may also "discriminate[] against a rail carrier" if it applies generally to commercial and industrial taxpayers (including railroads), but not to railroads' direct competitors. See Pet. App. 7a-12a. If railroads and their competitors are "similarly situated" and "there is no justification for the difference in treatment," a court cannot "say that such a tax" does not "discriminate" without "adopt[ing] a definition of [discrimination] at odds with its natural meaning." *CSX*, 131 S. Ct. at 1109.

Under this Court's decisions applying analogous anti-discrimination rules, claims of unlawful tax discrimination need not always be premised on a comparison between the plaintiff and a broad class of similarly situated entities. See, *e.g.*, *Arkansas Writers' Pro-*

ject, Inc. v. *Ragland*, 481 U.S. 221, 227-228 (1987) (explaining that "a discriminatory tax on the press burdens rights protected by the First Amendment," and noting that such "discrimination" can take several "distinct forms"). In *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), for example, the Court found that a state income tax on benefits paid to retired federal employees violated a federal statutory prohibition against taxes that "discriminate against the [federal] officer or employee because of the source of the pay or compensation." *Id.* at 808 (quoting 4 U.S.C. 111). In reaching that conclusion, the Court did not suggest that retired federal employees were treated less favorably than the bulk of retirees in Michigan. See *id.* at 805, 814. Rather, the Court compared the treatment of retired federal employees (who were taxed) to the treatment of similarly situated "retired state employees" (who were exempt) and found discrimination on that basis. See *ibid.*; see also *Bacchus Imps., Ltd.* v. *Dias*, 468 U.S. 263, 268-269 (1984) (holding that a generally applicable state excise tax on alcohol unconstitutionally "discriminate[d]" against interstate commerce because certain locally produced beverages were exempted).

Nothing in the 4-R Act suggests that the word "discriminates" in Section 11501(b)(4) imposes any greater limitation on the range of potentially appropriate comparison classes. To the contrary, the structure of the 4-R Act's anti-discrimination provision reinforces the absence of any such limitation. Subsections (b)(1)-(3) of 49 U.S.C. 11501 identify one (and only one) comparison class: "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3). Subsection (b)(4), by contrast, does not specify any com-

parison class; it broadly prohibits state and local taxes that "discriminate[] against a rail carrier." 49 U.S.C. 11501(b)(4); see *CSX*, 131 S. Ct. at 1114 (noting that Section 11501(b)(4) does not contain "any of the prior subsections' limitations"). That Congress included a specific comparison class for Subsections (b)(1)-(3) but not for Subsection (b)(4) indicates that the omission was intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 19 (2007) (explaining that, "[i]f Congress had wanted to impose" a particular "limit" in Section 11501, "it surely could have done so").[6]

The omission of a specific comparison class is also consistent with Congress's purposes in enacting the 4-R Act. Congress recognized that railroads "are easy prey for State and local tax assessors" because they are "'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *CSX*, 131 S. Ct. at 1117 (Thomas, J., dissenting) (citation omitted). "[L]inking the taxation of railroads to the taxation of businesses with local political influence" addresses that concern. *Ibid.* Congress also sought, however, to "restor[e] the financial stability of railroads (not of interstate carriers generally)," *id.* at 1109; see § 101(a), 90 Stat. 33; 45

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[6] That does not mean that discrimination under Section 11501(b)(4) occurs whenever any person is treated more favorably for state-tax purposes than is a rail carrier. If "a railroad challenged a scheme in which 'every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt,' * * * for some reason having nothing to do with railroads," the suit "would be promptly dismissed." *CSX*, 131 S. Ct. at 1110 n.8 (quoting *id.* at 1119 (Thomas, J., dissenting)).

U.S.C. 801(a), and to "foster competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33; see 45 U.S.C. 801(b)(2); see also *CSX*, 131 S. Ct. at 1109 (stating that the "distinctions drawn in § 11501(b) are * * * between railroads and other actors, whether interstate or local"). Linking the taxation of railroads to the taxation of other carriers and modes of transportation furthers that additional purpose.

2. In contending that commercial and industrial taxpayers are the only permissible comparison class in a Section 11501(b)(4) case, petitioners have argued (Pet. Br. 22-44) that the comparison class set forth in the preceding subsections applies under Section 11501(b)(4) as well; that a flexible approach to the comparison class deprives the word "discriminates" of any consistent meaning; that permitting use of different comparison classes in different Section 11501(b)(4) cases will make the law unpredictable and difficult to administer; and that the history of the 4-R Act supports a comparison class of local, rather than interstate, actors. Those arguments lack merit.

a. Since Congress conspicuously omitted any mention of a comparison class in Subsection (b)(4), it cannot have expected courts to borrow directly from Subsections (b)(1)-(3). See *Russello*, 464 U.S. at 23. The comparison class specified in those earlier subsections consists not of commercial and industrial *taxpayers* but of "commercial and industrial *property*," 49 U.S.C. 11501(b)(1)-(3) (emphasis added), and Subsection (b)(4) covers taxes *other than* property taxes. *CSX*, 131 S. Ct. at 1107. In drafting Section 11501(b), Congress drew a "sharp line between property taxes and other taxes," creating "an asymmetical statute" in

which a principle like "*ejusdem generis* is not relevant." *Id.* at 1113-1114. The comparison class in Subsections (b)(1)-(3) is also limited to commercial and industrial property that is actually taxed by the State, see 49 U.S.C. 11501(a)(4); *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 341-342 (1994), while Subsection (b)(4) permits a finding of discrimination based on exemptions from taxation, see *CSX*, 131 S. Ct. at 1105, 1107-1108; see also *id.* at 1114-1115 (Thomas, J., dissenting). It therefore makes little sense to carry into the "very different terrain" of Subsection (b)(4) the exact comparison class named in the preceding subsections. *CSX*, 131 S. Ct. at 1110 n.8.

Contrary to petitioners' argument (Pet. Br. 23-24, 27-29), the opening clause of Section 11501(b), which echoes some (but not all) of the language of the Interstate Commerce Act (49 U.S.C. 13(4) (1976)), does not require a comparison between the treatment of railroads and the treatment of "local businesses." That opening clause reflects Congress's apparent view that the prohibited forms of discrimination "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). Congress could reasonably conclude that a state tax giving a competitive advantage to one form of interstate transport over another will burden interstate commerce.

In any event, the text of the operative prohibition requires the court to determine, not whether the challenged Alabama tax discriminates against interstate commerce as such, but whether it "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). A state tax that subjected interstate motor carriers to uniquely onerous treatment, for example, might well burden

or discriminate against interstate commerce, but it would not violate the 4-R Act. As the Court in *CSX* explained, "[t]he distinctions drawn in § 11501(b) are not between interstate and local actors, as the State contends, but rather between railroads and other actors, whether interstate or local." 131 S. Ct. at 1109.

b. Petitioners are also wrong in arguing (Pet. Br. 29-30) that the court of appeals' holding deprives the word "discriminates" of consistent meaning. Under Section 11501(b)(4), a state tax "discriminates" if it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted). Because Section 11501(b)(4) bars only state taxes that "discriminate[] against a rail carrier," the plaintiff in a 4-R Act suit will always allege that railroads have been unreasonably disfavored vis-à-vis some other class of taxpayers. The fact that many classes of "favored" taxpayers are imaginable simply means that the term "discriminates" is capacious, not that it is inconstant. See *id.* at 1112 (explaining that "the very purpose of a catch-all provision like subsection (b)(4) is to avoid the necessity of listing each matter (here, each kind of tax discrimination) falling within it"); *id.* at 1113 ("[I]n the context of the 4-R Act, th[e] word [discriminates] has, and has always had, just one meaning.").

c. The Court need not adopt a fixed comparison class (let alone the particular class that petitioners urge) to render the 4-R Act administrable. See Pet. Br. 38-43. In Section 11501(b)(4) litigation, a court does not simply select the comparison class it prefers. Rather, the plaintiff, who is "master of the complaint,"

Caterpillar Inc. v. *Williams*, 482 U.S. 386, 398-399 (1987), makes a factual allegation of discrimination, based on the nature of the state tax at issue and the identity of the group that is claimed to receive more favorable treatment, cf. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (referring to "discrimination" under ADEA as "ultimate question[] of fact") (internal quotation marks omitted); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of Title VII "is a factual matter"). The court then decides whether the comparison class alleged is similarly situated to the plaintiff and otherwise appropriate to the circumstances—and either a broad class (commercial and industrial taxpayers) or a narrow class (competitors) may qualify in a given case. Compare, *e.g.*, *Kansas City S. Ry.* v. *Koeller*, 653 F.3d 496, 500, 508-510 (7th Cir.), cert. denied, 132 S. Ct. 855 (2011), with *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 985-986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000); cf. Samuel Eckman, Comment, *A State-Centered Approach to Tax Discrimination Under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051, 1082-1083 (2012). Several courts in Section 11501(b)(4) cases have embraced that flexible approach. See, *e.g.*, *Lohman*, 193 F.3d at 985-986; *Burlington N. R.R.* v. *Commissioner of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993); cf. *Koeller*, 653 F.3d at 508-510.

d. Finally, the legislative history on which petitioners rely (Pet. Br. 30-35) does not support their reading of Section 11501(b)(4). History relating to Section 11501(b)(4) itself is quite sparse, because language similar to that provision did not appear until near the end of the lengthy process that produced the

4-R Act. See *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981); H.R. 12891, 93rd Cong., 2d Sess 22 (Mar. 26, 1974) (generally prohibiting discrimination against common carriers). Much of the history on which petitioners rely—which consists mainly of testimony at hearings, and often generally refers to the treatment of "other taxpayers" without specifying which ones (*e.g.*, Pet. Br. 31-32)—dates from before any language analogous to the text of Section 11501(b)(4) was under consideration by Congress. All of that history, moreover, dates from a period when Congress was still considering including common carriers other than railroads within the scope of the prohibition on discrimination. See, *e.g.*, 121 Cong. Rec. 41,888, 41,894, 41,926 (Dec. 19, 1975) (quoting Conference Report on S. 2718); *Railroads—1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1178 (1975) (statement of American Trucking Associations favoring provision "prohibit[ing] discriminatory taxation * * * of the property of any carrier or freight forwarder") (cited in Pet. Br. 34). That history therefore does not indicate that the provision as enacted forbids a comparison between railroads and their competitors.

3. Here, the gravamen of respondent's challenge is that purchases of diesel fuel by interstate motor carriers and interstate water carriers are exempt from a generally applicable sales and use tax that railroads must pay when they purchase comparable fuel. See Pet. App. 20a (Cox, J., dissenting) (citing J.A. 28).[7] As we explain below, the court of appeals

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[7] Section 11501(b)(4) cases involving alleged discrimination by means of exemptions naturally lend themselves to a comparison

erred in disregarding the fact that interstate motor carriers (but not railroads) must pay a different Alabama tax when they purchase diesel fuel. But if motor carriers' purchases of diesel fuel were altogether exempt from Alabama tax, the fact that railroads are treated the same as the mine run of Alabama taxpayers would not save the scheme from invalidation under the 4-R Act. Indeed, at various points in this litigation, petitioners appeared to accept that railroads' competitors constituted a proper comparison class for purposes of the Section 11501(b)(4) analysis. See Pet. App. 8a, 11a; U.S. Petition-stage Amicus Br. 19-21. The court of appeals therefore was correct to approve that comparison class in this case.

B. A State Can Justify A Challenged Tax's Differential Treatment of Railroads By Pointing To An Alternative And Comparable Tax That Applies To The Comparison Class But Not To Railroads

In remanding this case, the Court in *CSX* explained that "[w]hether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers." 131 S. Ct. at 1110 n.8. Here, petitioners' justification for exempting motor carriers from Alabama's sales and use tax on diesel fuel is that such carriers already pay different (and higher) state excise taxes on diesel fuel, *i.e.*, motor-fuel taxes from which railroads are exempt. The court of appeals

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class of railroad competitors, since exemptions are more readily used to remove a small class from an otherwise generally applicable tax than to exclude almost everyone from the scope of the tax at the outset. Cf. *CSX*, 131 S. Ct. at 1109.

rejected that justification as a matter of law, refusing to consider any "taxes paid on diesel-fuel purchases" other than "the sales and use tax with respect to fuel." Pet. App. 12a-13a (internal quotation marks omitted). That ruling was erroneous. Under Section 11501(b)(4), one way a State can justify differential treatment of railroads with respect to a particular tax is to show that the comparison class is subject to alternative and comparable state taxes that are not levied against railroads.

1. a. As discussed above, the term "discriminates" calls for an inquiry into whether a "failure to treat all persons equally" is justified by some "reasonable distinction * * * between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted). A "reasonable distinction" can be based on the different actions or characteristics of the favored and disfavored groups. See *ibid.* (noting that whether "the groups are the same in all relevant respects" is pertinent); *id.* at 1109 & n.8 (explaining that a State does not violate Section 11501(b)(4) if it subjects railroads to a tax and exempts one person from that tax "for some reason having nothing to do with railroads"). Such a distinction can also be based on the different treatment of those groups under other provisions of state tax law. If a motor carrier pays motor-fuel taxes for each gallon of diesel fuel and a rail carrier does not, that may be a reasonable basis for subjecting the rail carrier to sales and use tax on each gallon of diesel fuel but exempting the motor carrier from that tax. Depending on the amounts of those separate taxes and how they are imposed, the result of that scheme may be equality of treatment rather than "discriminat[ion]." 49 U.S.C. 11501(b)(4).

To be sure, Section 11501(b)(4) speaks "in the singular about 'another tax,'" Pet. App. 13a, and a State does not violate the provision unless the challenged tax itself "discriminates," 49 U.S.C. 11501(b)(4). But a court cannot determine whether prohibited discrimination exists without considering how the various parties are situated in relation to the taxable item and to each other. Section 11501(b)(4) does not require the court conducting that inquiry to disregard a comparable tax on the relevant item simply because that tax is found in a different portion of a State's code, or is given a different name or label, than the allegedly discriminatory tax. Cf. *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U.S. 217, 227 (1908) (focusing on the "nature and effect" of a state tax rather than its "name" or "form of words").

The original version of the prohibition found in Section 11501(b)(4)—to which the current text must be construed as "substantive[ly]" identical, § 3(a), 92 Stat. 1466; see *CSX*, 131 S. Ct. at 1107 n.6; *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987)—reinforces that conclusion. The 1976 enactment barred "[t]he imposition of any other tax which *results in discriminatory treatment* of a common carrier by railroad." 90 Stat. 54 (emphasis added). That language suggests a congressional focus on whether the railroad ultimately suffers a practical "disadvantage" from the tax, Pet. App. 25a (Cox, J., dissenting), and not merely on how the railroad fares within the four corners of the challenged tax provision.

b. That conclusion is also bolstered by the "complementary tax" doctrine that applies in other areas of federal tax-discrimination law. In various contexts

where discriminatory state taxation is forbidden, this Court has long held that differential treatment under a particular state tax law can be justified by the existence of a complementary tax that levels the playing field.

That doctrine has been a consistent feature of this Court's dormant Commerce Clause jurisprudence for more than a century. See 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.14[3][c], at 4-111 to 4-112 (3d ed. 2000). In *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932), for example, the Court considered whether a tax on gasoline "intended to be stored or used for consumption" in South Carolina after being shipped into the State amounted to "discrimination against interstate commerce." *Id.* at 474, 479. Emphasizing that "[d]iscrimination * * * is a practical conception," the Court held that the existence of a separate state tax on gasoline use and consumption, which ensured that all entities using gasoline "in their business enterprises[] pay the same amount on the gasoline," justified the differential treatment of out-of-state gasoline under the challenged tax. *Id.* at 481. The plaintiff in *Gregg Dyeing* contended that there was no "right to invoke other statutes" taxing gasoline "to support the validity of the [a]ct assailed." *Id.* at 479. In rejecting that argument, the Court explained that the constitutionality of a State's taxing scheme "is not to be determined by artificial standards. * * * There is no demand in th[e] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit." *Id.* at 480.

Similarly in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), the Court held that a use tax that

applied only to goods purchased outside Washington did not discriminate against interstate commerce because goods purchased in the State were subject to a sales tax and the two taxes imposed equivalent burdens. The Court explained that "[f]or the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another." *Id.* at 584. Taking both provisions into account, the Court concluded, "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Ibid.*; see *id.* at 585-586.[8]

The law in cases involving state-tax discrimination against the federal government has long been to the same effect. Thus, in *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376 (1960), the Court observed that its determination whether a particular Texas tax provision "discriminate[d] against the Government or those with whom it deals" could not "rest merely on an examination of that article [of the Texas code]. It does not operate in a vacuum." *Id.* at 383, 387. Rather, the Court explained, "it is necessary to determine how other taxpayers similarly situated are treated" under the "tax structure of the state." *Id.* at 383 (internal quotation marks omitted); see, *e.g.*, *Washington* v. *United States*, 460 U.S. 536, 542, 544-546 (1983) (explaining that, in assessing

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[8] See also, *e.g.*, *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 102-103 (1994); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69-70 (1963); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204-205 (1961); *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 249-252 (1928).

whether a state tax discriminates against the federal government, "[t]he entire trend of [the Court's] decisions" since the 1930s "has been to avoid wooden formalism") (internal quotation marks omitted); see also, *e.g.*, *Mackay Tele. & Cable Co.* v. *City of Little Rock*, 250 U.S. 94, 100 (1919) (examining tax other than challenged tax in ruling on equal-protection claim).

Read against that backdrop, the word "discriminates" in Section 11501(b)(4) is naturally understood to require a court to consider the contention that the comparison class is subject to a tax that is comparable to the challenged tax and falls on the same taxable item. Nothing in the 4-R Act indicates that Congress intended the inquiry under Section 11501(b)(4) to be more truncated and formalistic than the inquiry carried out in other areas where federal law bars States from imposing discriminatory taxes. Cf. *CSX*, 131 S. Ct. at 1109.[9] When Congress prohibited any state tax

[9] *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979), is not to the contrary. In *Snead*, the Court analyzed 15 U.S.C. 391, which forbids a State from imposing "a tax on or with respect to the generation or transmission of electricity which discriminates" against out-of-state producers or consumers. The Court refused to incorporate a general gross-receipts tax into its discrimination analysis, explaining that "the federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." 441 U.S. at 149. Section 11501(b)(4) contains no analogous limiting language. And even if it did, the alternative taxes on which petitioners rely in this case would still qualify for consideration because (unlike the general gross-receipts tax invoked by the State in *Snead*) those taxes apply only to motor fuel. In addition, the Court in *Snead* identified clear evidence that Congress had enacted 15 U.S.C. 391 specifically to invalidate the particular state tax before the Court, see 441 U.S. at 149-150, and that rationale has no application here. See, *e.g.*, *Burlington N.*

that "discriminates against a rail carrier," it was presumably aware of this Court's Commerce Clause precedents, see 49 U.S.C. 11501(b) (explaining that conduct proscribed by the 4-R Act "unreasonably burden[s] and discriminate[s] against interstate commerce"); S. Rep. No. 445, 87th Cong., 1st Sess. 445-448 (1961); cf. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010), and did not reject the established, "judicially defined concept" they reflect, *Davis*, 489 U.S. at 813.

c. The court of appeals' contrary approach gives rise to "bizarre" results that are inconsistent with the purposes of the anti-discrimination provision. Pet. App. 25a (Cox, J., dissenting).

Refusing to take account of any tax other than the allegedly discriminatory tax could make railroads "most-favored taxpayers," *CSX*, 131 S. Ct. at 1109 n.8, turning Section 11501(b)(4) from a shield against discrimination into a sword by which to obtain a business advantage. If the Alabama sales and use tax paid by rail carriers on diesel fuel is equivalent to (or less than) the state motor-fuel taxes paid by motor carriers on diesel fuel, then a railroad suffers no "discernible disadvantage." Pet. App. 25a (Cox, J., dissenting); cf. *North Dakota* v. *United States*, 495 U.S. 423, 439 (1990) (plurality opinion) ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it."). Under respondent's approach, however, a railroad could obtain a 4-R Act injunction against imposition of the sales and use tax on its diesel fuel, see 49 U.S.C. 11501(c), thereby acquiring a competitive advantage over motor carriers.

R.R. v. *City of Superior*, 932 F.2d 1185, 1190 (7th Cir. 1991) (Flaum, J., dissenting in part).

Such a "windfall" goes far beyond the congressional purposes of "restoring the financial stability of railroads," *CSX*, 131 S. Ct. at 1109, 1110 n.8, and "foster[ing] competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33; see Pet. App. 25a (Cox, J., dissenting) ("a tax that places rail carriers in the same tax position as their competitors" or "a better one" cannot "threaten railroads' financial stability"); see also *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, 1305 (8th Cir.) (Gibson, J., dissenting), cert. denied, 502 U.S. 856 (1991).

Focusing solely on the challenged tax could also make the outcome of a Section 11501(b)(4) case turn on trivial differences in the structure of different States' tax codes. If a State adopted in separate provisions, and gave separate names to, what is essentially a unitary levy on railroads and motor carriers, it would risk a determination that each provision imposes a separate tax and that the motor-carrier-related provision cannot form part of the State's justification in a Section 11501(b)(4) suit. In contrast, if the State enacted in a single provision an "excise tax" that imposes separate financial responsibilities on railroads and motor carriers, it would maximize its chances of avoiding Section 11501(b)(4) liability. The 4-R Act's application should not turn on such artificial distinctions. Cf. *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 133-134 (1987) (rejecting interpretation of tax-discrimination provision that would "do no more than place a meaningless hurdle before state legislatures seeking to conform their tax scheme to the requirements of [that] provision").

2. In refusing to consider Alabama's motor-fuel taxes, the court of appeals asserted that the "actual fairness" of the State's "arrangements" for taxing diesel fuel was "too difficult and expensive to evaluate." Pet. App. 13a. But this Court recognized in *CSX* that, although "[d]iscrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified," such difficulties are no reason to "flout the congressional command" by "declar[ing] the matter beyond us." 131 S. Ct. at 1114; see *Burlington N. R.R.*, 481 U.S. at 464 (stating that possible burden on courts under Section 11501 could not justify "reconsider[ing]" Congress's judgment). The court of appeals should not have pretermitted the discrimination inquiry here on the ground that examining one alternative state levy on diesel fuel was unduly onerous.

Petitioners did not ask the district court to examine and weigh together *all* of the various tax burdens that state law places on railroads and motor carriers. With regard to the entirety of their operations, railroads and motor carriers—which purchase and own divergent kinds and amounts of property—are in many respects differently situated, see Pet. App. 61a-62a, and a broad comparison between them would "involve[] balancing incommensurate burdens imposed on disparate activities," *Associated Indus.* v. *Lohman*, 511 U.S. 641, 655-656 & n.5 (1994); see *id.* at 649-650; *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 105 (1994) (stating that attempt to compare "taxes on dissimilar events" would "plunge" the courts "into the morass of weighing comparative tax burdens") (internal quotation marks omitted); *McNamara*, 817 F.2d at 377 (refusing to

evaluate the "intrinsic economic fairness of a tax system to a particular taxpayer").

The justification that petitioners advanced in the district court was far more limited in scope. To explain the disparate treatment of motor carriers, petitioners relied solely on a few provisions of Alabama law, separate from the provisions imposing the sales and use tax, that specifically addressed motor-fuel taxation. See Ala. Code § 40-17-325(a)(2); Pet. App. 38a-39a & nn.6-7. Petitioners thus sought to compare the excise-tax burden that railroads shoulder for a gallon of diesel fuel to the excise-tax burden that motor carriers shoulder for the same taxable item. See Pet. App. 55a-58a. That comparison was especially apt because the state-law provisions on which petitioners relied were central to respondent's own claim of unlawful discrimination, since it is the imposition of motor-fuel tax on motor carriers that exempts those carriers from any additional excise tax (including sales and use tax) on the fuel. See Ala. Code § 40-17-325(a)(2), (b); Pet. App. 38a-39a & nn.6-7, 55a.

Deciding whether such an alternative tax is comparable to the challenged tax in nature and amount is a manageable undertaking, not a "Sisyphean burden." Pet. App. 16a; see *Lohman*, 511 U.S. at 655-656 n.5 (stating that a "court that is confined to examining the rates specified in statutes, ordinances, or regulations for taxes assessed on 'substantially equivalent event[s]'" can avoid "an amorphous inquiry," even if examination of multiple state-law provisions is required); see also, *e.g.*, *Georgia State Bd.*, 552 U.S. at 18-19 (explaining that, under the 4-R Act, courts must ascertain "true market value" even if the question is "complex" and there is a "clash of experts"). In this

case, the district court was able to consider Alabama's motor-fuel taxes, and to make detailed factual findings about how they compared to the sales and use tax on diesel fuel, without undue difficulty or expense. See Pet. App. 56a (concluding, based on parties' stipulations and a one-day bench trial that included expert testimony, that "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same"); *id.* at 21a (Cox, J., dissenting) (noting that respondent did not challenge that factual conclusion on appeal); see also *Norfolk S. Ry.* v. *Alabama Dep't of Revenue*, No. 08-cv-00285, 2008 WL 6515212 (N.D. Ala. Apr. 9, 2008) (making similar findings in prior case involving the same Alabama tax scheme), aff'd, 550 F.3d 1306 (11th Cir. 2008).[10]

Courts have regularly carried out similar analyses in dormant Commerce Clause cases and in suits alleging that state taxes discriminated against the federal government. See pp. 23-26, *supra*. Courts have noted in those contexts that it sometimes may be difficult for a State to prove that an alternative tax is actually comparable to the challenged tax. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 338-339, 344 (1996). But any such difficulty goes to whether the State's justification for differential treatment should ultimately be accepted, not to whether it is cognizable. If

[10] The court of appeals relied on a First Amendment case, *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), for the proposition that courts "are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Id.* at 589-590 (quoted in Pet. App. 16a). But the Court in that case demanded a particularly high level of "precision" in light of the "heavy burden on the State to justify" singling out the press for taxation. *Id.* at 589 & n.12, 592-593. That concern is not implicated here.

a State in a Section 11501(b)(4) case fails to establish that the alternative tax is sufficiently comparable to the tax imposed on railroads, then the court should reject the asserted justification. See *CSX*, 131 S. Ct. at 1108-1109; cf. *Fulton Corp.*, 516 U.S. at 333, 344. The mere possibility that a State might fail in that regard, however, provides no basis for categorically refusing to consider whether a tax applicable to the comparison class but not to railroads negates a claim of "discriminat[ion]" under Section 11501(b)(4).[11]

3. The appropriate disposition of this case is a remand to the court of appeals. In holding that respondent had established a meritorious discrimination claim, the court below expressly disregarded an important aspect of the Section 11501(b)(4) analysis. That court should have the initial opportunity to review, under the correct legal standard, the district court's conclusion that "neither transportation mode is unjustifiably favored" because railroads and motor carriers are subject to comparable taxes on their motor fuel. Pet. App. 57a.

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[11] The "theoretical difficult[y]" with which the court of appeals expressed particular concern was that the relative amounts paid by rail carriers and motor carriers under their respective diesel-fuel-related taxes might shift over time, because the sales and use tax is tied to the price of fuel while the motor-fuel taxes are not. Pet. App. 14a-15a. That difference could be relevant to the comparability analysis. See *id.* at 57a-58a. The court of appeals was wrong, however, to use an entirely hypothetical future change in the price of diesel fuel as a reason to reject the State's justification—or, indeed, any justification relying on a tax other than the challenged tax. See *id.* at 13a, 16a. Under Section 11501(b)(4), the question is whether the challenged tax "discriminates," not whether it *might* discriminate at some future time if particular contingencies occur.

Resolution of respondent's claim of discrimination vis-à-vis interstate water carriers does not turn on whether the water carriers pay a comparable alternative state tax; petitioners have not asserted that any such comparable tax exists. See *CSX*, 131 S. Ct. at 1106 n.3. Here too, however, a remand is appropriate. The district court gave several reasons for rejecting respondent's claim "that the taxes it pays compared to water carriers are discriminatory." Pet. App. 63a; see *id.* at 64a-66a. Rather than evaluate the district court's rationales, the court of appeals focused almost entirely on motor carriers and discussed water carriers only in a single sentence of its analysis. *Id*. at 17a. Accordingly, a remand is warranted for fuller consideration of respondent's claim of discrimination as compared to interstate water carriers.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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STATUTORY APPENDIX

1. 49 U.S.C. 11501 provides:

Tax discrimination against rail transportation property

(a) In this section—

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdic-

tion has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical princi-

ples applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.