No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC.

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 "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.

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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 denied. If the Court grants the petition, however, the United States respectfully requests that the Court add the following question:

> 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.

STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976

(4-R Act), Pub. L. No. 94-210, 90 Stat. 31, 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).

The 4-R Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See § 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) (*Georgia State Bd.*).[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, that authorizes federal courts to enjoin

[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." § 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 (ICC) 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.

prohibited forms of state taxation. 49 U.S.C. 11501(c); see *CSX*, 131 S. Ct. at 1105.

Section 11501(b) defines several types of prohibited taxation. 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). 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 (referring to "objective benchmark[s]" underlying "the comparison of ratios the statute requires" in Subsection (b)(1)); *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." That is the provision at issue here.

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 2011) (sales tax); *id.* § 40-23-61(a) (use tax). Although the sales and use taxes are generally applicable, state law exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* §§ 40-23-4(a)(10) (exemption from sales tax), 40-23-62(12) (exemption from use tax). Water carriers engaged in interstate or foreign commerce therefore typically do not pay tax to Alabama on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of

motor fuel, including diesel fuel. Ala. Code § 40-17-325(a)(2) (LexisNexis 2011).[2] Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-325(b). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to Alabama, 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—which is what locomotives burn—is exempt from Alabama's motor-fuel excise taxes. Ala. Code § 40-17-329(a)(3) (Supp. 2013). Railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise-tax exemptions) therefore typically pay sales and use taxes of four percent to the State, and they do not pay an excise tax on their fuel.[3]

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[2] At the time of the district court's decision in this case, the fuel excise taxes were codified at Ala. Code § 40-17-2 (LexisNexis 2011). 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 and, *inter alia*, repealed that section. The modifications are not material here. See Pet. App. 3a n.2.

[3] 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) (LexisNexis 2008) (powers of county commissions include levying taxes), *id.* § 11-3-11.2 (powers of county commissions include collecting local taxes), *id.* § 11-51-200 (powers of municipal corporations include levying taxes). Pursuant to that authority, several Alabama counties and municipalities impose additional sales and use taxes on dyed diesel fuel, see Pet. App. 35a-36a, as well as additional excise taxes on undyed diesel fuel, *id.* at 57a. In addition, federal motor-fuel taxes are collected on on-road diesel fuel, but not on off-road dyed diesel,

3. Respondent, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation Board, 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 taxes from which motor carriers and interstate and foreign 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 (11th Cir. 2008).

b. The 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 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. 1101.

i. The Court first 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

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such as that used by railroads. See 26 U.S.C. 4081, 4082; 26 C.F.R. 48.4082-1.

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 then 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) (*Black's*)), and that a tax with an exemption "discriminate[s]" if the exempt and non-exempt "groups are similarly situated and there is no justification for the difference in treatment," *id.* at 1109 & n.8. 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." *Id.* at 1109.

The Court declined, however, 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 address (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 "these and all other issues relating to whether Alabama actually has discriminated against [respondent] to the trial court." *Ibid.*

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, but they would have further held 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 found "no discrimination under the 4-R Act." Pet. App. 30a-66a. The court defined the appropriate comparison class as the rail carrier's "competing transportation modes" (*i.e.*, motor carriers and 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 parties here agree" on a "competitive mode class"). 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. Looking exclusively at state taxes, the court found that "motor carriers actually pay a higher rate" and that, "when factoring [in] the local (city and county) sales and use taxes imposed on rail carriers'[] diesel fuel," they "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 vis-à-vis water carriers, the district court found no "discriminat[ion]" for "two reasons." Pet. App. 63a. First, respondent 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 the 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.* (quoting *CSX*, 131 S. Ct. at 1108).

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

a. The court of appeals addressed a "first-order question that the 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. The court nevertheless felt "obliged to say a few words" about the matter. *Ibid.* 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. The court then noted (again) that the parties had "stipulated, and the district court [had] agreed, that the proper comparison class for this case was [respondent's] competitors." *Ibid.* In so holding, the court made clear that "the comparison class should be ap-

propriate to the type of tax and discrimination challenged in a particular case," *id.* at 12a n.4 (quoting *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000)), 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 concluded that respondent had "established a prima facie case of discrimination" because its "competitors do not pay the State's sales tax." *Id.* at 12a. 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 (quoting *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) (*UPRR*)). 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.

b. Judge Cox dissented. Pet. App. 18a-29a. He "agree[d] that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. Judge Cox disagreed, however, with the court'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.*

DISCUSSION

The two issues that the Court left open in *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 n.5 (2011), are both critical to determining

whether a tax "discriminates against a rail carrier" in violation of 49 U.S.C. 11501(b)(4). The first issue concerns the definition of an appropriate comparison class; the second is whether other aspects of the State's tax scheme can justify the challenged tax's disparate treatment of rail carriers. The court of appeals correctly held that a railroad's direct competitors can constitute an appropriate comparison class. The court erred, however, in finding the challenged tax discriminatory without considering alternative and comparable taxes that could have justified the disparate treatment.

Whether those issues would warrant this Court's review in an appropriate case is a close question. There is some tension among the courts of appeals with respect to the comparison-class issue, but the conflict asserted by petitioners is substantially overstated. There is also no square conflict on the second issue (*i.e.*, whether other aspects of the State's tax scheme are relevant to the discrimination inquiry), but the courts of appeals that have squarely addressed the question have reached the wrong conclusion. And while the issues are potentially significant, it is not clear whether they have substantial nationwide import.

In any event, this case is not an appropriate vehicle for resolving those issues. The petition presents only the comparison-class question, and that issue was not actively contested below. The issue of alternative and complementary taxes was fully litigated below, but petitioners have abandoned the argument in this Court. If the Court finds it appropriate to clarify the discrimination inquiry under Section 11501(b)(4), it should do so in a case that cleanly presents both ques-

tions. Because this is not such a case, the petition for a writ of certiorari should be denied. In the alternative, the Court should add a second question presented as set forth above.

A. The Court Of Appeals' Decision Is Correct In Some Respects And Flawed In Others

In *CSX*, 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." 131 S. Ct. at 1107 n.5. The courts below addressed those questions on remand. On the first issue, the court of appeals held that the comparison class may vary depending on the type of discrimination alleged and that, in this case, a comparison class consisting of the rail carrier's direct competitors was appropriate. Pet. App. 7a-12a. On the second issue, the court held that a State cannot justify disparate tax treatment of rail carriers by pointing to alternative and complementary taxes imposed on competitors but not on rail carriers. *Id.* at 12a-16a. The court correctly resolved the first issue, but not the second.

1. Petitioners contend (Pet. 19-22) that "commercial and industrial taxpayers generally" are the only comparison class that can properly be used to determine whether particular state taxes violate Section 11501(b)(4). That approach is inconsistent with the statute's text and structure, and it would not fully effectuate Congress's purpose.

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 (quoting *Black's* 534). 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). *Id.* at 1115 (Thomas, J., dissenting); see *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). But it is not the only form. A tax may "discriminate[] against a rail carrier" (49 U.S.C. 11501(b)(4)) if it applies generally to commercial and industrial taxpayers (including railroads), but not to rail carriers' direct competitors. See Pet. App. 7a-12a. If the two groups 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.

The structure of the antidiscrimination provision reinforces that ordinary meaning. 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 comparison 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 (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) strongly suggests that the omission was

intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[4]

In enacting the 4-R Act, Congress was clearly concerned 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 4-R Act § 101(a), 90 Stat. 33, and to "foster competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33. Linking the taxation of railroads to the taxation of other carriers and modes of transportation would further that purpose.

The court of appeals thus correctly held that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," Pet. App. 12a n.4 (quoting *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000)), and that "the ap-

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[4] That does not mean that prohibited 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 (quoting *id.* at 1119 (Thomas, J., dissenting)).

propriate comparison class" in this case was respondent's "competitors," *id.* at 11a-12a.

2. The court of appeals also addressed whether a State could justify the disparate treatment of rail carriers by pointing to other aspects of the State's tax scheme, or whether the court could consider only the specific taxes challenged. The court held that only the challenged taxes are relevant. Pet. App. 12a-16a. The dissenting judge and the district court concluded that alternative, complementary taxes may be considered as well. *Id.* at 20a-28a (Cox, J., dissenting), 46a-62a. Those judges have the better of that argument.

Section 11501(b)(4) prohibits discrimination. Economic "discrimination" does not exist simply because two classes are treated differently. A state tax that treats a rail carrier differently than a similarly-situated taxpayer "discriminates against a rail carrier" (49 U.S.C. 11501(b)(4)) only if the State cannot justify the differences in treatment. See *CSX*, 131 S. Ct. at 1109 & n.8. As the United States has previously explained, one way a State can justify differential treatment is by showing that entities within the comparison class are subject to alternative and comparable state or local taxes that are not levied against railroads. See Gov't Merits Amicus Br. at 26 n.8, *CSX*, *supra* (No. 09-520); Gov't Pet. Stage Amicus Br. at 17 & n.8, *CSX*, *supra* (No. 09-520); Gov't Merits Amicus Br. at 21-22, *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332 (1994) (No. 92-74).

The court below truncated the discrimination analysis because it perceived a broader inquiry to be unduly difficult. Pet. App. 13a-16a. But the Court recognized in *CSX* that "[d]iscrimination cases sometimes do raise knotty questions," and that such difficulties

are no reason to "flout the congressional command." 131 S. Ct. at 1114. Petitioners did not ask the court below to examine the State's entire tax structure. Rather, they sought to justify the differential treatment of rail carriers and motor carriers under the sales and use taxes by pointing to a single, alternative tax on the same taxable item (*i.e.*, diesel fuel). See Pet. App. 24a-26a (Cox, J., dissenting). The district court had engaged in precisely that inquiry without undue burden or expense, see *id.* at 55a-62a, and it found that "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same," *id.* at 56a—a finding that respondent did not challenge on appeal, *id.* at 21a (Cox, J., dissenting). In those circumstances, the court of appeals' exclusive focus on the sales and use taxes had the potential to produce a "bizarre" result (*id.* at 25a (Cox, J., dissenting)) that exalted form over substance.

B. Whether The Issues Would Warrant The Court's Review In An Appropriate Case Is A Close Question

The question whether these issues (left open by the Court in *CSX*) would warrant the Court's review in an appropriate case is a close one.

1. Petitioners assert (Pet. 11-15) that there is an entrenched conflict among the lower courts as to the proper comparison class for Section 11501(b)(4) claims. The *CSX* dissent similarly observed that "lower courts have split over the proper scope of the comparison class." 131 S. Ct. at 1118 n.3 (Thomas, J., dissenting). And the courts of appeals have acknowledged some division among the circuits. See Pet. App. 7a-8a; *Kansas City S. Ry.* v. *Koeller*, 653 F.3d 496, 508 (7th Cir.), cert. denied, 132 S. Ct. 855 (2011). Alt-

hough there is some tension, the asserted conflict is considerably overstated.

Nearly all of the decisions cited by petitioners are consistent with the proposition that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." *Lohman*, 193 F.3d at 986. In cases where the rail carrier is subject to a general tax, but its competitors are not, rail carriers allege, and the courts generally adopt, a comparison class consisting of the rail carrier's competitors. See Pet. App. 7a-12a; *Lohman*, 193 F.3d at 985-986; *Burlington N. R.R.* v. *Commissioner of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993); see also *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, 969 F. Supp. 2d 895, 897-899 (M.D. Tenn. 2013); cf. *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) (parties agreed to "competitive mode class"); *Kansas City S. Ry.* v. *Bridges*, No. 04-2547, 2007 WL 977552, at *7 (W.D. La. Mar. 30, 2007) (same). In cases where the rail carrier and a handful of other taxpayers are subject to a tax, but most commercial and industrial taxpayers are not, rail carriers allege, and the courts generally adopt, a comparison class of other commercial and industrial taxpayers. See *McNamara*, 817 F.2d at 374-376 (tax applied to public utilities including rail carriers' main competitors); *Koeller*, 653 F.3d at 500, 508-510 (higher tax applied to two railroads, four pipelines, and two utilities).

None of the decisions cited above adopted a categorical rule that there is one and only one proper comparison class for all cases brought under Section 11501(b)(4). Several courts have expressly disclaimed any such holding. See, *e.g.*, Pet. App. 11a n.3 (ac-

knowledging that an "all commercial and industrial taxpayer[]" comparison class "might be appropriate in certain situations"); *Lohman*, 193 F.3d at 985, 986 (holding that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," and that "a comparison class of competitors" is appropriate "[w]ith respect to the Missouri sales and use taxes at issue here"); *Burlington N. R.R.*, 509 N.W.2d at 553 (distinguishing cases that do not "deal[] with the situation where the railroad is subject to a general tax but its competitors are not"); cf. *Koeller*, 653 F.3d at 508-510 (noting that decision is not "incompatible" with *Lohman*, "endors-[ing] reference to other commercial and industrial users" "for now," and leaving other "hypothetical" cases "for another day"). Other courts simply did not reach the question whether a different comparison class might be proper in another case. See *McNamara*, 817 F.2d at 374-376.

The lone exception is *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, 78 F.3d 438 (9th Cir.) (*Atchison*), cert. denied, 519 U.S. 1029 (1996). The rail carrier in that case challenged sales and use taxes that applied generally to commercial and industrial taxpayers (including rail carriers), but that exempted motor carriers (who were subject to a different tax scheme). *Id.* at 439. In a split decision, the court held that "the proper comparison class to use in analyzing discriminatory taxation of the railroads under the 4-R Act is 'all other commercial and industrial taxpayers subject to the taxes,'" and that a "narrow comparison class, comprised only of 'motor carriers,'" could not be used. *Id.* at 441-442. Although that decision conflicts with the decision below, the split is by no means en-

trenched. *Atchison* has never been cited or relied on by any court in the Ninth Circuit. And the court did not have the benefit of this Court's decision in *CSX*, which expressly abrogated another aspect of the *Atchison* decision. 131 S. Ct. at 1106 n.4.

2. There is also no square conflict on the question whether a court should take into account alternative and complementary state taxes in determining whether the challenged tax is discriminatory. The Eighth Circuit, like the court below, has held that 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. No court of appeals has adopted a contrary approach. Accordingly, while there is no circuit conflict, the courts that have squarely decided the issue have (in the government's view) reached the wrong conclusion.

3. Both issues appear to be important and to have significance beyond the facts of this particular case. Petitioners suggest (Pet. 14) that they stand to lose "at least $5 million each year in revenues, and may face refund claims exceeding $10 million," as a result of the court of appeals' decision. And the parties agree that at least a "handful" of other States "impose a sales and use tax on railroad diesel fuel while exempting motor carriers." Br. in Opp. 24; see Pet. 14-15. Indeed, comparable taxing schemes in at least four other States have prompted litigation. See, *e.g.*, *Illinois Cent. R.R.*, 969 F. Supp. 2d at 893-894 (Tennessee); *Bridges*, 2007 WL 977552, at *1-*2 (Louisi-

ana); *UPRR*, 507 F.3d at 694 (Minnesota); *Lohman*, 193 F.3d at 984-985 (Missouri).

The precise scope of the prospective impact on other States, however, is unclear. The Multistate Tax Commission (MTC) notes that the large majority of States exempt fuel for highway use from general sales and use taxes. MTC Amicus Br. 10; see Am. Trucking Ass'ns, Inc. Amicus Br. 5, 7 ("most States exempt fuels subject to their motor fuels excise tax from sales tax"). But neither petitioners nor their amici have addressed whether rail carriers in those States are subject to sales and use taxes on diesel fuel, and respondent contends (Br. in Opp. 24) that "most States that have sales and use taxes exempt diesel fuel used by railroads."

C. This Case Is Not An Appropriate Vehicle For Clarifying The Discrimination Inquiry Under Section 11501(b)(4)

Even if this Court concludes that the questions discussed above warrant its review, it should clarify the discrimination inquiry under Section 11501(b)(4) in a case that cleanly presents both issues. Resolving one while leaving the other undecided would be an artificial and incomplete exercise. For that reason, this case is not a suitable vehicle for further review.

1. The petition for a writ of certiorari presents only the comparison-class question. See Pet. i. Respondent argues (Br. in Opp. 18-23) that petitioners have "waived" that issue. That argument has considerable support in the record.

In the initial proceedings, petitioners "conceded that * * * the comparison class consists of motor carriers and water carriers." Pet. App. at 12a, *CSX*, *supra* (No. 09-520); see Resp. Br. at 48 n.7, *CSX*, *su-*

pra (No. 09-520). This Court recognized that petitioners had potentially "waived" the issue, but left it to the district court to decide the waiver question in the first instance. *CSX*, 131 S. Ct. at 1107 n.5.

On remand, petitioners did not argue that they had preserved the comparison-class issue, and they did not withdraw their earlier concession. Petitioners made a passing mention of "other commercial taxpayers," Pet. App. 80a, 91a, and they cited the dissenting Justices' reference to "taxes that target or single out railroads as compared to general commercial and industrial taxpayers," *id.* at 70a-71a (quoting *CSX*, 131 S. Ct. at 1120); see 4/25/12 Bench Trial Tr. 12 (Dkt. No. 65). But petitioners never actually *pressed* the *CSX* dissenters' argument that other commercial and industrial taxpayers are the only appropriate comparison class. To the contrary, they told the district court that the "only way to determine if" the State "has targeted or singled out railroads for discrimination, is to look at the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their competitors." Pet. App. 88a-89a; see *id.* at 71a. The district court thus understood "both parties" to "agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act." *Id.* at 45a; see *id.* at 51a (rejecting other circuit case law "since the parties here agree" on a "competitive mode class").

In the court of appeals, petitioners acknowledged that "the parties" had "agreed on a much smaller [comparison] class below," *i.e.*, "that of the competitive mode class." Pet. C.A. Br. 23. Petitioners asked the court to "consider[] the excise tax structure that

applies to the subject of the tax (use or consumption of diesel fuel) as compared to railroads and their competitors." *Id.* at 19. Petitioners did offer the "broader theory, espoused by Justices Thomas and Ginsburg" as an alternative ground for affirmance, but they implicitly acknowledged that the argument had not been raised in the district court. *Id.* at 36-37. And, while the court of appeals ultimately decided the issue, it too relied in part on petitioners' earlier concession that "the proper comparison class for this case was [respondent's] competitors." Pet. App. 11a; see *id.* at 18a (Cox, J., dissenting); see also *id.* at 8a.

2. Petitioners do not seek further review of the one issue they *did* litigate below, *i.e.*, whether Alabama's imposition of *other* taxes on motor carriers' receipt of diesel fuel is relevant to the 4-R Act inquiry. That issue is neither fairly included in the question presented, see Pet. i, nor addressed in the body of the petition.[5] Respondent noted in its brief in opposition (at 21) that petitioners have "chosen not to seek this Court's review of the question actually decided by the lower courts," and petitioners did not contest that assertion in their reply brief. Accordingly, the issue is not properly before the Court. See Sup. Ct. R. 14.1; *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

3. The Court thus has before it a petition that (a) raises an issue that may have been waived or forfeited below and (b) fails to raise a related issue that is central to the ultimate determination whether the challenged sales and use taxes violate the 4-R Act. Even if the Court concludes that these issues warrant

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[5] The only mention of the argument is in the Statement of the Case. See Pet. 8, 9.

its review, it should await a more suitable vehicle.[6] If the Court concludes that review in this case is appropriate, however, it should add a second question presented concerning the relevance to the 4-R Act analysis of other Alabama taxes imposed on motor carriers. A merits decision by this Court that resolved the comparison-class issue, but left the complementary-tax issue undecided, would provide incomplete guidance to States, railroads, and lower courts.

[6] A similar case that appears to raise both issues is currently pending in the Sixth Circuit. See *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, No. 13-6348 (oral argument scheduled for June 19, 2014).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the petition is granted, the Court should add the following question:

> 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.

Respectfully submitted.

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MAY 2014