No. 09- 09-520 OCT 28 2009

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE AND
TIM RUSSELL, COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge as "another tax that discriminates against a rail carrier" under section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4).

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly held. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

CSX Transportation, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) and its order denying hearing en banc (App. 39a) are unreported, as are the orders and opinion of the district court (App. 3a-12a). The controlling opinion of the court of appeals in *Norfolk Southern Railway* v. *Alabama Department of Revenue* is reported at 550 F.3d 1306, and is reproduced here for the Court's convenience (App. 13a-38a).

JURISDICTION

The court of appeals entered judgment on September 1, 2009. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act") provides, in relevant part:

> § 11501. 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 jurisdiction 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.

49 U.S.C. § 11501(a)-(b).

STATEMENT OF THE CASE

In *Norfolk Southern Railway* v. *Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008), App. 13a-38a, the Eleventh Circuit held that a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is not subject to challenge as "another tax that discriminates against a rail carrier" under section 306(1)(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). The Eleventh Circuit acknowledged that its interpretation of the 4-R Act directly conflicts with decisions of the Eighth Circuit and the Minnesota Supreme Court. In the present case, the Eleventh Circuit denied a petition for en banc hearing to reconsider *Norfolk Southern*, thus leaving in place the square conflict among the lower courts. Its decision, which raises a fundamental issue regarding the appropriate bounds under the 4-R Act of railroad taxation by all 50 States, is worthy of this Court's review.

A. Statutory Background

The 4-R Act protects interstate rail carriers "by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads." *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 336 (1994). Congress enacted the prohibition in recognition "that the railroads are 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." *Ibid.* (internal quotation marks omit-

ted). The 4-R Act sets forth four forbidden taxation schemes. 49 U.S.C. § 11501(b).

The first three schemes concern *ad valorem* property taxes: (1) assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of "other commercial and industrial property"; (2) levying a property tax based on such an assessment; and (3) levying a property tax at a higher rate that that imposed on other "commercial and industrial property." § 11501(b)(1)-(3). These methods of discrimination were commonly practiced by the States prior to enactment of the 4-R Act.

The fourth scheme is: "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." § 11501(b)(4). Subsection (b)(4) "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991). Congress recognized that the temptation to raise revenues on the backs of railroads might be too great to resist, and thus enacted subsection (b)(4) as a prophylactic protection against unfair taxing schemes not encompassed in subsections (b)(1)-(3).

In *ACF Industries*, this Court held that exemptions from a generally applicable *property* tax were not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. As shown below, the lower courts have since divided over whether the same holds for exemptions from a generally applicable *non-property* tax.

B. Proceedings Below

1. The parties stipulated to all relevant facts. 11th Circuit Expanded Record Excerpts ("ERE") No. 12. Petitioner CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate commerce. App. 7a. CSXT operates in Alabama, and is subject to taxation by Alabama and municipalities and subdivisions within the State. *Ibid.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, or use of diesel fuel in Alabama. App. 7a. Counties and municipalities in Alabama impose additional sales and use taxes, which parallel the state tax, and which likewise apply to the railroads' purchase and use of diesel fuel. *Ibid.* In 2006 and 2007, CSXT paid some $4.1 million and $3.0 million, respectively, in sales and use taxes on its purchase and consumption of diesel fuel in Alabama. *Id.* at 8a n.2. The railroads' principal competitors in Alabama, motor carriers and water carriers, are expressly exempt from sales and use taxes on purchase and consumption of diesel fuel, and therefore paid no such tax. *Id.* at 7a-8a; see Ala. Code §§ 40-17-2(1), 40-23-4(a)(10), 40-23-62(12).

2. On April 18, 2008, CSXT filed suit in federal district court, claiming that, given the exemption granted motor carriers and water carriers, the 4-R Act prohibits Alabama from imposing sales and use tax on CSXT's purchase and consumption of diesel fuel. ERE No. 1. On May 29, 2008, CSXT moved for a preliminary injunction to halt respondent Alabama tax authorities ("Alabama") from enforcing the tax as to CSXT. ERE No. 5. On July 8, 2008, the district

court granted a preliminary injunction, holding that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, it follows that there is reasonable cause to believe that the [4-R] Act has been violated—i.e., the Alabama diesel fuel tax on railroads is discriminatory" under subsection (b)(4). App. 12a.

3. On December 11, 2008, the Eleventh Circuit issued its opinion in *Norfolk Southern Railway* v. *Alabama Department of Revenue*. In that case, another interstate railroad challenged precisely the same Alabama sales and use tax, on precisely the same grounds, as CSXT does here. The Eleventh Circuit rejected the challenge, ruling that exemptions from a generally applicable non-property tax are not even subject to scrutiny, and thus are categorically non-discriminatory, under subsection (b)(4). App. 24a-25a.

The court of appeals noted that its interpretation of subsection (b)(4) was consistent with the majority opinion in *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, 78 F.3d 438, 442-44 (9th Cir. 1996), which also held that subsection (b)(4) did not permit challenges to exemptions from generally applicable non-property taxes. App. 30a-31a & n.14. At the same time, the court acknowledged that its interpretation was inconsistent with *Union Pacific Railroad* v. *Minnesota Department of Revenue*, 507 F.3d 693, 695-96 (8th Cir. 2007); *Burlington Northern, Santa Fe Railway* v. *Lohman*, 193 F.3d 984, 985-86 (8th Cir. 1999); and *Burlington Northern Railroad* v. *Commissioner of Revenue*, 606 N.W.2d 54, 58-59 (Minn. 2000), which "scrutinized exceptions to generally applicable non-property taxes" under subsection (b)(4), and which the Eleventh Circuit rejected as not "persuasive." App. 31a & n.15 (emphasis omitted). Even

though the conflict among the lower courts is clear and unavoidable, the railroad in *Norfolk Southern* did not seek this Court's review of the Eleventh Circuit's holding.

4. Less than a week after the Eleventh Circuit issued *Norfolk Southern*, the district court in this case vacated its preliminary injunction order and dismissed CSXT's complaint "[i]n light of the dispositive Eleventh Circuit's decision." App. 3a. CSXT appealed and, in light of *Norfolk Southern*, sought an initial hearing by the court en banc, which the Eleventh Circuit denied. *Id.* at 39a. Shortly thereafter, the panel affirmed the district court's judgment, recognizing that it was "bound" by *Norfolk Southern*. *Id.* at 2a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decisions in *Norfolk Southern* and below deepen a conflict in the lower courts over the scope of § 306(1)(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). Two circuits have held that a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is not subject to challenge under subsection (b)(4) as "another tax that discriminates against a rail carrier." Another circuit and two state courts of last resort have held the opposite. This is precisely the kind of conflict that this Court routinely grants certiorari to review. See, *e.g.*, *CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 128 S. Ct. 467, 471-72 (2007); *ACF Indus., Inc.*, 510 U.S. at 337-38. Moreover, this case presents an ideal vehicle to resolve the conflict.

I. THERE IS AN ACKNOWLEDGED CONFLICT AMONG THE LOWER COURTS ON THE QUESTION PRESENTED.

The Eleventh Circuit in *Norfolk Southern* held that exemptions to generally applicable non-property taxes are not subject to challenge under § 11501(b)(4), even where railroads are taxed and competitors to railroads are exempt. App. 28a-32a; *accord id.* at 2a. In so holding, the court of appeals relied exclusively on *ACF Industries*, where this Court ruled that property tax exemptions are not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. According to the Eleventh Circuit, *ACF Industries* "is equally applicable" to non-property tax exemptions. App. 29a. The Eleventh Circuit's ruling is in accord with *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, where the Ninth Circuit read subsection (b)(4) in the same restrictive manner. 78 F.3d at 443 ("Although *ACF* specifically addressed property tax exemptions, the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions.").

The decisions of the Ninth and Eleventh Circuits directly conflict with two decisions of the Eighth Circuit. In *Burlington Northern, Santa Fe Railway* v. *Lohman*, the Eighth Circuit held that non-property tax exemptions are subject to challenge under subsection (b)(4), and invalidated a Missouri statute subjecting railroads, but not "their direct competitors," to "a generally imposed nonproperty tax." 193 F.3d at 986. The Eighth Circuit adhered to its interpretation of subsection (b)(4) in *Union Pacific Railroad* v. *Minnesota Department of Revenue*, which invalidated a Minnesota statute imposing a generally applicable sales and use tax on fuel consumption by railroads, while exempting motor carriers and air

carriers. 507 F.3d at 695-96. See also *ATSF Ry.*, 78 F.3d at 444 (Nielsen, J., dissenting) (contending that railroads may invoke subsection (b)(4) to challenge scheme that imposes transaction privilege tax and use tax on railroads while exempting motor carriers).

Two state courts of last resort have expressed the same view of subsection (b)(4). In *Burlington Northern Railroad* v. *Commissioner of Revenue*, the Minnesota Supreme Court expressly rejected the State's argument that *ACF Industries* immunized non-property tax exemptions from scrutiny under subsection (b)(4). 606 N.W.2d at 58-59. And, in *Atchison, Topeka & Santa Fe Railway* v. *Bair*, 338 N.W.2d 338, 346-48 (Iowa 1983), the Iowa Supreme Court held invalid under subsection (b)(4) a statutory scheme that exempted the railroads' competitors from a fuel excise tax applied to railroads. *Accord, e.g.*, *Kan. City S. Ry.* v. *Bridges*, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (invalidating under subsection (b)(4) the imposition of Louisiana sales and use tax on the railroads' use and consumption of fuel, given the exemption of motor carriers and water carriers).

This conflict over the scope of subsection (b)(4) is unquestionably worthy of this Court's review. The conflict is particularly stark between the Eleventh Circuit's decisions below and in *Norfolk Southern* and the Eighth Circuit's decisions in *Lohman* and *Union Pacific*. In all four cases, a railroad challenged under subsection (b)(4) a State's generally applicable sales and use taxes on diesel fuel because railroads were taxed while their direct competitors were exempt. Yet the courts reached diametrically opposed conclusions: while Alabama's discriminatory taxation scheme continues unabated, Missouri's and Minnesota's have been enjoined.

The States' ability to tax—and, more fundamentally, whether non-property tax exemptions are subject to challenge under subsection (b)(4) in the first place—should not depend solely on the Circuit in which the State happens to be located. This Court should grant review to resolve this fundamental and acknowledged conflict over the provision's scope.

II. THE ELEVENTH CIRCUIT'S DECISION MISINTERPRETS THE 4-R ACT AND CONFLICTS WITH THIS COURT'S DECISIONS.

This Court ruled in *ACF Industries* that exemptions from generally applicable property taxes are not subject to challenge under § 11501(b)(4). 510 U.S. at 347-48. The Eleventh Circuit construed *ACF Industries* as foreclosing challenge not only to property tax exemptions, but to exemptions from generally applicable non-property taxes as well. App. 26a-32a; see also *id.* at 2a (adhering to *Norfolk Southern*). The court's ruling misinterprets a precedent of this Court and, in so doing, improperly curtails the protection Congress intended to provide railroads under § 11501(b)(4). That the Eleventh Circuit erred reinforces the need for this Court's review, both to provide uniformity in the law and to promote Congress's clear intent in passing the 4-R Act.

The plaintiff in *ACF Industries* claimed that Oregon violated subsection (b)(4) "by imposing an ad valorem tax upon railroad property while exempting various other, but not all, classes of commercial and industrial property." 510 U.S. at 335. To decide whether the claim was cognizable under subsection (b)(4), this Court examined the interplay between that provision, which prohibits States from imposing "another tax that discriminates against a rail carrier providing transportation," 49 U.S.C. § 11501(b)(4),

and subsections (b)(1)-(3), which focus expressly on discriminatory property taxes.

The Court first addressed subsections (b)(1)-(3). *ACF Indus.*, 510 U.S. at 340-43. Those provisions prohibit a State or municipality from imposing a tax rate or assessment ratio on railroads that exceeds the rate or assessment ratio applied to other "commercial and industrial property." 49 U.S.C. § 11501(b)(1), (3). The term "commercial and industrial property," in turn, 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*." § 11501(a)(4) (emphasis added). It follows, the Court reasoned, that a railroad may challenge a tax rate or assessment ratio under subsections (b)(1)-(3) as exceeding the rate or assessment ratio applied to other "'commercial and industrial property'" only if that other property was actually "'subject to a property tax levy.'" 510 U.S. at 341-42. Because property exempted from taxation is not "'subject to a property tax levy,'" the Court concluded that "railroads may not challenge property tax exemptions under" subsections (b)(1)-(3). *Id.* at 342.

That conclusion, the Court explained, impacts the scope of subsection (b)(4). Recognizing that it "must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3)," the Court held that it "would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." *Id.* at 343. Accordingly, the Court ruled that "[t]he structure of § [11501] ... warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property

while exempting various classes of nonrailroad property." *Ibid.*

ACF Industries does not govern exemptions from non-property taxes. The Court's holding that property tax exemptions are immune from scrutiny under subsection (b)(4) rests entirely on the conclusion that such exemptions are "beyond the reach of subsections (b)(1)-(3)." *Ibid.* That conclusion, in turn, rests entirely on the fact that the comparison class in subsections (b)(1)-(3)—other "'commercial and industrial property'"—excludes exempt property. *Id.* at 341-42. This plain congressional intent to immunize exemptions from scrutiny is unique to property taxes, and has no bearing whatsoever on non-property taxes like the sales and use taxes at issue here. Because nothing in subsections (b)(1)-(3) reflects a decision to freely permit non-property tax exemptions, and because nothing in subsection (b)(4) reflects a decision to permit *any* exemptions, it would not "subvert the statutory plan" to permit railroads to challenge discriminatory non-property tax exemptions under subsection (b)(4). *Id.* at 340.

To the contrary, it would subvert the statutory plan to preclude such challenges.

> Although Congress was long concerned with blatant property-tax discrimination by many states, it realized near the end that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation. Congress therefore added § [11501(b)(4)] to ensure that the statute would not fail of its broader purpose.

Kan. City S. Ry. v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987).

The point is illustrated by *Burlington Northern, Santa Fe Railway* v. *Lohman*, which concerned a Missouri scheme that imposed a generally applicable sales and use tax on the railroads' purchase and use of diesel fuel while exempting trucks and barges, the railroads' major competitors. 193 F.3d at 985. The Eleventh Circuit's reading of subsection (b)(4) would immunize Missouri's scheme from challenge, thereby placing the railroads "at a competitive disadvantage that would defeat the purpose of the statute—financial stability." *Id.* at 986. At the same time, the Eleventh Circuit's view would permit a subsection (b)(4) challenge to a lesser form of discrimination—for instance, imposing a four percent sales and use tax on the railroads, and a two percent sales and use tax on trucks and barges. There is no basis in the text or structure of § 11501 for, and it is inconceivable that Congress intended, such a result.

This is the second time in three years that the Eleventh Circuit has misconstrued the scope of *ACF Industries*. See *CSX Transp., Inc.* v. *State Bd. of Equalization*, 472 F.3d 1281, 1288-90 (11th Cir. 2006), *rev'd*, 128 S. Ct. 467 (2007). In the process, along with the Ninth Circuit in *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, the Eleventh Circuit has created a square conflict among the lower courts. This Court correctly granted certiorari in *CSX Transportation* and reversed, and it should do the same here.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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