No. 06-1287

In the Supreme Court of the United States

CSX TRANSPORTATION, INC., PETITIONER

v.

GEORGIA STATE BOARD OF EQUALIZATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, in an action by a railroad under 49 U.S.C. 11501(b)(1) claiming that a State has assessed the railroad's property at a higher ratio of assessed value to true market value than the ratio for other commercial and industrial properties, the district court may, in determining the railroad's true market value, consider evidence of market value derived from accounting methodologies other than those used by the State, or whether, as the court of appeals held, the State's chosen methodology is binding on the district court.

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INTEREST OF THE UNITED STATES

This case concerns the scope of federal protection against discriminatory state taxation provided to railroads by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54 (49 U.S.C. 11501). The Surface Transportation Board—the independent federal agency with responsibility for the economic regulation of the Nation's railroads, 49 U.S.C. 721—is charged with fostering economic conditions that allow rail carriers to earn adequate revenues. The Department of Transportation is the federal agency charged with, among other functions, overseeing rail safety, 49 U.S.C. 20103 (2000 & Supp. IV 2004), and thus also has an interest in the financial health of the Nation's railroads. The United States has participated as amicus curiae in previous cases regarding the scope of the 4R Act's protections. See *Burlington N. R.R.* v. *Oklahoma Tax*

Comm'n, 481 U.S. 454 (1987) (*Burlington Northern*); *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332 (1994) (*ACF*).

STATEMENT

1. The 4R Act was enacted in response to the economic deterioration of the rail industry. See 4R Act § 101, 90 Stat. 33. Section 11501, originally Section 306 of the 4R Act, focuses on discriminatory state taxation as a particular cause of that decline. See § 306, 90 Stat. 54 (49 U.S.C. 11501); H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).[1] After 15 years of study, Congress had found that discriminatory state taxation of railroad property "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." 4R Act § 306, 90 Stat. 54 (49 U.S.C. 26c(1) (1976)). In order to protect those critically important channels of interstate commerce, Congress took the extraordinary step of carving out an exception to the Tax Injunction Act, 28 U.S.C. 1341, and empowered federal courts to enjoin prohibited forms of discriminatory state taxation. 4R Act § 306, 90 Stat. 54 (49 U.S.C. 11501(c)).

Section 11501 specifies certain forms of prohibited discrimination and also broadly prohibits States from imposing any other "tax that discriminates against a rail carrier providing transportation." 49 U.S.C. 11501(b)(4). With respect to tax assessments (and taxes levied or collected on the basis of such assessments) in particular, the statute requires that a State's

[1] The statutory language of the original 4R Act was altered slightly when Section 306, originally codified at 49 U.S.C. 26c (1976), was recodified in 1978 at 49 U.S.C. 11503 (1994) as part of the positive enactment of Title 49. See Act of Oct. 17, 1978 (1978 Act), Pub. L. No. 95-473, 92 Stat. 1337. The restatement of prior law effected by the 1978 reenactment was "without substantive change." 1978 Act § 3(a), 92 Stat. 1466. 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, Pub. L. 104-88, § 102(a), 109 Stat. 804.

(or political subdivision's) assessment of railroad property for purposes of an ad valorem tax be tested by a simple comparison of two arithmetic ratios. Under that test, a State's assessment practices are unlawfully discriminatory if the ratio of assessed value to "true market value" (assessment ratio) for railroad property exceeds the assessment ratio for "all other commercial and industrial property." 49 U.S.C. 11501(b)(1).

The statute expresses a preference for establishing the assessment ratio for non-railroad commercial and industrial property "through the random-sampling method known as a sales assessment ratio study." 49 U.S.C. 11501(b)(1).[2] If the assessment ratio for non-railroad commercial and industrial property cannot be established satisfactorily by that method, the statute then requires the court to enjoin any discrimination that is revealed by a comparison of the railroad's assessment ratio to the assessment ratio for "*all other property* subject to a property tax levy in the assessment jurisdiction," *i.e.*, a ratio not limited to commercial and industrial property. 49 U.S.C. 11501(c)(1) (emphasis added).[3]

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[2] A "sales assessment ratio study" compares the assessed value to the actual sale price for a representative and statistically valid sample of property within the assessment jurisdiction. See International Ass'n of Assessing Officers, *Improving Real Property Assessment: A Reference Manual* 122-155 (1978).

[3] Section 11501(c)(1) contains a scrivener's error, which was introduced when Title 49 was recodified and enacted as positive law in 1978. In the original 4R Act, Congress provided unambiguously that the alternative comparison ratio (if a sales assessment ratio study of commercial and industrial property was inadequate) was the ratio of assessed value to true market value of "all other property in the assessment jurisdiction" subject to tax, *i.e.*, not just the ratio of assessed to market value of other commercial property. See 4R Act § 306, 90 Stat. 55 (49 U.S.C. 26c(2)(e) (1976)). In 1978, when Congress recodified Title 49, the words "commercial and industrial" were inserted into the description of the denominator of that alternative ratio, but no similar limitation was added to the numerator, which continues to refer to "all other property subject to a property tax." 1978 Act § 11503(c)(1), 92 Stat. 1446 (49 U.S.C. 11501(c)(1)). The House Report made no reference to the change. See H.R. Rep. No. 1395, 95th Cong., 2d Sess. 179 (1978). Comparison of the railroad's assessment ratio to the ratio indicated by the literal terms of the

A federal court that finds state property tax assessments to discriminate against railroads is empowered to enjoin the violation. 49 U.S.C. 11501(c). Congress limited the impact of the anti-discrimination prohibition, however, by barring the district court from granting any relief under Section 11501 unless the assessment ratio for the railroad's property exceeds the assessment ratio for other commercial and industrial property by at least 5%. *Ibid.*

2. In Georgia, public utilities (*i.e.*, railroads, investor-owned electric utilities, investor-owned telephone companies, pipeline companies, and gas distribution companies) are assessed at the State level. The State Revenue Commissioner, acting on proposed assessments prepared by the Property Tax Division of the Georgia Department of Revenue (Department), certifies the proposed assessments to each county in which there is taxable property. Pet. App. 2a-3a. Other properties, including non-utility commercial and industrial properties, are assessed locally. See *id.* at 2a.

Georgia, like most States, assesses public utilities using the "unit rule," under which the appraiser "values the entire operating system * * * as a going concern and integrated whole irregardless of where it is located," Pet. App. 30a, and then multiplies the value of the whole unit "by the percentage of the entity located within Georgia to determine what portion of the company should be allocated to the state," *id.* at 3a.

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statute would be nonsensical, because the latter ratio would be a meaningless apples-to-oranges comparison of vastly disparate classes of property. Because the statute would be absurd if applied as written, and because Congress specified that the enactment of Title 49 was a restatement of prior law "without substantive change," that could "not be construed as making a substantive change in the laws replaced," § 3(a), 92 Stat. 1466, the reenactment's introduction of the words "commercial and industrial" in the denominator of the comparison ratio in Section 11501(c)(1) must be deemed a scrivener's error. Although this Court quoted the "commercial and industrial" language from Section 11501(c)(1) in *Burlington Northern*, 481 U.S. at 462, that language was not itself at issue and the Court did not analyze the significance of the statutory change.

The alternative "summation" method, employed by some States, is to calculate the value of each individual item of taxable property owned by the taxpayer within the State in isolation and to then aggregate those discrete values. See Committee on Unit Valuation, National Association of Tax Adm'rs, *Appraisal of Railroad and Other Public Utility Property for Ad Valorum Tax Purposes* 2 (1954) (Unit Valuation Report).

The methods used to value a company under the unit rule "fall into three general categories: the sales comparison approach, the cost approach, and the income approach," Pet. App. 3a, which, as their names suggest, derive estimates of value from, respectively, "actual sales of comparable companies or properties," the cost of the company's property, or the company's predicted future income stream. *Ibid*. There are variations within each of those three basic approaches as well. For example, under the cost approach, one could select between original cost or reproduction cost. See Unit Valuation Report 7-8.

In *Burlington Northern*, this Court held that the district court could review a railroad's claim that the State had violated the 4R Act's prohibition against discriminatory assessment ratios by overvaluing the railroad's assets. The Court rejected the State's position that the federal courts must accept "whatever the State determines the value of the railroad to be." 481 U.S. at 461-462. Further, the Court held that a railroad need not show that "the overvaluation results from discriminatory intent." *Id*. at 463.

In so holding, the Court noted that the railroad's "sole challenge [was] to the application of [the State's] methodology." *Burlington Northern*, 481 U.S. at 463 n.5. Thus, the Court expressed "no view" as to "whether a railroad may * * * challenge * * * the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual deter-

minations to which the State's preferred accounting methods were applied." *Ibid.*

3. Petitioner, a freight rail carrier that has multiple routes through Georgia, brought this action under Section 11501 in the United States District Court for the Northern District of Georgia against Georgia's State Board of Equalization to challenge the proposed valuation of the railroad's operating property for ad valorem tax purposes. Pet. App. 24a-25a. Petitioner claimed that for the tax year 2002 the Georgia tax authorities had overestimated the true market value of its transportation property by valuing it at $7.8 billion when its "true market value * * * did not exceed $6 billion." *Id.* at 7a. As a result, the assessment ratio for its property—when the correct market value was used—exceeded the ratio for non-railroad commercial and industrial property within Georgia.

In 2002, the Department's appraiser, Gregg Dickerson, made certain changes to the manner in which the State calculated value under the unit rule. Pet. App. 4a. He discarded a "capitalized earnings approach" and a "direct capitalization approach," two income approaches, in favor of another income approach—the discounted cash flow approach (DCF)—and a "market multiple approach," which values the company by multiplying its income by a multiple derived from the ratio of stock price to income for companies engaged in similar lines of business. Pet. App. 35a. Dickerson retained a "stock and debt approach," which the State had already been using. *Ibid.* For the market multiples approach, Dickerson utilized three different multiples. *Id.* at 5a. He thus derived "five values from these three methods" which ranged from $8.126 billion to $12.346 billion. *Ibid.* "As he did with all public utilities that year, Dickerson selected an amount at the lower end of that range," $8.2 billion, in an effort "to avoid potential litigation." *Ibid.* He then deducted $400 million "to account for intangible property not subject to *ad valorem* taxation" in Georgia, yielding a final taxable valuation of $7.8 billion. *Ibid.*

In support of its claim, petitioner offered a valuation report prepared by its own appraiser, Thomas Tegarden, whose credentials the district court deemed to be "impeccable." Pet. App. 25a. Tegarden used three valuation methods, "(1) a stock and debt approach, (2) a cost approach, and (3) a yield capitalization approach," which is "another variation of the income approach." *Id.* at 35a. He concluded that "the unit value of the Railroad for tax year 2002 did not exceed $6 billion." *Id.* at 7a.

4. After a bench trial, the district court concluded that the State "ha[d] not discriminated against CSXT in violation of 49 U.S.C. § 11501(b)(1)." Pet. App. 71a. The court held that "the 4-R Act does not generally allow a railroad to challenge the state's chosen methodology." *Id.* at 42a. Rather, "[a]s long as the Department's chosen valuation methods are rational and were not chosen for the purpose of discriminating against [the railroad], the court will not second guess the Department's choice of methods." *Ibid.* The court explained that "all five approaches used by CSXT and the Department * * * are widely used to value property" and are "accepted valuation methods." *Id.* at 38a.

The court emphasized that, in its view, "the Department used essentially the same valuation methods for CSXT that it used for other centrally assessed taxpayers." Pet. App. 40a. Given that "at least three different valuation methods" had been used by each side's expert to "arrive[] at different conclusions * * * under each method," *id.* at 41a, it was "clear" to the court "that the determination of the true market value of CSXT * * * is, at best, an educated guess." *Id.* at 42a. Finally, the court held that the Department's chosen valuation methods, all of which "are widely accepted and used by valuation experts," *ibid.*, "are rational" and therefore not subject to challenge. *Id.* at 43a.

5. A divided panel of the court of appeals affirmed. Pet. App. 1a-23a. The court began its analysis by concluding that

the principle "that a statute will not be construed to burden states in the exercise of their traditional powers unless it clearly states its intent to do so," *id.* at 11a, was applicable because, in the court's view, "[t]he selection of a valuation methodology is a part of th[e] fundamental power" of the States to tax, *id.* at 12a. In the court's view, moreover, "[t]he text of the Act does not clearly state that railroads may challenge valuation methodologies." *Id.* at 14a.

"[T]o the extent [legislative history] ha[d] any relevance to [the] inquiry," the court stated that the legislative history "supports the conclusion that railroads may not challenge state valuation methodologies in federal court." Pet. App. 14a (quoting *ACF*, 510 U.S. at 345). The court quoted a Senate report on a precursor of Section 306. That report stated that the bill contemplated no change in "assessment standards, assessment practices, or the assessments themselves," but "merely provides a single standard against which all affected assessments must be measured." *Ibid.* (quoting S. Rep. No. 1483, 90th Cong., 2d Sess. 22 (1968)). Accordingly, the court concluded "that railroads may not challenge state valuation methodologies under subsection (b)(1)." *Ibid.*

Judge Fay dissented, "disagree[ing] with the * * * holding that the 4-R Act bars the Railroad from challenging the valuation methodology chosen by the State." Pet. App. 20a. Noting that "there are many methodologies that can be used in assessing the value of property," *id.* at 21a, he observed that "[s]urely a state could not use one method to assess the market value of railroad property and a different method to assess other commercial and industrial property if such resulted in a gross discrimination toward the railroad," *id.* at 21a-22a. Moreover, he reasoned that "a railroad should be allowed to challenge the method used in an attempt to prove that the result of such a method was not the *true market value* of its property." *Id.* at. 23a.

SUMMARY OF ARGUMENT

Section 306 of the 4R Act is an anti-discrimination provision that prohibits de facto discrimination against railroads in state property taxation. One form of discrimination against which the Act expressly protects is the practice of assessing railroads at a higher ratio to their true market value than is true generally of other commercial properties. In order to determine whether such discrimination has occurred, the federal court must ascertain true market value with respect to both the railroad and other commercial properties. The statute expressly contemplates a hearing on that question: it addresses the burden of proof and it specifically references a presumptively preferred method of valuation for other commercial properties that is to be used if the evidence is "to the satisfaction of the district court." 49 U.S.C. 11501(c). Based on those features of the statute, this Court held in *Burlington Northern* that the true market value of the railroad is a matter to be determined by the federal court. The same reasoning that led the Court to that result also compels the conclusion that consideration of valuation methodologies different from those of the State can be part of that determination.

There is nothing sacrosanct about a State's use of a particular methodology in determining a railroad's "true market value"; if that is, in fact, a step in the State's assessment process. In fact, the legislative history reflects that the States' use of certain "outdated procedures," which yielded inflated market values for railroads, was one of the problems that Congress sought to address. The court of appeals' ruling that state methodologies are beyond challenge defeats that purpose. Moreover, the court of appeals' premise—that a State necessarily chooses a single valuation approach—is itself mistaken. The most appropriate valuation approach may vary from property to property based on individual factual circumstances. Moreover, an appraiser often derives multiple indications of value utilizing various approaches, which must be

weighed in light of the particular facts of the case to arrive at a final value that may not correspond to the value indicated by any single method. In that circumstance, as when a State does not even calculate "true market value" as a step in its assessment process, there is no single State "method" to which to defer.

There is, moreover, no clear line of demarcation between the State's choice of a "method" and its "application." In this case, for example, the seemingly different formulae used by the experts are really different ways of stating the same principle, but with slightly different assumptions about petitioner's future income. The court of appeals' broad rule that even the choice among different assumptions in the course of a valuation constitutes unassailable "methodology" cannot be reconciled with *Burlington Northern* and would render state appraisals susceptible to easily implemented, unredressable manipulation.

Federal courts must determine the true market value of property in many different circumstances, a process that necessarily involves judicial resolution of issues of appraisal methodology. There is nothing problematic about the courts doing so in an action under Section 11501(b)(1) as well. Contrary to the court of appeals' apparent assumption, an action under Section 11501(b)(1) is not an administrative law proceeding for deferential review of a state appraiser's valuation, but rather a de novo action to vindicate a federal right to be free from discriminatory state tax assessments. It would be inappropriate in such an action for the federal court simply to defer to the State's valuation.

ARGUMENT

I. IN DECIDING A CLAIM OF DISCRIMINATORY OVERVALUATION UNDER THE 4R ACT, A FEDERAL COURT IS NOT REQUIRED TO ACCEPT THE STATE'S METHOD OF VALUATION

A. In Providing A Remedy Against De Facto As Well As Intentional Discrimination, Congress Required The Federal Courts To Make Independent Determinations Of True Market Value

Congress enacted Section 306 of the 4R Act to address the problem of "discriminatory state taxation of railroad property." *Burlington Northern*, 481 U.S. at 457. Thus, Congress provided a remedy against any tax that "*results in* discriminatory treatment of a common carrier by railroad." 4R Act § 306, 90 Stat. 54 (emphasis added) (49 U.S.C. 26c(1)(d) (1976)).[4] Significantly, as this Court explained in *Burlington Northern*, Congress forbade "'acts' which 'unreasonably burden and discriminate against interstate commerce'" without reference "to the intent of the actor." 481 U.S. at 463 (quoting 49 U.S.C. 11501(b)).

With respect to discriminatory assessments, Section 11501(b)(1) forbids, and Section 11501(c) authorizes the federal courts to enjoin, States from assessing railroad property "at a value that has a higher ratio to [its] true market value" than the corresponding ratio for "other commercial and industrial property." 49 U.S.C. 11501(b)(1). As the Court recognized in *Burlington Northern*, "[i]t is clear from this language that in order to compare the actual assessment ratios, it is

[4] The 1978 Act replaced the words "results in discriminatory treatment" with "discriminates," see 1978 Act § 11503(b)(4), 92 Stat. 1446 (49 U.S.C. 11501(b)(4)), but that "change[] 'may not be construed as making a substantive change in the laws replaced.'" *Burlington Northern*, 481 U.S. at 457 n.1 (quoting 1978 Act § 3(a), 92 Stat. 1466).

necessary to determine what the 'true market values' are." 481 U.S. at 461. The Court rejected the argument that the federal courts must accept "whatever the State determines the value of the railroad to be." *Id.* at 461-462. The statutory reference to "true market value" is not a reference to a State's definition of value for its own assessment purposes. Rather, the railroad's "true market value" is a federal question "to be litigated in federal court." *Id.* at 462.

In *Burlington Northern*, the railroad had "not challenged the valuation methodology" used by the State to determine the railroad's value, but had limited its challenge to "the application of that methodology." 481 U.S. at 463 n.5. Thus, the Court noted, without deciding, the question "whether a railroad may, in an action under [Section 11501], challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied." *Ibid.*

Although *Burlington Northern* reserved the question, its logic requires that the federal court also be able to consider questions of valuation methodology. There is no clear line that separates methodological choices from mere questions of application. Moreover, because, as the district court conceded, it is the State's choice of "a particular methodology that, to a large extent, predetermines the result," Pet. App. 38a, foreclosing any challenge to the State's methodology would essentially eviscerate the protection afforded by Section 11501(b)(1), particularly if "methodology" is understood in the broad sense employed by the courts below.

The *Burlington Northern* Court recognized that Section 11501(b)(1) and (c) plainly require the reviewing court to determine the "true market value" of the railroad's property. There is no indication in the statutory text that Congress intended to bind the federal courts to employ the particular

methodological judgments adopted by state or local government appraisers in performing that inquiry. To the contrary, the statute reflects Congress's understanding that a property's "*true* market value" is a question of fact that is to be decided by the federal court using the best evidence available to it, even if that evidence points to an approach that diverges from the State's chosen method of valuation or demonstrates that the State's methodology is deeply biased or flawed. Moreover, as discussed below, a rule that rests on a purported distinction between method and application, allowing litigation of only the latter, would lead to unnecessary litigation and produce standardless and unpredictable decisionmaking regarding the question whether a particular challenge fell on one side or the other of that ephemeral line. The facts of this case amply demonstrate the weaknesses of such a rule.

B. The Text And Structure Of Section 11501 Demonstrate Congress's Intent That Federal Courts Determine True Market Value Based On The Best Evidence Available, Not Blind Adherence To State Methodologies

The text of Section 11501 demonstrates that Congress intended the federal courts to determine true market value using the best evidence available, even when that evidence departs from the State's various methodological choices. In *Burlington Northern*, the Court found the language of the 4R Act "clear" in requiring the federal courts "to determine what the 'true market values' are." 481 U.S. at 461. See *ibid.* (finding the legislative history "irrelevant" because "the terms of [the] statute [are] unambiguous") (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). Not only does the 4R Act's directive that federal courts independently determine "true market value" not distinguish between the State's choice of methodology and its application of that methodology—the latter of which is unquestionably subject to federal review, see *id.* at 462—it affirmatively indicates Congress's presumptive preference for using a particular methodology for deter-

mining true market value (*viz.*, a sales methodology) when feasible and satisfactory to the court, *regardless* of the method(s) preferred by the State.

Section 11501(c) provides that "[t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. 11501(c). As the Court has recognized, "[i]t would be inconsistent to allocate the burden of proof as to an issue which could not be litigated in federal court in the first place." *Burlington Northern*, 481 U.S. at 462. Section 11501(c) goes on to provide that if satisfactory evidence is available, the federal court should generally utilize "the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study)" to determine "the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property." 49 U.S.C. 11501(c). In other words, Congress concluded that arms-length sales that take place in the marketplace are presumptively the best evidence of "true market value," and it directed the federal courts to rely on such actual sales information whenever it can be used to determine the ratio of assessed to true market value of non-railroad commercial and industrial property "to the satisfaction of the district court." *Ibid.* Plainly, it would not be open to a State to object to such evidence on the ground that, for example, the State had determined the true market value of non-railroad commercial and industrial property using the income, rather than sales, method of valuation.

Section 11501(c) thus makes clear that Congress expected the federal courts to calculate the true market value of other commercial and industrial property by employing a sales-based approach whenever that method was satisfactory *to the district court*—and entirely without regard to the State's preferred method(s), if any, for making that determi-

nation. It logically follows that Congress's use of the same term—"true market value"—with respect to railroad property likewise refers to the value of the property as determined to the satisfaction of the district court without regard to the methodology utilized by the State. See *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007) ("identical words and phrases within the same statute should normally be given the same meaning"). It is inconceivable, for example, that in light of Congress's expressed preference for sales information as evidence of true market value, Congress would have expected or intended that a State's methodological choices could preclude a court from considering the price at which a railroad was sold at the end of the previous year in determining its true market value.

The Court considered and rejected in *Burlington Northern* the argument that Section 11501(c)'s reference to a particular method for deriving the true market value of other commercial and industrial property implies, by negative inference, that Congress did not intend the federal courts to determine independently the true market value of railroad property. Rather, "the language of subsection (c) leads to the opposite conclusion." 481 U.S. at 462. The statute makes clear that "assessed value and true market value are subjects for judicial inquiry, and are to be proved," and the specific reference in subsection (c) to a method for proving the ratio for commercial property by a statistical sample is simply a "particular grant of authority * * * to use statistical methods." *Ibid.* It "raises no implication whatever that the value of another kind of property may not be proved at all." *Id.* at 463. By the same token, it raises no implication that a court is bound by the State's choice of methodology for valuing railroad property, but instead reflects Congress's expectation that federal courts would make a determination concerning "true market value," and that methodological choices, like

other aspects of that inquiry, would be matters for judicial resolution "to the satisfaction of the district court."

C. The Legislative History Likewise Reflects Congress's Understanding That State Assessments Would Be Measured Against A Federal Standard Of True Market Value, Rather Than The States' "Outdated Procedures"

The legislative history confirms that Congress did not intend to bind federal courts to the methodologies used by the States to evaluate railroad property. Indeed, the contrary intent is clearly reflected in the Senate Report's recognition that railroads "are discriminated against as compared to other property taxpayers in the same jurisdiction, due in large measure to *outdated procedures* (which are sometimes deliberately retained) for assessment of property." S. Rep. No. 630, 91st Cong., 1st Sess. 2 (1969) (emphasis added) (quoting Interstate Commerce Commission letter, which quoted the report on *National Transportation Policy*, S. Rep. No. 445, 87th Cong., 1st Sess. 451 (1961) (Doyle Report)). The Doyle Report noted that "[c]ost, whether it be original or reproduction cost, is poor evidence of system value for railroads," but that it nonetheless "remains in use" by States as a valuation method because "cost is usually a higher figure for railroads than current cash value." Doyle Report 456-457. By "justify[ing] a higher full value" for the railroad through the use of a cost methodology, a State could "in turn appear to produce a lower equalized assessment ratio." *Id.* at 457.[5] Plainly Congress did not forbid the federal courts to scruti-

[5] The Second Circuit's decision in *Consolidated Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473, cert. denied, 515 U.S. 1122 (1995), exemplifies the cost methodology' potential to overvalue a railroad's property. In that case, the New York State Board of Equalization and Assessment, using a "cost approach," determined that Conrail's property in New York had a "true market value of $974 million," which was more than twice the $451 million value indicated by the "stock and debt" and "income capitalization" methods. *Id.* at 480.

nize those same valuation "procedures" that were the cause of the problem Congress sought to remedy.

The Senate Report further reflects the Committee's understanding that the statutory standard of "true market value" was to be the *federal* standard against which state assessments would be compared in determining discrimination. S. Rep. No. 630, *supra*, at 25-26; S. Rep. No. 1483, *supra*, at 22. The report indicates that the bill did not "require a State to change its assessment standards, assessment practice, or the assessments themselves," but that it did "provide[] a single standard"—true market value—"against which all affected assessments must be measured." *Ibid*. True market value "is not a standard for determining value; it is a standard to which values that have already been determined [*i.e.*, the State's assessments] must be compared." *Ibid*. Thus, "true market value" is not an assessment method or practice that the States were being required by Congress to adopt. States remain free to use any method they like in arriving at the numerator of assessed value. But the denominator of "true market value" is a federal standard as to which States are not owed particular deference. That remains true even if states calculate a market value or true market value as a step in their assessment. Their assessment, including any calculation of market value, is taken as a given for purposes of the numerator, but "true market value" in the denominator of Section 11501(b)'s ratio remains a question for the federal court. Indeed, as discussed at pp. 26-27, *infra*, some States do not even *attempt* to base assessments on true or fair market value. "True market value" is simply the *federal* standard to which state assessments are to be compared in determining whether a railroad has been subjected to discrimination. Plainly, "true market value" would not be much of a litmus test if the State's own assertions as to true market value were dispositive.

The court of appeals read the above-quoted statement from the Senate Report as "support[ing] the conclusion that rail-

roads may not challenge state valuation methodologies in federal court." Pet. App. 14a; *id.* at 40a-41a. But the assertion that States are not required to "change" their "assessment standards, assessment practices, or the assessments themselves," S. Rep. No. 630, *supra*, at 25, cannot plausibly be read to suggest that those matters—including "the assessments themselves"—are binding on the federal courts in the course of making their independent determinations of "true market value." The court of appeals' reading proves too much, as it would entirely nullify the Act (and overrule *Burlington Northern*) by forbidding any meaningful examination of true market value, at least in the many taxing jurisdictions that purport to "assess" at that value or a fixed proportion thereof.

Throughout the hearings leading up to the enactment of Section 306, state representatives repeatedly objected to an assessment-ratio test like the one ultimately adopted by Congress, on the precise ground that it would entail independent federal court determinations of value.[6] Notwithstanding those objections, Congress enacted the assessment ratio approach into law, signalling its rejection of those concerns. The legislative history thus confirms that Congress did not intend to limit the discretion of federal courts to employ valuation approaches different from those utilized by the States.

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[6] See *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 114 (1967) (statement of Charles F. Conlon); *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 99, 102 (1969) (statement of George Kinnear).

II. THE RULE ADOPTED BY THE COURT OF APPEALS IS NEITHER WORKABLE NOR JUSTIFIED

A. The Court Of Appeals' Distinction Between Valuation Methodology and Application Is Ephemeral And Would Lead To Standardless Collateral Litigation

The approach adopted by the lower courts presupposes a meaningful and discernible distinction between a State's unreviewable choice of a valuation "methodology" and its reviewable "application" of that methodology. That purported distinction, however, is far too indeterminate and ephemeral to support the weight that the lower courts would place upon it. As the facts of this case demonstrate, valuation "methodology" and "application" are often indistinguishable in practice, and a rule that makes so much turn on the supposed distinction would only invite unnecessary and ultimately standardless collateral litigation about whether various aspects of the State's calculations fall on one or the other side of the line.

The rule adopted by the lower courts—that "[t]he district court was not allowed to consider a valuation methodology different from *the methodology* of the Board," Pet. App. 15a (emphasis added)—was based on the mistaken premise that "each appraisal is based on *a particular* methodology." *Id.* at 38a (emphasis added). See *id.* at 12a (deference to the State's "selection of a valuation methodology"). Valuation treatises make clear, however, that in general no single method of valuation produces a property's "true market value." Rather, an appraiser's ultimate estimate of value reflects evidence gathered from a variety of approaches (and techniques within approaches), the relative strength of which the appraiser weighs based on the particular facts and circumstances concerning the property. In most instances, there will be no single state "methodology" to which the court could defer.

"Appraisers develop an opinion of property value with specific appraisal procedures that reflect three distinct methods

of data analysis: 1. Cost[;] 2. Sales comparison[;] 3. Income capitalization." Appraisal Inst., *The Appraisal of Real Estate* 62 (12th ed. 2001) (Appraisal Inst.). None of those approaches (or variations on those approaches) yields, in itself, the property's "true market value"; rather, each provides an "indication of value," *i.e.*, "*evidence* of value." *Id.* at 597; Unit Valuation Report 3 (emphasis added). In any given appraisal, "more than one approach to value is usually applied, and each approach typically results in a different indication of value." Appraisal Inst. 597; James H. Boykin & Alfred A. Ring, Valuation of Real Estate 434 (4th ed. 1993) (Boykin) ("[T]he appraiser proceeds with an analysis of the data under each of the value approaches"). Indeed, "several value indications may be derived in a single approach," such as different indications of value derived "from applying income multipliers to specific types of income, directly capitalizing net income, and discounting cash flows." Appraisal Inst. 597.

The ultimate task of the appraiser is to reconcile the distinct indications of value generated by the different approaches to reach a final estimate of value. The process of reconciliation is not simply "a mathematical process involving mere averaging of the estimates derived under the independent value approaches." Boykin 434; see Appraisal Inst. 597-598. The appraiser's "task is to weigh the pertinency of such evidences and to make an objective analysis of each." Unit Valuation Report 59. "The appraiser weighs the relative significance, applicability, and defensibility of each value indication and relies most heavily on the approach that is most appropriate to the nature of the appraisal problem." Appraisal Inst. 600. The final opinion of value "need not be identical to the value produced by" any single approach. *Ibid.*

Thus, the lower courts' assumption that there will be a single "state methodology" to which to defer is mistaken. In any given appraisal, the State's final opinion of value often will not represent the figure that a single approach would

generate, but rather the appraiser's weighing of the different "evidences of value." That weighing process should reflect the appraiser's consideration of all the relevant facts, including the strength of the data upon which the calculations were derived and the nature of the property or enterprise being evaluated. Appraisal Inst. 600. It is impossible to discern where, in such a situation, the State's purportedly unreviewable "choice of methodology" ends and where its "application" begins.[7]

The facts of this case demonstrate the difficulty of identifying a principled basis for distinction. Here, it was undisputed that Georgia did not value all properties in Georgia, or even all centrally assessed properties, according to a single valuation approach. For each centrally assessed property, the State "calculat[ed] five values under three different methods and select[ed] a figure at the low end of the resulting range."

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[7] At the highest level of generality, when a State is making the initial determination whether to use the unit rule or the summation method to value railroad or other property, it may be fair to say that the choice is purely one of methodology, or perhaps even that it is part of the logically prior decision of what property the State is going to tax. One might argue that there is also a sufficiently clear methodological dichotomy between a "cost" approach, on the one hand, and an "income" or "sales" approach, on the other. See Unit Valuation Report 3 ("The cost approach is a summation appraisal, and as such may not be regarded as a measure of unit value."). Even at that level, however, the distinction becomes much less clear, because although cost is not itself an indication of unit value, it is "good information to guide judgment, and therefore is a proper evidence to consider in finding value." *Ibid.* As discussed above, most appraisers use a cost approach as just one of many evidences of value, with the final value opinion being derived from no one approach alone. There is even more practical overlap between the income and sales approaches, and moreover the choice of approach even at that high level of generality may reflect a fact-based assessment of the particular circumstances of the entity to be valued. In any event, there is simply no discernible line between "methodology" and "application" once the appraiser moves past the threshold question of cost, income, and/or sales methods and begins selecting sub-approaches (*e.g.*, DCF versus yield ratio), choosing techniques (*e.g.*, for determining a discount rate), and making assumptions and judgments based on the particular facts and circumstances.

Pet. App. 17a. The lowest figure could have been generated by the income approach in the case of one utility, by the stock and debt approach in the case of another, and by the market multiples approach in the case of a third. As the court of appeals recognized, in this case, the State's selection "of an appraisal amount nearest to the discounted cash flow number did not reflect the conclusion that discounted cash flow was the most accurate of the methods used, only that it was the lowest." *Id.* at 18a. It is at best awkward to describe the State's approach—always to choose the lowest of the calculated figures—as an "accounting method[]" or "valuation methodology" to which the courts must defer. And if deference is due here, it would seem equally applicable to a State's decision always to choose a particular method that is well-established to overvalue railroads relative to other commercial property.

The lower courts' refusal to consider the "yield capitalization" valuation proposed by petitioner's expert, Tegarden, on the ground that it was a different methodology from the State's DCF approach further demonstrates the difficulty of drawing the line that is at the heart of the court of appeals' rule. The district court recognized Tegarden's "yield capitalization" analysis as a "cousin" to the "discounted cash flow" analysis used by the State, because both are versions "of the income approach." Pet. App. 35a-36a. The court nonetheless concluded (and the court of appeals agreed, *id.* at 15a-18a) that Tegarden's was "a different valuation method" that could not be considered, *id.* at 45a.

That conclusion expands the scope of "methodology" into the realm of mere *assumptions* made by appraisers. While Dickerson and Tegarden expressed their respective approaches by different formulae, see Pet. App. 36a, the latter is simply a mathematical shorthand of the former if one assumes, as Tegarden did, that petitioner's income would remain level. See J.A. 80-81 (setting out Dickerson's DCF for-

mula, and noting that "[w]here income has the characteristics of a perpetuity * * *, the universal capitalization formula, *Value = Income ÷ Rate*, can be used").[8] Tegarden's calculations could likewise have been expressed in Dickerson's longer form, with the numerator remaining constant each year. Thus, the difference between the two formulae boils down to the appraisers' differing *assumptions* regarding the growth of petitioner's future income. An approach that deems appraisers' mere assumptions to qualify as unreviewable "methodology" would effectively preclude *any* meaningful review of state determinations of true market value, because the assumptions made by the appraiser at each step of the process ultimately determine the outcome of *any* valuation approach. See *Metlyn Realty Corp.* v. *Esmark, Inc.*, 763 F.2d 826, 835 (7th Cir. 1985) (Easterbrook, J.) ("It is a simple matter to increase or reduce the outcome of a cash flow analysis by 200% by making changes in assumptions [such as the firm's costs, rate of growth, and the discount rate] that appear by themselves to be insignificant.").

In an attempt to justify its conclusion that Tegarden's approach could not be considered, the court of appeals held that "all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be," qualify as "accounting methods" that a railroad may not challenge. Pet. App. 17a. In the first place, however, there is no basis for the court of appeals' view that an appraiser's particular assumptions about the best way to value a particular taxpayer's property are "nonfactual determinations"—surely the question whether a railroad's income should be held constant or assumed to increase in future years is more factual than legal in nature, as are most, if not all, of the myriad of

[8] The district court's representation of Dickerson's discounted cash flow formula (Pet. App. 36a) contains an error. The court failed to compound the discount rate in each successive year. Under the correct formula, the denominator (1 + discount rate) should be squared in year two, cubed in year three, etc. See Appraisal Inst. 688.

other assumptions that appraisers must make in selecting, applying, and weighing various valuation approaches.

Under the court of appeals' rule, moreover, any valuation rule that a State can articulate in general terms would apparently become unassailable. For example, if the State were to adopt a general rule to treat property as obsolete only in certain circumstances, it could foreclose challenge to its refusal to make deductions for obsolescence for property that did not satisfy the rule as articulated by the State. Likewise, if the State adopted a "methodology" for determining the discount rate in DCF calculations, such as using the Federal Reserve Board's federal funds rate, that "nonfactual determination * * * in constructing [the] valuation process," Pet. App. 17a, would seemingly be immune from judicial scrutiny.

Plainly, the court of appeals' rule cannot be squared with this Court's holding in *Burlington Northern*, in which the Court specifically held that the district court could adjudicate petitioner's challenges to "the State's evaluation of the cost of capital" and its "refusal to make deductions for property which petitioner claims is obsolete." 481 U.S. at 463 n.5. Yet there is no other obvious place to draw a principled, meaningful, and judicially manageable line between that which is subject to judicial review and that which is not.

B. The Determination Of A Property's True Market Value Is A Common Judicial Function That The Courts Cannot Escape Under Section 11501

The court of appeals' reluctance to undertake judicial review of valuation methodologies reflects its view that such an inquiry would amount to inappropriate "freewheeling judicial second-guessing." Pet. App. 17a. The district court likewise believed that it was being asked to "dictate a particular valuation method to the Department," which it was not qualified to do. *Id.* at 42a. But the valuation of property is a function that courts routinely undertake, in numerous contexts. Moreover, because States need not make *any* attempt to calculate "true

market value" in the course of making property assessments, but instead can use an assessment formula driven by other factors, such as historical sales prices, courts applying Section 11501 will sometimes have no choice but to make an independent determination of "true market value," which *necessarily* will entail making determinations regarding methodology. The court's role in assessing "true market value" for purposes of the federal-law denominator is not materially different whether or not a State calculates market value as a step in its assessment process. The federal court's role under Section 11501 is not that of a state court deferentially reviewing administrative agency action; rather, it is to conduct a de novo hearing on whether the State has violated the railroad's federal right against de facto discrimination.

The federal courts are routinely called upon to decide questions of property valuation in contexts other than Section 11501. See, *e.g.*, *United States* v. *50 Acres of Land*, 469 U.S. 24, 29-30 (1984) (Just Compensation Clause); *VFB LLC* v. *Campbell Soup Co.*, 482 F.3d 624, 632 (3d Cir. 2007) (action in bankruptcy to set aside sale of corporate division as fraudulent); *Citicorp Real Estate, Inc.* v. *Smith*, 155 F.3d 1097, 1106 (9th Cir. 1998) (determination of property's fair value in suit for deficiency judgment); *McMurray* v. *Commissioner*, 985 F.2d 36, 40 (1st Cir. 1993) (valuation of land donated to charity in action for tax deficiency). There is no reason to believe that federal courts are any less competent to weigh expert testimony regarding valuation issues in litigation under Section 11501 than they are in those other contexts.

The courts below believed that Congress intended that federal courts *not* make determinations regarding valuation methodology pursuant to Section 11501(b)(1). To the contrary, however, by making a determination of "true market value" an essential component of any suit under Section 11501(b)(1), and without requiring States to undertake such a calculation, Congress plainly contemplated that the determi-

nation of value (which necessarily entails judgments regarding methodology) was one for the federal courts to make.

Although most States do determine some version of market value as part of their assessment processes, that is not necessarily the case. Historically, some taxing jurisdictions simply "estimate[d] the 'fractional' valuation directly without even attempting to first determine full value." Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374, 1379 (1962); see *In re Kents 2124 Atl. Ave., Inc.*, 166 A.2d 763, 767 (N.J. 1961) (when "they valued new construction, the assessors expressly eschewed any conception of the value of the properties" in favor of drawing an "assessment" value directly from comparable properties); *Batson* v. *Pearl River County*, 35 S. 2d 712 (Miss. 1948) (upholding "arbitrary assessment value of $2.50 per acre" for "all cut-over lands in the county"). More recently, in *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992), the Court upheld a state constitutional amendment that made it the express policy of the State *not* to tax properties as a percentage of their market value, but according to a formula based upon their historical value. *Id.* at 5-6, 18.

Actions under Section 11501 likewise illustrate that not all States calculate "true market value" within the meaning of the 4R Act. See, *e.g.*, *Louisville & Nashville R.R.* v. *Department of Revenue*, 736 F.2d 1495, 1499 (11th Cir. 1984) (holding that "full market value" rather than "just value" represents "true market value for purposes of section [11501]"). Cf. *Consolidated Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473, 476 (2d Cir. 1995) (noting New York's practice of assessing railroad property as a percentage of "taxable value," which differed from "true market value"). In fact, in the case at bar, the court of appeals recognized that the figure used by the State "did not reflect the conclusion that discounted cash flow was the most accurate of the methods used, only that it was the lowest." Pet. App. 18a. Thus, federal courts simply can-

not avoid their responsibility in an action under Section 11501(b)(1) to determine the railroad property's "true market value" for purposes of the federal statute.

Whereas the court of appeals would preclude review of the State's chosen methodology altogether, Pet. App. 15a, the district court attempted to chart a middle course, allowing review to determine whether the State's methodology is unreasonable or purposefully discriminatory. The district court's attempt to reintroduce a threshold element of discriminatory intent into Section 11501(b)(1) runs directly contrary to this Court's holding in *Burlington Northern*. Moreover, the district court's approach, which is analogous to the standard a court might apply in reviewing agency action, is inappropriate for a statute that creates a federal right against de facto discrimination by the State. The courts of appeals have recognized as much in selecting the appropriate standard of proof to govern claims under Section 11501. See *CSX Transp., Inc.* v. *Board of Public Works*, 95 F.3d 318, 323 (4th Cir. 1996) (action under Section 11501(b)(1) is "an original action" and "does not involve review of an assessment by a state agency or other comparable body"); *Burlington N. R.R.* v. *Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985) (rejecting standard for administrative review in favor of that for "de novo review in state court"). But see *Burlington N. R.R.* v. *Department of Revenue*, 23 F.3d 239, 241 (9th Cir. 1994) (applying Washington's "clear, cogent, and convincing evidence" standard for review of tax assessments).[9]

[9] Section 11501(c) provides that the "burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. 11501(c). Arguably, the reference to "burden of proof" refers to the question of which party bears the "burden," not to the separate question of the *standard* of proof that party must bear. Alternatively, if read as referring to the standard of proof, it should be the State standard for civil proceedings generally, not for assessment appeals. See *Bair*, 766 F.2d at 1226. Were it otherwise, a State might effectively immunize itself from challenge under Section 11501(b)(1) by imposing an impossibly high standard of proof on those who challenge assessments in its own courts. In any event, that question is not

Ironically, the approach adopted by the court of appeals grants state assessors more deference in an action under the 4R Act's anti-discrimination provision than they enjoy when their assessments are appealed to Georgia's own courts. As the Georgia courts have repeatedly held, "[j]ust and fair valuation of property is a question to be determined by the factfinder, [*i.e.*], the trial court." *Dougherty County Bd. of Equalization* v. *Casto Dev. Co.*, 491 S.E.2d 483, 485 (Ga. Ct. App. 1997). In the "de novo investigation" before the trial court, the burden is on the initiating party, but "neither party is entitled to any prima facia presumption regarding the correctness of its evidence of valuation." *Hirsch* v. *Joint City County Bd. of Assessors*, 463 S.E.2d 703, 705 (Ga. Ct. App. 1995) (citation omitted). Taxpayers may present the opinions of their own experts, who are free to offer testimony based on valuation methods different from those of the State. See, *e.g.*, *Casto Dev. Co.*, 491 S.E.2d at 484 (noting that taxpayer's expert had criticized "the county's cost approach" and offered his own multi-approach analysis that "ascribe[d] more weight to the income approach"). Like an action in Georgia court, an action in federal court under the 4R Act is a "de novo" proceeding, in which the railroad should be permitted to prove its claim of discriminatory taxation with any competent evidence.

C. The Court Of Appeals' Reliance On Concerns Of Federal Comity Is Misplaced

The court of appeals believed that its curtailment of federal court review was compelled by principles of federalism and respect for the States' sovereign interest in setting tax policy. Pet. App. 12a-13a. This Court rejected that argument in *Burlington Northern* and it should do so here as well.

In *Burlington Northern*, the State urged that "injunctive relief against state taxation offends the principles of comity."

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presented in this case because Georgia permits a de novo hearing, with no presumption in favor of the State's assessment or its valuation methodology. See p. 28, *infra*.

481 U.S. at 464 (citation omitted). The Court disagreed, explaining that while such "policy considerations * * * may have weighed heavily with legislators who considered the Act," the Court was "not free to reconsider them now." *Ibid.* The 4R Act itself, which creates an express exception to the Tax Injunction Act, 28 U.S.C. 1341, see 49 U.S.C. 11501(c), makes clear that Congress fully intended to authorize the federal courts to enjoin prohibited forms of discriminatory state taxation. Moreover, as *Burlington Northern* held, the statute unambiguously establishes "true market value" as an element of the railroad's federal claim that must be proved to the district court's satisfaction. 481 U.S. at 462-464. There is no basis for the court of appeals' insistence that Congress also specify in a "clear statement" (Pet. App. 14a) each element of "true market value" that the federal court is to determine.

The court of appeals believed that this Court's more recent decision in ACF, rather than *Burlington Northern*, was the more apposite, but its reliance on *ACF* was misplaced. There, the Court held that a State does not violate the 4R Act's prohibition against "another tax that discriminates against a rail carrier," 49 U.S.C. 11501(b)(4), when it exempts certain non-railroad property from a generally applicable ad valorem tax without providing a similar exemption for railroad property. 510 U.S. at 347-348. The Court reasoned that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemption in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)," which did "not speak with any degree of particularity to the question of tax exemptions." *Id.* at 343. By contrast, the statutory text and structure of Section 11501(b)(1) and (c) makes evident that Congress expected the federal courts to make an independent determination of "true market value," which includes considerations of methodology.

The court of appeals believed that *ACF*, rather than *Burlington Northern*, was more relevant because federal

review of the State's choice of valuation methodology is more intrusive than review of the State's application of that methodology. Pet. App. 11a-12a. In *ACF*, the Court stressed that "[p]roperty tax exemptions are an important aspect of state and local tax policy." 510 U.S. at 344. But the only "[i]mportant question[] of state policy" that the court of appeals identified regarding valuation methodologies was the possibility that a State would choose "a simple valuation methodology rather than a complicated one" due to budget constraints. *Id.* at 12a. There is no indication that Congress believed that a State's refusal to expend resources on an accurate appraisal should be a defense against a claim of de facto discrimination under the 4R Act. Indeed, among the problems that the Senate Report identified and to which the 4R Act was addressed were the States' "outdated procedures." S. Rep. No. 630, *supra*, at 2. Nor is there any reason to conclude that the State's "methodology" of choosing the lowest of five calculated values, or its fortuitous use of the discounted cash flow approach in this case, reflects an "[i]mportant question[] of state policy" that implicates the "fundamental power of the state." Pet. App. 12a.

CONCLUSION

The judgment of the court of appeals should be vacated.

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