No. 01-1617

In the Supreme Court of the United States

EARL ATWOOD, ETC., ET. AL. PETITIONERS

v.

BURLINGTON NORTHERN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

MARK B. STERN
STEPHANIE R. MARCUS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether in enacting Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11501, Congress validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 270 F.3d 942. The opinion of the district court (Pet. App. 11-37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2001. A petition for rehearing was denied on January 31, 2002 (Pet. App. 38-39). The petition for a writ of certiorari was filed on April 30, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 306(b) of the Railroad Revitalization and Regulatory Reform Act (4-R Act) prohibits States, their subdivisions, and their officials from assessing, levying, collecting, and imposing taxes that discriminate against railroads as compared to other commercial and industrial entities. 49 U.S.C. 11501(b). As codified at 49 U.S.C. 11501(b), Section 306(b) provides that "a State, subdivision of a State, or authority acting for a State or subdivision of a State may not":

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. 11501(b).[1]

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[1] We refer to Section 306 as presently codified. Although Congress made some technical changes in language when it recodified the original Section 306, such changes "may not be construed as

To achieve its goal of preventing such discriminatory taxation, Congress expressly authorized actions in federal district court to prevent violations of Section 306. 49 U.S.C. 11501(c). Congress provided that "[n]otwithstanding section 1341 of title 28 [the Tax Injunction Act]," federal district courts have "jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section." *Ibid.* Relief is available under Section 306 "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to the market value of other commercial and industrial property in the same assessment jurisdiction." *Ibid.*

2. Respondents Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company filed two separate actions against petitioners, the Directors of the Wyoming Department of Revenue and the Wyoming Department of Transportation, alleging violations of Section 306 of the 4-R Act. Respondents sought declaratory and injunctive relief to prevent the enforcement and collection of Wyoming's Excise Tax on Commercial Transportation of Coal and its Tax on Railroads to the extent that such taxes violate Section 306. Pet. App. 12.

Petitioners moved to dismiss on the ground that the Eleventh Amendment barred respondents' claims. Pet. App. 13. The United States intervened to support the constitutionality of Section 306. The district court denied petitioners' motions to dismiss. *Id.* at 11-37. The court held that Congress validly abrogated state

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making a substantive change in the laws replaced." *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987) (internal quotation marks omitted).

sovereign immunity in Section 306 under Section 5 of the Fourteenth Amendment. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-10. The court explained that in *Union Pacific Railroad* v. *Utah*, 198 F.3d 1201 (10th Cir. 1999), it had held that, under Section 5 of the Fourteenth Amendment, Congress had the power to abrogate state sovereign immunity in Section 306 of the 4-R Act. Pet. App. 5. The court determined that its decision in *Union Pacific* remained controlling. *Id.* at 3-10.

The court of appeals reiterated the crucial conclusions that it had reached in *Union Pacific*. First, it had ruled that in enacting Section 306, Congress made "an unmistakably clear expression of congressional intent to abrogate state immunity." Pet. App. 6 (internal quotation marks omitted). Second, it had held that in order to validly abrogate state immunity under Section 5, Congress need not expressly rely on the Fourteenth Amendment. *Ibid.* Third, it had determined that Congress enacted Section 306 in response to "'evidence of a pattern of unconstitutional taxation'" of railroad property by States. *Id.* at 7 (quoting *Union Pac.*, 198 F.3d at 1206-1207). Fourth, it had ruled that the remedy that Congress provided in Section 306 was "congruent with and in proportion to the Equal Protection violation," since Section 306 allows only injunctive relief, and permits such relief only when the discriminatory taxation exceeds a threshold of five percent. *Id.* at 7-8 (quoting *Union Pac.*, 198 F.3d at 1208).

The court of appeals then rejected petitioners' contention that *Union Pacific* had been undermined by this Court's decisions in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). Pet. App. 8-10. The court held that even

"[a]ssuming for the sake of argument" that *Kimel* requires a court to consider whether a statute prohibits "substantially more practices" than would the Fourteenth Amendment in determining the validity of an abrogation of immunity, "it does not follow that the State would then prevail." *Id.* at 8-9. The court explained that petitioners had "overlooked" the fact that Section 306 provides a remedy only when the ratio of assessed value to true market value of railroad property is at least 5 percent greater than the ratio that applies to other commercial and industrial property. Pet. App. 9. The court also observed that in *Union Pacific*, it had "already established that discriminatory taxation of railroads violates the Equal Protection Clause." *Ibid.* The court added that even if Section 306 prohibits some state discrimination that does not violate the Equal Protection Clause, this Court has "never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Ibid.* (quoting *Kimel*, 528 U.S. at 88).

The court also rejected petitioners' contention that, in light of *Kimel*, there was insufficient evidence that Section 306 responded to a pattern of unconstitutional discrimination by the States. Pet. App. 10. The court explained that, in *Union Pacific*, it had already reviewed the legislative record and had expressly found that Congress "was responding to * * * a pattern of unconstitutional taxation." *Ibid.*

DISCUSSION

The court of appeals' holding that Congress validly abrogated state sovereign immunity in Section 306 of the 4-R Act does not conflict with the decision of any other court of appeals. The courts of appeals that have addressed the issue have uniformly held that Section 5

of the Fourteenth Amendment authorizes Congress's abrogation of state sovereign immunity in Section 306. *Union Pac. R.R.* v. *Utah*, 198 F.3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie Ry.* v. *Public Util. Comm'n*, 141 F.3d 88 (3d Cir. 1998), cert. denied, 528 U.S. 928 (1999); *Oregon Short Line R.R.* v. *Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998). Because those decisions are correct, and consistent with this Court's precedents, further review is not warranted.

Certiorari is also unwarranted because respondents sought relief against individual state officials to prevent ongoing violations of federal law, and that relief is available pursuant to *Ex parte Young*, 209 U.S. 123 (1908), even absent a valid abrogation. *Verizon Maryland, Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1760 (2002); *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 540 (4th Cir.), cert. denied, 525 U.S. 821 (1998). There is therefore no need to decide in this case whether Congress validly abrogated state sovereign immunity. *Ibid.*

1. In order to abrogate state sovereign immunity, Congress must have "unequivocally expresse[d] its intent to abrogate the immunity," and must have "acted pursuant to a valid exercise of power." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) (internal quotations omitted). Petitioners do not challenge the court of appeals' conclusion that Congress clearly expressed its intent to abrogate Eleventh Amendment immunity in Section 306. See Pet. App. 6; see also *Union Pac.*, 198 F.3d at 1206; *Wheeling*, 141 F.3d at 92; *Oregon Short Line*, 139 F.3d at 1263, 1265; *CSX Transp.*, 138 F.3d at 539-540. The remaining question is whether Congress "acted pursuant to a valid exercise of power." *Seminole Tribe*, 517 U.S. at 55 (internal quotation marks omitted).

As *Seminole Tribe* makes clear, when an abrogation of immunity is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, the Eleventh Amendment poses no bar. 517 U.S. at 65-66; *Garrett*, 531 U.S. at 364. Under Section 5, Congress has "the power to enforce the substantive guarantees contained in § 1 [of the Fourteenth Amendment] by enacting 'appropriate legislation.'" *Garrett*, 531 U.S. at 365. In doing so, Congress "is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* Instead, "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Ibid.* (quoting *Kimel*, 528 U.S. at 81). Congress's authority under Section 5 is not unbounded, however. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997); *Kimel*, 528 U.S. at 81-82; *Garrett*, 531 U.S. at 365.

Under those principles, Section 306 is a valid exercise of Congress's authority under Section 5. The text of Section 306 and its legislative history demonstrate that Congress's primary purpose in creating a federal cause of action was to prevent States from imposing discriminatory tax rates on railroads. 49 U.S.C. 11501(b) and (c); S. Rep. No. 630, 91st Cong., 1st Sess. 8 (1969). Congress specifically found "a substantial history of state discrimination in the taxation of railroad property." *Union Pac.*, 198 F.3d at 1206. Indeed, the legislative history of Section 306 "is replete with evidence of widespread, long-standing and deliberate 'discriminatory taxation of interstate common carrier transportation

property'" conducted by the States. *Ibid.* (quoting S. Rep. No. 630, *supra*, at 4).

Congress's findings not only reflect that States had subjected railroads to discriminatory taxation; they also reflect a pattern of unconstitutional discrimination. In *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345-346 (1989), the Court invalidated a state tax on equal protection grounds because of the "intentional systematic undervaluation by state officials" of property comparable to plaintiffs' property in the face of an express state policy of uniform taxation. Here, Congress found that States had engaged in precisely such unconstitutional discrimination against railroads. In particular, in the face provisions in state constitutions or laws requiring equal and uniform taxation, S. Rep. No. 630, *supra*, at 6, Congress found that there was a "studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates." *Id.* at 2 (internal quotation marks omitted).

Congress also identified a second form of discrimination against railroads—laws that place "interstate carriers in a separate tax category which, while permitted by state law, impermissibly discriminates against interstate commerce." *Union Pac.*, 198 F.3d at 1206. Under this Court's precedents, laws that place railroads in a separate tax category are unconstitutional when they are based on a desire to disadvantage interstate railroads and to favor local interests. *Southern Ry.* v. *Greene*, 216 U.S. 400, 418 (1910) (invalidating a state tax on an interstate railroad on the ground that "to tax the foreign corporation * * * by a different and much more onerous rule than is used in taxing domestic corpora-

tions for the same privilege, is a denial of equal protection of the laws"); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 878 (1985) (state tax that discriminates against out-of-State corporations based on a desire to favor local interests violates Equal Protection Clause).

Congress was justifiably concerned that state laws that single out railroads for differential tax treatment could reflect just such a purpose. When States deliberately assess railroad property at a higher right than comparable property despite state laws that require uniform treatment, there is a very real danger that state laws that impose facially discriminatory rates on railroads reflect the same impermissible purpose to disadvantage railroads and favor local interests. Moreover, "Congress was aware that the railroads are easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation." *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (internal quotation marks omitted), Congress therefore devised Section 306 to prevent and deter both forms of unconstitutional discrimination.

That legislation is both congruent and proportional to the unconstitutional discrimination that Congress identified. Section 306 does not prohibit States from taxing railroads; rather, it merely prohibits that part of the tax that is discriminatory. *Union Pac.*, 198 F.3d at 1208. Moreover, Section 306 "provides a remedy only when such discrimination passes a threshold of five percent." *Ibid.*; 49 U.S.C. 11501(c) (relief available "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent" ratio that applies to other commercial and industrial property). In addition, Section 306 allows solely injunctive and declaratory relief; damages are

unavailable. *Union Pac.*, 198 F.3d at 1208. Finally, "state law is to govern the burden of proof" in determining the assessed and true market value of the property at issue. *Ibid.*

2. Petitioners err in contending (Pet. 6) that Section 306 is not valid Section 5 legislation under this Court's decision in *Kimel*. In *Kimel*, the Court held that Congress did not validly abrogate state immunity in the Age Discrimination in Employment Act (ADEA). The Court explained that, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination, * * * the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." 528 U.S. at 91.

The situation here is entirely different. The 4-R Act is not indiscriminate in scope; it affords only injunctive and declaratory relief, which is available "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent" the ratio that applies to other commercial and industrial property. 49 U.S.C. 11501(c). Moreover, the legislative record of the 4-R Act demonstrates that Congress enacted Section 306 in response to "evidence of a pattern of unconstitutional taxation," of railroad property by States. *Union Pac.*, 198 F.3d at 1206-1207. *Kimel* therefore provides no support for petitioners' challenge to Section 306.[2]

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[2] Petitioners' reliance (Pet. 11) on court of appeals cases involving Congress's power to abrogate state sovereign immunity in federal statutes other than the 4-R Act is also misplaced. As noted above, in light of the 4-R Act's history, purpose and remedial scheme, the courts of appeals have uniformly upheld the validity of its abrogation of Eleventh Amendment immunity.

Petitioners further contend (Pet. 10) that Section 306 substantively redefines the requirements of the Fourteenth Amendment, because it prohibits conduct that the Fourteenth Amendment does not prohibit. In enforcing the requirements of the Fourteenth Amendment, however, Congress is not limited to parroting the requirements of that Amendment. As this Court has explained, Congress has authority to deter and prevent violations of the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Garrett*, 531 U.S. at 365 (quoting *Kimel*, 528 U.S. at 81).

Petitioners also err in arguing (Pet. 4, 8-9, 15) that, in light of *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362 (1940), Congress could not have enacted the 4-R Act to respond to unconstitutional state taxation. *Nashville* holds only that a State may impose special tax rates on public utilities, including railroads, when their "distinctive characteristics and functions in society make [the special rates] appropriate." *Id.* at 368. Nothing in that decision suggests that a tax that treats railroads differently from other commercial and industrial property is per se constitutional. Moreover, this Court's subsequent decisions in *Allegheny* and *Metropolitan Life* make clear that Congress correctly identified state discriminatory taxation of interstate railroads as an equal protection concern. See *Louisville & Nashville R.R.* v. *Public Serv. Comm'n*, 631 F.2d 426, 432 (6th Cir. 1980), cert. denied, 450 U.S. 959 (1981); *Louisville & Nashville R.R.* v. *Public Serv. Comm'n*, 389 F.2d 247, 248-251 (6th Cir. 1968) (affirming district court injunctions against certification of state tax assessments of railroad property on

ground that such assessments violate Equal Protection Clause).

Finally, petitioners argue (Pet. 12-14) that because the legislative history of the 4-R Act refers to Congress's power under the Commerce Clause, and not to Congress's power under Section 5, the Act may not be sustained under Section 5. But the text of the 4-R Act expressly prohibits "[t]ax discrimination against rail transportation property." 49 U.S.C. 11501. That textual reference to discrimination demonstrates that Congress sought to address an equal protection concern. In any event, it makes no difference whether Congress specifically invoked the Fourteenth Amendment in enacting Section 306. *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). The "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise *Ibid.* (internal quotation marks omitted).

3. This Court should deny certiorari for an additional reason. Regardless of whether the State is immune from suit under the Eleventh Amendment, the district court has jurisdiction pursuant to *Ex parte Young*, 209 U.S. 123 (1908), to grant prospective injunctive and declaratory relief against individual state officials to prevent ongoing violations of federal law. *Verizon*, 122 S. Ct. at 1760.

As this Court recently explained in *Verizon*, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" 122 S. Ct. at 1760. In the present case, respondents' action seeks injunctive and declaratory relief to bar state officials from enforcing and collecting

taxes that respondents have not yet paid. Respondents' action therefore satisfies the Court's "straightforward inquiry." Because relief identical in substance is available to respondents under *Ex parte Young*, there is no need to decide whether Section 306 validly abrogates the State's immunity from suit.[3]

The Fourth Circuit followed precisely that approach in *CSX Transp.*, 138 F.3d at 537. In that case, the Fourth Circuit held that railroads may sue to enjoin the collection of taxes imposed in violation of the 4-R Act under *Ex parte Young*, and that there is therefore no need to decide whether the 4-R Act validly abrogates a State's immunity from suit. 138 F.3d at 540-543.

The Fourth Circuit's approach is consistent with this Court's recent decision in *Verizon*. There, the State argued that Congress had not validly conditioned participation in a federal regulatory scheme on the State's waiver of immunity from suit. The Court held that "[w]hether the Commission waived its immunity is another question we need not decide, because * * * even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*." 122 S. Ct. at 1760.

The situation is the same here. Regardless of whether Congress validly abrogated the State's immunity from suit, respondents may proceed against the individual state officials pursuant to *Ex parte Young*. Review of the question whether Congress validly abrogated the States' immunity from suit is therefore

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[3] Although the court of appeals did not address the *Ex parte Young* issue, the parties briefed that issue in the district court (Pet. App. 14-15), and the court of appeals (Burlington Northern C.A. Br. 39-45; U. S. C.A. Br. 30-38; State C.A. Reply Br. 8-14).

not warranted. Indeed, as *Verizon* illustrates, this Court would have no need to address that constitutional question even if review were granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

MARK B. STERN
STEPHANIE R. MARCUS
Attorneys

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