No. 09-520

In the Supreme Court of the United States

CSX TRANSPORTATION INC., PETITIONER

v.

ALABAMA DEPARTMENT OF REVENUE, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable 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."

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the following question:

> Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable 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."

STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (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." *Id.* § 101(a), 90 Stat. 33; see *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

a. The Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See 4-R Act § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). To protect those important channels of interstate commerce, Congress created an exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c).

Section 11501(b) describes several types of prohibited taxation. Subsections (b)(1)-(3) address ad valorem property taxes; those provisions bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property rela-

[1] Section 306 of the 4-R Act, 90 Stat. 54, has been repeatedly recodified and rephrased without substantive change. It was originally codified at 49 U.S.C. 26c (1976). It was then recodified in 1978, with a slight change in language, at 49 U.S.C. 11503 (1994) as part of the enactment into positive law of Title 49. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. That restatement of prior law was "without substantive change." *Id.* § 3(a), 92 Stat. 1466; see *Burlington N. R.R.*, 481 U.S. at 457 n.1. In 1995, the provisions of Section 11503 were again reenacted without substantive change but renumbered as Section 11501, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission and created the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. Accordingly, this brief refers throughout to the current codification of Section 306 at 49 U.S.C. 11501. See Sup. Ct. R. 34.5.

tive to "other commercial and industrial property." Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *CSX Transp.*, 552 U.S. at 16, 18 (referring to "objective benchmark[s]" underlying "the comparison of ratios the statute requires" in Subsections (b)(1)-(3)); *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 from imposing "another tax that discriminates against a rail carrier." By its terms, Subsection (b)(4) reaches beyond the ad valorem property taxes addressed in the preceding provisions "to prevent discriminatory taxation of a railroad carrier by any means." *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

b. In *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994) (*ACF*), this Court addressed the application of Subsection (b)(4) to allegedly discriminatory state property taxes. In particular, the Court considered "[w]hether a tax upon railroad property is even subject to challenge under [S]ubsection (b)(4) on the ground that certain other classes of commercial and industrial property are exempt" from the property tax. *Id.* at 338-339. Ruling against the challenger, the Court concluded that Subsection (b)(4) does not limit States' authority to exempt non-railroad property from taxes that rail carriers are required to pay. See *id.* at 338-348. Accordingly, the Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under [S]ubsection (b)(4)." *Id.* at 340.

This Court explained that "central to the interpretation of [S]ubsection (b)(4)" are the neighboring provisions of Subsections (b)(1)-(3), along with the definition of "other commercial and industrial property" contained in Subsection (a)(4). *ACF*, 510 U.S. at 340. Subsections (b)(1)-(3), which are specific to property taxes, require a comparison between the rate imposed on railroad property and the rate imposed on other "commercial and industrial property." *Ibid.* Subsection (a)(4) identifies the reference point for the inquiries prescribed in Subsections (b)(1)-(3) by defining the term "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." See *ibid.* In light of that statutory structure, the Court explained, a plaintiff may establish a violation of Subsections (b)(1)-(3) only by showing that railroad property is taxed at a higher rate than non-railroad commercial- or industrial-use property that is actually "subject to a property tax levy" (*i.e.*, not exempt). *Id.* at 340-342. The Court further explained that, because any property that is exempt from state taxation falls outside the 4-R Act's definition of "commercial and industrial property," such "[e]xempt property * * * is not part of the comparison class against which discrimination is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions." *Id.* at 342.

Having concluded that Subsections (b)(1)-(3) do not prevent States from taxing railroad property while exempting particular categories of non-railroad property, the *ACF* Court then addressed the question whether such differential taxation is prohibited by Subsection (b)(4). The Court stated that "[i]t would be illogical to conclude that Con-

gress, having allowed the States to grant property tax exemptions in [S]ubsections (b)(1)-(3), would turn around and nullify its own choice in [S]ubsection (b)(4)." 510 U.S. at 343. The Court explained that such a "result would contravene the 'elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Id.* at 340 (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

This Court further explained that "[o]ther considerations reinforce[d] [this] construction of the statute." *ACF*, 510 U.S. at 343. Because "[p]roperty tax exemptions are an important aspect of state and local tax policy," the Court found that the 4-R Act's "silence on the subject—in [contrast to] the explicit prohibition on tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place." *Id.* at 344. The Court also stated that "[p]rinciples of federalism" counseled against reading Subsection (b)(4) as a "prohibition of property tax exemptions," *id.* at 345, and that the legislative history of the 4-R Act did not support the challenger's position, *id.* at 345-346. The Court therefore sustained Oregon's property tax and exemption scheme.

2. Alabama imposes four-percent sales and use taxes on the retail sale, storage, use, or consumption in Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (LexisNexis Supp. 2009) (sales tax), § 40-23-61(a) (LexisNexis 2003) (use tax). Although the sales and use taxes are generally applicable, state law expressly exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (LexisNexis Supp. 2009) (exemption from sales tax), § 40-23-62(12) (LexisNexis Supp. 2009) (exemption from use tax). Consequently, water carriers engaged in interstate or foreign

commerce typically do not pay tax to respondents on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of motor fuels, including diesel fuel. Ala. Code § 40-17-2(1) (LexisNexis 2003) (primary motor fuel excise tax), § 40-17-220(e) (LexisNexis Supp. 2009) (additional motor fuel excise tax). Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-2(1) (LexisNexis 2003). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to respondents, and they do not pay a 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 designated for off-road use under 26 U.S.C. 4082—which is what locomotives burn—is exempt from Alabama's primary motor fuels excise tax. Ala. Code § 40-17-2(1) (LexisNexis 2003). In addition, railroad locomotive fuel is expressly exempted from Alabama's additional motor fuels excise tax. *Id.* § 40-17-220(d)(2) (LexisNexis Supp. 2009). Consequently, railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise tax exemptions) typically pay sales or use taxes of four percent to the State, and they do not pay an excise tax on their fuel.[2]

3. Petitioner, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation

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[2] The foregoing describes only the state-level tax scheme. Certain subdivisions of Alabama are authorized to levy taxes. See Ala. Code § 11-3-11(a)(2) (LexisNexis 2008) (powers of county commissions includes levying taxes); Pet. App. 15a; CSX C.A. Reply Br. 14 (discussing cumulative tax rates in Mobile, Birmingham, and Montgomery). The record in this case appears to contain relatively little evidence regarding county or municipal taxes.

Board, sued respondent Alabama Department of Revenue in federal district court under the 4-R Act. Petitioner contended that, by requiring rail carriers to pay sales and use taxes from which motor carriers are exempt, respondents had discriminated against petitioner in violation of 49 U.S.C. 11501(b)(4).

a. In July 2008, the district court granted petitioner's motion for a preliminary injunction against collection of the sales and use taxes. The court held that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, * * * there is reasonable cause to believe that the [4-R] Act has been violated." Pet. App. 12a. The district court also granted respondents' motion to stay further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway Co.* v. *Alabama Department of Revenue*, No. 08-12712, in which a different rail carrier had brought a materially identical challenge to Alabama's sales and use taxes. Dkt. 19 (July 23, 2008).

b. In December 2008, the Eleventh Circuit announced its decision in *Norfolk Southern*, rejecting the rail carrier's challenge there. Pet. App. 13a-38a. The court of appeals in *Norfolk Southern* found this Court's decision in *ACF* controlling. *Id.* at 26a-32a. The court acknowledged that *ACF* involved property taxes rather than use or sales taxes. *Id.* at 29a. The court concluded, however, that this Court's analysis was "equally applicable" to the exemptions from sales and use tax that were at issue in *Norfolk Southern*. *Ibid.*

In discussing *ACF*, the court of appeals did not address whether this Court's structural inference from Subsections (b)(1)-(3) translated from property taxes to sales and use taxes. Rather, it focused on the Court's observations that Subsection (b)(4) does not speak in terms to property tax exemptions; that property tax exemptions were ubiquitous

when the 4-R Act was passed; and that "concerns for state sovereignty" disfavored federal constraints on a State's tax exemptions. Pet. App. 29a-31a. The court of appeals concluded that, because those observations were also applicable to sales and use tax exemptions, such exemptions could not be the basis for a discrimination claim under Subsection (b)(4). *Ibid.* The court stated that its holding aligned it with "other courts that also have applied [*ACF*] to state and local taxes analogous to Alabama's." *Id.* at 31a; see *id.* at 31a n.14 (citing cases). The court of appeals acknowledged, however, that other courts have "scrutinized exceptions to generally applicable *non*-property taxes." *Id.* at 31a; see *id.* at 31a n.15 (citing cases).[3]

c. After the Eleventh Circuit issued its decision in *Norfolk Southern*, the district court in this case *sua sponte* entered an order dissolving its preliminary injunction and dismissing petitioner's suit. Pet. App. 3a. Petitioner appealed and, acknowledging that *Norfolk Southern* was controlling, sought initial hearing en banc. *Id.* at 2a & n.1. The court of appeals denied initial hearing en banc, *id.* at 39a, and a panel subsequently affirmed the district court's

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[3] The *Norfolk Southern* court stated that, although "a tax with widespread exemptions could indicate that a [S]tate has 'single[d] out' the railroad for discriminatory treatment," such was "not the case here." Pet. App. 32a (quoting *ACF*, 510 U.S. at 347) (second pair of brackets in original). The court also rejected the rail carrier's argument that respondents had unlawfully discriminated against rail carriers by "us[ing] the proceeds of the taxes levied on motor carriers to maintain roads [while] railroads do not receive similar subsidies." *Id.* at 35a. The court refused to "compare the sales and use tax to the fuel excise tax, insofar as there are differences in the ways in which their respective proceeds are spent." *Id.* at 36a. The court found it inappropriate "to look past the particular tax at issue to analyze the overall state tax structure," *ibid.*, or to scrutinize "the use to which a state puts its tax revenue," *id.* at 37a.

dismissal order in a per curiam decision resting on *Norfolk Southern*, *id.* at 1a-2a.

DISCUSSION

In *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994) (*ACF*), this Court addressed the application of Subsection (b)(4) to a state taxing regime under which rail carriers (and related entities) paid a property tax, while certain other persons were exempt. The Court held that Subsection (b)(4) does not provide a basis for challenging that form of differential taxation. This case concerns the application of Subsection (b)(4) to a *non*-property tax scheme under which rail carriers pay a tax, while certain other persons are exempt. The petition presents the threshold question whether such a disparity can ever render a non-property tax invalid under Subsection (b)(4)—or, as this Court put it in *ACF*, whether a taxing decision of this sort is "even subject to challenge" under the 4-R Act, 510 U.S. at 338.[4]

The Ninth and Eleventh Circuits have held that such schemes are not subject to challenge under Subsection (b)(4). By contrast, the Eighth Circuit and two state supreme courts have permitted such challenges (and indeed, have concluded that the taxes in question were invalid). The Eighth Circuit's view of the threshold issue is correct. The text of Subsection (b)(4) encompasses without qualification any "tax that discriminates against a rail carrier." As this Court recognized in *ACF*, 510 U.S. at 343, a State's requirement that rail carriers pay a tax from which others

[4] The court of appeals acknowledged, and the parties do not appear to dispute in this Court, that Section 11501(b)(4) would condemn a tax from which the so-called "exemptions" were so widespread that the tax effectively "singled out railroad[s] * * * for discriminatory treatment," *ACF*, 510 U.S. at 347. That distinct and well-accepted principle is not implicated by the taxes at issue here. See Pet. App. 32a-34a.

are exempt can be a form of tax discrimination. And although the Court in *ACF* held that property tax schemes involving exemptions are not subject to challenge under Subsection (b)(4), the Court's reasoning in that case does not carry over to *non*-property tax regimes.

Although the state taxing regime at issue here is subject to challenge under Subsection (b)(4), that scheme is not necessarily invalid. Respondents may be able to demonstrate, for example, that the challenged sales and use taxes are not discriminatory because persons exempt from those taxes must pay corresponding motor fuel taxes in equal or greater amounts. See Br. in Opp. 8-10. Respondents frame the question presented in such a way as to encompass not only the threshold issue of Subsection (b)(4)'s applicability, but also the ultimate validity of "the State's overall excise tax structure." See *id.* at i.

That ultimate issue, however, is not presently suitable for this Court's review. The factual record is limited because it was developed on a motion for a preliminary injunction and no discovery has yet occurred. Moreover, further consideration by lower courts of the standards for determining whether a tax "discriminates against a rail carrier," 49 U.S.C. 11501(b)(4), would likely assist this Court, especially because courts rejecting Subsection (b)(4) claims at the threshold have had no opportunity to decide those issues.

Accordingly, to resolve the clear split on a threshold issue of the 4-R Act's application, the Court should grant the 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 sales and use taxes on fuel subject the taxes to chal-

lenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

A. The Court Of Appeals' Decision Is Incorrect

This Court held in *ACF* that "a tax upon railroad property is [not] even subject to challenge under [49 U.S.C. 11501(b)(4)] on the ground that certain other classes of commercial and industrial property are exempt." 510 U.S. at 338-339. In *Norfolk Southern* (see Pet. App. 28a-32a) and in this case (*id.* at 1a-2a), the Eleventh Circuit extended that rule to encompass non-property taxes, such as the sales and use taxes at issue here. That threshold rejection of petitioner's challenge was incorrect.

1. Contrary to the court of appeals' analysis, *ACF*'s reasoning does not support the decision below. The Court in *ACF* addressed the application of Subsection (b)(4) to property tax exemptions, see 510 U.S. at 338-339, and did not comment on any other form of tax.[5] Moreover, the *ACF* Court's reasoning does not logically encompass the sales and use taxes at issue here because the Court's structural analysis relied on adjacent 4-R Act provisions that apply solely to property taxes.

The Court in *ACF* relied on the facts that Subsections (b)(1)-(3) establish specific non-discrimination requirements for property taxes, and that those Subsections require a comparison between taxes on rail transportation property and taxes on other "commercial and industrial property." 510 U.S. at 340. Because the term "commercial and industrial property" is limited to specified categories of "prop-

[5] Indeed, *ACF*'s only discussion of tax exemptions in general—as a category broader than property tax exemptions—came in this Court's acknowledgment that "tax exemptions, as an abstract matter, could be a variant of tax discrimination," though "the statute does not speak with any degree of particularity to the question of tax exemptions." 510 U.S. at 343.

erty * * * subject to a property tax levy," *id.* at 341, a phrase the Court construed to mean "taxed property," *id.* at 342, a rail carrier cannot establish a violation of Subsections (b)(1)-(3) by showing that its property is taxed while other property is exempt, see *ibid.* The Court in *ACF* held that such challenges to property-tax exemptions could not go forward under Subsection (b)(4) because "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in [S]ubsections (b)(1)-(3), would turn around and nullify its own choice in [S]ubsection (b)(4)." *Id.* at 343.

The *ACF* Court's structural analysis does not logically apply to the sales and use taxes at issue here. Neither Subsections (b)(1)-(3) nor any other 4-R Act provision establishes specific non-discrimination requirements for non-property taxes. Nor does any 4-R Act provision otherwise suggest that, with respect to allegedly discriminatory sales or use taxes, the only appropriate point of comparison is other *taxed* transactions or activities. Treating petitioner's current challenge as cognizable under Subsection (b)(4) therefore poses no threat of "nullify[ing]" (*ACF*, 510 U.S. at 343) any congressional policy choice reflected in more specific 4-R Act provisions.

Although this Court in *ACF* described its structural analysis as "central to the interpretation of [S]ubsection (b)(4)," 510 U.S. at 340, the Eleventh Circuit did not discuss that analysis in *Norfolk Southern*. Instead, the court of appeals focused on what this Court described as "[o]ther considerations" that "reinforce[d]" the basic structural inference. *Id.* at 343; see Pet. App. 28a-31a. None of those considerations warrants the weight the court of appeals gave it.

First, the court of appeals thought it significant that "Congress could clearly have prohibited * * * exemp-

tions, but did not." Pet. App. 28a. But this Court acknowledged in *ACF* that exemptions can be a form of tax discrimination. See 510 U.S. at 343. The absence of an express mention of one potential method of discrimination (selective exemptions) is of particularly little significance in a catch-all provision like Subsection (b)(4), whose very purpose is to avoid the impractical task of anticipating and enumerating every possible discriminatory mechanism. See, *e.g.*, *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) ("Congress possessed a general concern with discrimination in all of its guises."), cert. denied, 465 U.S. 1100 (1984).

Second, the court of appeals observed that, "as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted." Pet. App. 30a. Although the Court in *ACF* viewed that state-law backdrop as confirming evidence of Congress's intent to leave property tax exemptions undisturbed, see 510 U.S. at 344, it does not bear the independent weight the court of appeals gave it. Indeed, the Court in *ACF* found preexisting state tax practice relevant only "in light of the explicit prohibition of tax rate and assessment ratio discrimination," *ibid.*—a counterpoint notably absent here. Moreover, the ubiquity of a practice prior to the 4-R Act cannot be a defense to Section 11501's application, because it was precisely the prevalence of discriminatory taxation schemes that prompted Congress to enact the 4-R Act's prohibition.

The court of appeals' third concern—principles of federalism—also carries little weight in this specific context. The 4-R Act is preemptive in its design and by its broad, clear, and express terms. Cf. *CSX Transp. Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 20-21 (2007) ("[E]ven if important questions of state policy are [implicated], judicial scrutiny * * * is authorized by the 4-R Act's clear

command."); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("[T]he language of [Section] 1150[1] plainly declares the congressional purpose."). Thus, any presumption against preemption is overcome by "the clear and manifest purpose of Congress" to preempt any discriminatory tax. *ACF*, 510 U.S. at 345 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Accordingly, *ACF* does not support the court of appeals' decision.

2. The text, structure, and history of the 4-R Act support petitioner's view that a tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4). On its face, Subsection (b)(4) reaches beyond property taxes to forbid "another tax"—here, a sales or use tax—"that discriminates against a rail carrier." A rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4).[6]

The legislative history of the 4-R Act confirms that Subsection (b)(4) is not qualified in the way the court of appeals believed it to be. As the Fifth Circuit explained in connection with a Subsection (b)(4) challenge to Louisiana's gross receipts tax, Congress studied and debated discriminatory property taxation for 15 years before passing the 4-R Act, with its finely calibrated rules about property taxation. *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 372-373 (1987). But Congress "realized near the end [of the legislative process] that banning discriminatory property taxes

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[6] A prima facie showing that the rail carrier is subjected to *differential* taxation does not end the inquiry, because it does not conclusively establish that the "tax * * * *discriminates* against [the] rail carrier." 49 U.S.C. 11501(b)(4) (emphasis added). But neither the standards for resolving that ultimate question, nor their proper application in this case, is presently suitable for this Court's review. See p. 19, *infra*.

was not enough to save the railroads from unfair state taxation. Congress therefore added [Subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Id.* at 373. That history suggests that Congress developed and intended a nuanced scheme for identifying discriminatory property taxes (as this Court recognized in *ACF*), while enacting a more general ban on "discriminat[ion] against a rail carrier" where "another tax" was concerned. 49 U.S.C. 11501(b)(4).

B. The Clear And Entrenched Split On The Question Presented Warrants Resolution By This Court

The courts of appeals and state supreme courts are squarely divided on the threshold question whether a rail carrier may invoke 49 U.S.C. 11501(b)(4) to challenge a state law under which rail carriers pay a non-property tax while certain other persons (typically competitors) are exempt. The Ninth Circuit in *Atchison, Topeka & Santa Fe Railway Co.* v. *Arizona*, 78 F.3d 438, 443 (*ATSF*), cert. denied, 519 U.S. 1029 (1996), and the Eleventh Circuit in *Norfolk Southern*, Pet. App. 26a-32a, have held that such schemes cannot be challenged under Subsection (b)(4). Both courts concluded that this Court's reasoning in *ACF* applies equally to non-property taxes. See *ATSF*, 78 F.3d at 442-443 ("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."); Pet. App. 29a ("*ACF Industries*' construction of the 4-R Act guides our decision.").

By contrast, the Eighth Circuit has entertained rail carriers' challenges under Subsection (b)(4) to state sales and use taxes from which the carriers' direct competitors were exempt. See *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693 (2007) (*UPRR*); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (1999), cert. denied, 529 U.S.

1098 (2000). Two state supreme courts within the Eighth Circuit have likewise held that such challenges are cognizable under Subsection (b)(4). See *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984); *Burlington N. R.R.* v. *Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000). The Eleventh Circuit in *Norfolk Southern* acknowledged that conflict in authority. See Pet. App. 31a & nn.14-15.

Although this Court has previously denied review of this issue, the Court's intervention is now warranted to resolve the split. When the Court last denied review of this issue, see *Wilson* v. *Burlington N. Santa Fe Ry.*, 529 U.S. 1098 (2000), the Ninth Circuit alone had held challenges like this one to be non-cognizable under Subsection (b)(4), while the Eighth Circuit and the Supreme Courts of Iowa and Minnesota (the latter having ruled shortly after the petition in *Wilson* was filed) had held that such challenges could go forward. At that time, a reversal of course by the Ninth Circuit would have eliminated the split.

But the question presented has continued to arise in litigation,[7] and two recent developments have entrenched the split and made it worthy of this Court's review. First, the Eleventh Circuit denied initial hearing en banc in this

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[7] *Norfolk Southern* and this case, both brought in 2008, have involved challenges to Alabama's sales and use taxes on fuel. A 4-R Act suit brought earlier this year challenging Tennessee's sales and use taxes on fuel has been stayed pending disposition of the instant petition for a writ of certiorari (or the conclusion of this Term). See *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, No. 3:10-CV-197, Docket entry No. 12 (M.D. Tenn. Mar. 29, 2010). *UPRR*, brought in 2004, concerned Minnesota's sales and use taxes on fuel. In another case brought in 2004, the district court enjoined Louisiana's collection of its sales and use tax on fuel from the challenging rail carrier. See *Kansas City S. Ry.* v. *Bridges*, No. 5:04-cv-02547-SMH-MLH, Docket entry No. 33 (W.D. La. May 1, 2007).

case, in full view of the split it had widened with its decision in *Norfolk Southern*. Pet. App. 39a. Second, the Eighth Circuit adhered to *Lohman* in *UPRR*, emphasizing that its "holding in *Lohman* is clear." 507 F.3d at 696. This Court's review is therefore now appropriate.

C. The Court Should Limit The Question Presented To The Threshold Issue Of Whether Alabama's Sales And Use Taxes Are Subject To Challenge Under Subsection (b)(4)

Respondents reframe the question presented so as to encompass not only the cognizability of petitioner's challenge under Subsection (b)(4), but also the ultimate validity of the State's sales and use taxes. Compare Pet. i with Br. in Opp. i. Respondents argue (*id.* at 8-10) that, even if petitioner's challenge to the State's taxing regime may be brought under Subsection (b)(4), that challenge fails on the merits because petitioner's non-railroad competitors actually pay *higher* taxes, under a different provision of the Alabama Code, on their purchases of diesel fuel.

The government agrees with respondents that, in resolving a claim of unlawful tax discrimination under Subsection (b)(4), a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers.[8] This Court should not attempt to decide in the first instance, however, whether petitioner's

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[8] The Eighth Circuit has held that, in resolving challenges to sales and use taxes under Subsection (b)(4), courts should look solely at the taxes that rail carriers are required to pay, and should find that unlawful discrimination has occurred if the rail carriers' competitors are exempt from those taxes, without regard to the remainder of the state taxing scheme. See *UPRR*, 507 F.3d at 695; *Lohman*, 193 F.3d at 986. Although the Eighth Circuit was correct in its threshold determination that Subsection (b)(4) authorizes rail carriers to challenge taxes from which their competitors are exempt, that court used an unduly narrow inquiry to resolve the merits of the rail carriers' discrimination claims.

rights under Subsection (b)(4) have been violated. The record in this case, which was developed in a preliminary injunction proceeding and without discovery, is insufficient to resolve issues beyond the threshold question framed in the petition. Moreover, assessing petitioner's claim on the merits could require this Court to resolve a number of subsidiary legal questions that were not addressed (or were addressed only briefly) by the courts below.

As the government's amicus brief in *ACF* explained, the 4-R Act prohibits "[e]conomic 'discrimination,'" which "exists when [two classes of economic actors] are treated differently without an acceptable justification." Gov't Br. at 17, *ACF*, *supra* (No. 92-74). That test implicates legal questions, such as how much differential treatment is necessary for a prima facie showing, and what justifications a State may advance in defense of its tax scheme. But the ultimate question of discrimination necessarily entails a factual inquiry. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), "is a factual matter subject to the clearly- erroneous standard of Rule 52(a)"). Thus, if this Court grants certiorari and holds that petitioner's challenge is cognizable under Subsection (b)(4), the lower courts may need to consider on remand such factors as the nature of the distinctions Alabama's tax laws draw among rail carriers and their competitors, the extent to which those competitors are subject to the motor fuel excise tax, the legal implications of the parallel tax scheme, and the relevance of any taxes imposed by Alabama's political subdivisions.[9]

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[9] The court in *Norfolk Southern* did not resolve any of these issues in a way that would prevent petitioner from ultimately prevailing on remand. The *Norfolk Southern* court did, however, foreclose a claim of

Petitioner's formulation of the question presented, which asks whether "a State's exemption * * * is subject to challenge," Pet. i, is not entirely satisfactory either. That wording is imprecise because the relief in a successful Section 11501(b)(4) challenge is not to undo the putatively favorable tax treatment accorded to non-rail carriers (here, the exemption of certain non-rail carriers from Alabama's sales and use taxes). As this Court has explained in connection with constitutional challenges to state taxes, a federal court may not "decree a valid tax for the invalid one which the State ha[s] attempted to exact"; rather, the appropriate decree is that the invalid tax "may not be exacted." *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 752 (1961) (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960)). For that reason, petitioner's Subsection (b)(4) suit is properly viewed as challenging the allegedly discriminatory tax imposed on rail carriers, not the exemption granted to their competitors. See 49 U.S.C. 11501(b)(4) (providing that a State may not "[i]mpose a[] tax that discriminates against a rail carrier").[10]

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discrimination based on the manner in which tax proceeds are used. See Pet. App. 36a-37a. This Court need not decide whether that holding is correct in order to hold that petitioner's challenge is cognizable under Subsection (b)(4).

[10] In the 4-R Act, Congress prescribed a remedial approach somewhat different from this Court's approach in constitutional challenges. Under *Moses Lake*, a constitutionally invalid tax should be enjoined *in toto*. By contrast, the 4-R Act's legislative history specifically rejects the *Moses Lake* approach and indicates that, under the remedial provisions of 49 U.S.C. 11501(c), "[t]here is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion." S. Rep. No. 630, 91st Cong., 1st Sess. 13 (1969). This only underscores, however, that it is the tax, not the exemption, that a rail carrier must challenge.

The United States therefore respectfully suggests that, if this Court grants the petition for a writ of certiorari, it should limit the grant as described above. If this Court grants certiorari and ultimately reverses the judgment of the court of appeals, the lower courts on remand can determine whether Alabama's overall scheme of taxes on diesel fuel "discriminates against a rail carrier" within the meaning of Subsection (b)(4). But an appropriately drawn question presented would productively focus the briefing in this Court on the threshold issue that presently divides the lower courts and which this case is an appropriate vehicle to resolve.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the following question:

> Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable 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."

Respectfully submitted.

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