Nos. 18-447 and 18-612

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC.

CSX TRANSPORTATION, INC.,
CONDITIONAL CROSS-PETITIONER

v.

ALABAMA DEPARTMENT OF REVENUE, ET AL.

ON PETITION AND CONDITIONAL CROSS-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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QUESTIONS PRESENTED

A provision of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, prohibits States and subdivisions thereof from "[i]mpos[ing] [a] tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board." 49 U.S.C. 11501(b)(4).

The question presented by the petition for a writ of certiorari is as follows:

Whether Alabama has proffered a sufficient justification for imposing its sales and use tax on diesel fuel used by rail carriers, while exempting water carriers from the same tax.

The question presented by the conditional cross-petition for a writ of certiorari is as follows:

Whether Alabama's sales and use tax imposed on diesel fuel used by rail carriers is a "tax that discriminates against a rail carrier," 49 U.S.C. 11501(b)(4), when the State exempts from that tax diesel motor fuel used by motor carriers but imposes a different excise tax on the motor fuel that is "roughly equivalent" to the tax paid by rail carriers, and the State expends revenue collected from the motor-fuel tax on public road infrastructure.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition and conditional cross-petition for a writ of certiorari should be denied.

STATEMENT

This case presents the question whether the State of Alabama's taxation of diesel fuel used by CSX Transportation, Inc. (CSX) and other rail carriers impermissibly discriminates against rail carriers in violation of 49 U.S.C. 11501(b)(4). Section 11501(b)(4) originated in Congress's 1976 enactment of legislation addressing the physical and economic decline of the domestic rail industry.

1. 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 [Nation's] railway system," so that railroad transportation would "remain viable in the private sector of the economy." § 101(a), 90 Stat. 33 (45 U.S.C. 801(a)); see *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 280 (2011) (*CSX I*). As relevant here, Section 306 of the 4-R Act—which Congress has recodified and rephrased without substantive change at 49 U.S.C. 11501, see *CSX I*, 562 U.S. at 280 & n.1—targets discriminatory state taxation as a particular cause of rail-industry decline. See § 306, 90 Stat. 54; *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007). To protect those important channels of interstate commerce, Section 11501 authorizes federal courts to enjoin certain prohibited forms of state taxation. 49 U.S.C. 11501(c) (establishing exception to the Tax Injunction Act, 28 U.S.C. 1341); see *CSX I*, 562 U.S. at 280-281.

Section 11501(b) identifies four types of prohibited state taxation of rail carriers that "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). Paragraphs (1)-(3) of subsection (b) prohibit

"a State, [or a] subdivision of a State," 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); see *Georgia State Bd. of Equalization*, 552 U.S. at 16, 18.

This case concerns Section 11501(b)'s fourth paragraph, which prohibits "a State, [or a] subdivision of a State," from imposing "another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board" (STB). 49 U.S.C. 11501(b)(4). That provision imposes a "broad ban on tax discrimination" against rail carriers, and it regulates "any form" of non-property tax that "a State might impose[] on any asset or transaction." *CSX I*, 562 U.S. at 284 n.6, 285, 292; see *id.* at 290-291.

Under Section 11501(b)(4), a tax is impermissibly discriminatory "when it treats 'groups that are similarly situated' differently without sufficient 'justification for the difference in treatment.'" *Alabama Dep't of Revenue* v. *CSX Transp., Inc.*, 135 S. Ct. 1136, 1141 (2015) (*CSX II*) (brackets and citation omitted). A State's imposition of a tax on a rail carrier is sufficiently justified if that tax "is the rough equivalent" of a separate tax imposed on a similarly situated entity, because "no discrimination [exists] when" a State imposes such distinct but "roughly comparable taxes." *Id.* at 1144.

2. a. The federal government generally taxes diesel fuel used in highway motor vehicles, 26 U.S.C. 4041(a)(1)(A), 4081(a)(2)(A), and deposits the corresponding revenue into the federal Highway Trust Fund, 26 U.S.C. 9503(a), (b)(1)(A) and (D) (2012 & Supp. V 2017). Diesel fuel destined for nontaxable uses—including use in a train—is "indelibly dyed," 26 U.S.C. 4082(a)(1)-(2)

and (b)(2); see 26 U.S.C. 4041(a)(1)(C)(ii)(III); 26 C.F.R. 48.4082-1, which distinguishes it from federally taxed (clear) diesel used by motor vehicles in order to prevent circumvention of that tax. Diesel locomotives can operate on clear diesel, but rail carriers "buy dyed diesel to avoid paying federal and state motor fuels taxes at the pump." Pet. App. 11a n.3.

Alabama imposes a four-percent sales tax on the retail sale in the State of tangible personal property, including diesel fuel. Ala. Code § 40-23-2(1).[1] If that sales tax is not paid, Alabama law imposes an equivalent use tax on the storage, use, or consumption of such property in the State. §§ 40-23-61(a), 40-23-62(1). CSX contends that Alabama's four-percent sales and use tax unlawfully discriminates against rail carriers because that tax applies to dyed diesel purchased and used by rail carriers but does not apply to the diesel fuel used by interstate water carriers and motor carriers. See Pet. App. 3a & n.1.

Water carriers involved in "solely intrastate transportation are subject to the same sales and use tax as rail carriers." *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 892 F. Supp. 2d 1300, 1316 (N.D. Ala. 2012). But Alabama fully exempts from that tax water carriers "engaged in foreign or international commerce or in interstate commerce." Ala. Code §§ 40-23-4(a)(10), 40-23-62(3). Thus, unlike interstate rail carriers, water carriers engaged in interstate transportation pay no state tax on (dyed) diesel. Pet. App. 3a.

Alabama separately imposes a primary excise tax and an additional excise tax totaling 19¢/gallon on motor fuel, including (clear) diesel fuel. Ala. Code § 40-17-325(a)(2);

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[1] All citations to the Alabama Code in this brief are to that code as revised through the 2018 supplement thereto.

see § 40-17-329(a)(3) (exempting sales of dyed diesel from these taxes); Pet. App. 3a n.2. Such fuel is exempt from the State's four-percent sales and use tax. § 40-17-325(b). Motor carriers therefore generally pay a state tax of 19¢/gallon for (clear) diesel fuel. Pet. App. 3a.

Alabama also authorizes certain subdivisions of the State to levy and collect taxes. See, *e.g.*, Ala. Code §§ 11-3-11(a)(2), 11-3-11.2, 11-51-200. Local governments in Alabama accordingly may "levy sales and use taxes and motor fuels taxes at varying rates." Pet. 6.

b. During the 2007-2016 period relevant to this case, rail carriers paid on average about 9.85¢/gallon of (dyed) diesel for Alabama's four-percent sale and use tax, which was significantly less than the 19¢/gallon that motor carriers paid for Alabama excise taxes on (clear) diesel. Pet. App. 55a. When additional taxes from local Alabama jurisdictions are included, rail and motor carriers paid on average a total of about 23.48¢ and 20¢-23¢, respectively, for state and local tax per gallon of diesel. *Ibid.*; see *id.* at 65a-66a & n.15. As previously noted, interstate water carriers paid no state tax for their purchase and use of dyed diesel in Alabama. *Id.* at 56a.

3. In 2008, respondent/cross-petitioner CSX, a rail carrier subject to the jurisdiction of the STB, sued petitioners/cross-respondents (collectively, Alabama) in district court. CSX alleged that Alabama had violated 49 U.S.C. 11501(b)(4) by requiring rail carriers to pay sales and use taxes for diesel while exempting motor carriers and interstate water carriers. Pet. App. 4a, 48a.

a. The district court dismissed respondent's suit, and the court of appeals affirmed. 350 Fed. Appx. 318 (11th Cir. 2009). Both courts held that Section 11501(b)(4) does not prohibit a State from applying a generally ap-

plicable tax to a rail carrier, even though that State exempts other entities from the tax. *Id.* at 319-320 (following *Norfolk S. Ry. Co.* v. *Alabama Dep't of Revenue*, 550 F.3d 1306, 1316 (11th Cir. 2008)).

This Court reversed. *CSX I*, 562 U.S. 277. The Court held that Section 11501(b)(4)'s prohibition against discriminatory taxes applies to a state tax that treats "groups [that] are similarly situated" differently without sufficient "justification for the difference in treatment." *Id.* at 287. The Court accordingly held that "a state excise tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier,'" and that the railroad bringing that challenge will prevail if the State cannot "offer[] a sufficient justification for declining to provide the exemption at issue to rail carriers." *Id.* at 288 & n.8.

b. On remand, the parties stipulated that motor and water carriers are "[t]he principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama." Agreed Facts ¶ 10 (July 11, 2016); see Pet. App. 28a. After a bench trial, and using motor and water carriers as the appropriate comparison class, the district court again held that Alabama's sales and use tax did not discriminate against CSX. 892 F. Supp. 2d at 1308, 1312-1317.

The district court rejected CSX's discrimination claim vis-à-vis motor carriers because Alabama's overall state and local tax rates for motor-carrier diesel were "substantially similar" to that for the dyed diesel used by rail carriers. 892 F. Supp. 2d at 1313-1314. The court declined to consider how Alabama spends revenue from such taxes, explaining that Section 11501(b)(4) re-

stricts discriminatory taxes, not state spending decisions. *Id.* at 1314. The court also rejected respondent's discrimination claim vis-à-vis interstate water carriers. *Id.* at 1315-1317. The court held that respondent had offered no evidence of discriminatory effect and had failed to show that "rail carriers and interstate/foreign water carriers are similarly situated." *Id.* at 1316-1317.

A divided panel of the court of appeals reversed and remanded. 720 F.3d 863 (2013). The court held that respondent had established a prima face case of discrimination because rail carriers pay a sales and use tax on diesel while "motor and water carriers do not." *Id.* at 871; see *id.* at 869-871. The court declined to consider the state fuel excise taxes that motor carriers pay, concluding that the pertinent inquiry "'look[s] only at the sales and use tax [paid by rail carriers] with respect to fuel to see if discrimination has occurred.'" *Id.* at 869, 871 (citation omitted).

This Court again reversed and remanded. *CSX II*, 135 S. Ct. 1136. In light of respondent's claim and the parties' stipulation, the Court held that "a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination" absent a sufficient justification. *Id.* at 1143; see *id.* at 1141-1143. The Court then rejected the court of appeals' narrow focus on only the tax paid by rail carriers. *Id.* at 1143-1144. The Court concluded that "[n]o discrimination [exists] when there are roughly comparable taxes," and that "Alabama can [therefore] justify its decision to exempt motor carriers from [the] sales and use tax" paid by rail carriers by showing that it has imposed on motor carriers "an alternative, roughly equivalent tax." *Ibid.*

This Court remanded for a determination "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption," and for an evaluation of Alabama's "other justifications for the water carrier exemption," including "that such an exemption is compelled by federal law." *CSX II*, 135 S. Ct. at 1144.

c. The court of appeals remanded to the district court, 797 F.3d 1293, 1294 (11th Cir. 2015) (per curiam), which held a second bench trial. Pet. App. 50a. The district court again held that Alabama's tax scheme did not violate Section 11501(b)(4). *Id.* at 47a-76a.

The district court found no discrimination vis-à-vis motor carriers because, as relevant here, "the fuel excise tax motor carriers pay is 'roughly equivalent' to the sales tax CSX pays." Pet. App. 66a; see *id.* at 59a-66a. The court also found no discrimination vis-à-vis interstate water carriers. *Id.* at 67a-75a. While rejecting several of the State's arguments, *id.* at 70a-74a, the court held that the water-carrier exemption was justified because repealing it would "expose" the State "to liability under the negative Commerce Clause," *id.* at 70a; see *id.* at 68a-70a.

4. The court of appeals reversed and remanded, later issuing a substitute opinion (Pet. App. 1a-46a) in response to Alabama's and CSX's separate requests for clarification. *Id.* at 2a; see 891 F.3d 927, 928 (11th Cir. 2018) (adding paragraph reproduced at Pet. App. 45a).

a. As relevant here, the court of appeals agreed with the district court that Alabama's sales and use tax on dyed diesel did not discriminate against rail carriers vis-à-vis motor carriers because the tax is "roughly equivalent" to the State's excise tax on clear diesel, Pet. App.

26a-27a. See *id.* at 16a-27a. The court explained that, when "only state taxes" are considered, rail carriers paid about 9.85¢/gallon while motor carriers paid 19¢/gallon. *Id.* at 27a. Even when local taxes are added, the court continued, the taxes "approximate[d] one another": Rail carriers on average paid 23.48¢/gallon while motor carriers paid between 20¢ and 23¢/gallon. *Ibid.*

CSX argued that "the excise tax is not roughly equivalent to the sales and use tax" because the State uses revenues from the excise tax to fund public highways, which effectively subsidizes infrastructure used by motor carriers. Pet. App. 17a. The court of appeals rejected that contention, stating that Section 11501(b)(4) prohibits the discriminatory "imposition of a tax," *id.* at 19a, not state spending decisions that allocate tax revenues. *Id.* at 17a-21a.

b. The court of appeals held, however, that Alabama had violated Section 11501(b)(4) by taxing rail-carrier diesel while exempting diesel used by interstate water carriers. Pet. App. 27a-44a. As relevant here, the court determined that Alabama could not justify the disparate taxation "merely because" eliminating its water-carrier exemption "might 'expose' the State to a lawsuit under federal law." *Id.* at 31a, 44a. The court recognized that the disparate taxation would be sufficiently justified if the water-carrier exemption was "compelled by federal law." *Id.* at 31a (citation omitted). The court found that no such compulsion existed, however, because Alabama could apply its sales and use tax to diesel used by interstate water carriers without "violat[ing] federal law." *Id.* at 44a; see *id.* at 31a-39a. The court also held that the federal tax on water-carrier diesel and the low costs to the State associated with water carriers

did not justify the challenged tax on rail carriers. *Id.* at 39a-44a.

DISCUSSION

Alabama contends (Pet. 21-28) that the court of appeals erred by rejecting the State's proffered justifications for taxing diesel used by rail carriers while exempting from that tax the same fuel used by railroads' water-carrier competitors. CSX argues in its conditional cross-petition (at 16-24) that, if the Court grants Alabama's certiorari petition, it should also review the court of appeals' conclusion that the manner in which a State spends tax revenue is irrelevant to the discrimination inquiry under Section 11501(b)(4). The court of appeals correctly resolved both questions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

A. Alabama's Water-Carrier Contentions Do Not Warrant Review

The court of appeals correctly held that Alabama had violated Section 11501(b)(4) by taxing the diesel used by rail carriers while exempting interstate water carriers' purchases and use of the same diesel. Pet. App. 31a-44a. Alabama argues (Pet. 21; Reply Br. 6) that a State can justify such disparate treatment simply by identifying "some reason having nothing to do with railroads," so long as the State's differential tax treatment reflects a "'reasonable distinction,'" *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 286, 289 n.8 (2011). See Pet. 21, 23, 25 (repeating six times Alabama's reason-having-nothing-to-do-with-railroads formulation). From that premise, Alabama contends (Pet. 21) that it did not violate Section 11501(b)(4) because it has "multiple reasons" for initially "exempt[ing] water carriers

in 1939" (Pet. 22-23) and for "not repeal[ing] the exemption in 2018" (Pet. 23-28).

To prevail in this case, CSX need not show that Alabama acted unreasonably *either* by taxing railroad diesel *or* by exempting water-carrier diesel. Each of those state policy choices, standing alone, was undoubtedly a permissible exercise of Alabama's broad discretion in the taxing sphere. Under Section 11501(b)(4), however, the crucial question is whether the State has established a sufficient justification *for the disparate treatment*. In this case, Alabama's proffered reasons do not justify imposing the State's sales and use tax on diesel used by rail carriers while exempting interstate water carriers' purchases and use of the same diesel. In the absence of a division of authority, the State's arguments do not warrant review.

1. Alabama provides insufficient justifications for taxing rail-carrier diesel while exempting from tax the same diesel when used by water carriers

The court of appeals correctly recognized that, if Alabama's water-carrier exemption were "compelled by federal law," *Alabama Dep't of Revenue* v. *CSX Transp., Inc.*, 135 S. Ct. 1136, 1144 (2015), Alabama would not have violated Section 11501(b)(4) by applying its sales and use tax to rail-carrier diesel while exempting diesel used by interstate water carriers. See Pet. App. 31a. Alabama does not dispute the court of appeals' conclusion (*id.* at 31a-39a) that federal law does not actually compel such an exemption. The State instead argues (Pet. 21; Reply Br. 6) that this disparate treatment does not violate Section 11501(b)(4) so long as it reflects a "'reasonable distinction,'" *CSX I*, 562 U.S. at 286 (citation omitted), based on "some reason having nothing to do with railroads," *id.* at 289 n.8. The State provides no

sound justification for its disparate taxation of railroad and water-carrier diesel.

a. A tax "discriminates" in violation of Section 11501(b)(4) if it produces disparate tax treatment disfavoring a rail carrier and "'no reasonable distinction can be found between those favored and those not favored.'" *CSX I*, 562 U.S. at 286 (citation omitted). A State may justify such disparate treatment by showing that the entities in question are not similarly situated for purposes of appropriate tax treatment. But where the tax "treats 'groups that are similarly situated' differently," the tax will discriminate in violation of Section 11501(b)(4) if the State does not offer a "sufficient 'justification for the difference in treatment.'" *CSX II*, 135 S. Ct. at 1141 (brackets and citation omitted); see *CSX I*, 562 U.S. at 288 n.8.

Two aspects of the 4-R Act are particularly salient in determining what qualifies as a sufficient justification here. First, Congress simply prohibited "a State, [or] subdivision of a State," 49 U.S.C. 11501(b), from imposing a tax that discriminates against a rail carrier. Congress did not restrict the federal government's ability to imposes taxes (or adopt non-tax policies) that favor or disfavor rail carriers vis-à-vis other entities. Federal law therefore should be taken as given in determining whether a particular state tax violates Section 11501(b)(4).

Thus, if federal law requires that a category of entities be exempt from relevant state taxation, a State may implement that exemption while applying the relevant tax to rail carriers without violating Section 11501(b)(4). See *CSX II*, 135 S. Ct. at 1144 (indicating that Alabama might justify its differential taxing scheme if its water-carrier exemption is "compelled by federal law"). But if

rail-carrier competitors are subject to a federal tax that is not imposed on rail carriers themselves, a State cannot invoke that federal disparate treatment as a justification for taxing railroads more heavily than their competitors. Although such disparate treatment under state law might equalize the overall (*i.e.*, state plus federal) tax burdens imposed on the two classes, it would effectively countermand the relevant federal policy concerning the appropriate competitive balance between rail carriers and their marketplace competitors.[2]

Second, the 4–R Act's stated purpose is to "restore the financial stability of the railway system of the United States," while "foster[ing] competition among all carriers by railroad and other modes of transportation." 45 U.S.C. 801(a) and (b)(2). "[D]iscrimination in favor of [competitors to rail carriers] most obviously frustrates th[at] purpose." *CSX II*, 135 S. Ct. at 1142. Thus, where (as here) a state tax favors an entity that both competes with and is similarly situated to the disfavored rail carrier, the tax presumptively falls within the core of Section 11501(b)(4)'s prohibition. Such taxes require a more substantial justification to withstand scrutiny.

Alabama suggests (Pet. 21, 23, 25; Reply Br. 6) that, under *CSX I*, a State can justify differential tax treatment of railroads and their competitors simply by articulating some rationale that is unrelated to railroads. That is incorrect. The Court in *CSX I* "presume[d]"

[2] Congress has incrementally reduced the federal tax on diesel used by rail carriers to 0.1¢/gallon, 26 U.S.C. 4041(a)(1)(C)(ii) and (d)(3), while imposing a 24.4¢/gallon tax on motor-carrier diesel, 26 U.S.C. 4041(a)(1)(A) and (C)(i), 4081(a)(2)(A)(iii) and (B), and an increasing tax (now 29.1¢/gallon) on water-carrier diesel, 26 U.S.C. 4042(a) and (b)(2) (2012 & Supp. V 2017).

that a suit under Section 11501(b)(4) would be "promptly dismissed" if a railroad challenged a tax regime 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." 562 U.S. at 289 n.8 (citation omitted). But nothing in that statement suggests a generally applicable some-reason-having-nothing-to-do-with-railroads standard. In noting that an exemption for a single non-railroad taxpayer would not violate Section 11501(b)(4), the Court did not condone a tax exemption for an entire category of businesses (interstate water carriers) that are principal competitors of rail carriers, with respect to an item (diesel fuel) that is central to railroad operations.

b. Alabama principally contends (Pet. 25) that its disparate tax treatment of railroad and water-carrier diesel is justified because the State could legitimately choose to avoid the "cost and risk of litigation" that might result from repealing its water-carrier exemption, even though "the State believes it *should* prevail" in such litigation. That is not a sufficient basis for the State's differential tax treatment of rail and water carriers.

To be sure, "avoiding litigation risk" generally constitutes a "valid government interest," Pet. 27, that would justify a State's decision to forbear from imposing taxes or regulatory obligations. That is so even if the State views the likelihood of an adverse judgment as remote and simply seeks to avoid nuisance suits. Under the 4-R Act, however, a State must satisfy a standard higher than minimum rationality in order to justify its imposition on railroads of a tax from which their direct competitors are exempt. Thus, when a rail carrier challenges a tax under Section 11501(b)(4) as impermissibly discriminatory "on the basis of the tax scheme's

exemptions" for other entities, the State must "offer[] a sufficient justification for declining to provide the exemption at issue to rail carriers." *CSX I*, 562 U.S. at 288 n.8. Here, Alabama's desire to avoid the potential cost and risk of litigating what the State itself views as meritless claims, Pet. 25, does not justify its differential tax treatment of rail and water carriers.

Alabama's asserted interest in avoiding the burdens of litigation seems particularly inapposite here, since its decision to exempt water carriers from a tax imposed on railroads has led to this prolonged 4-R Act lawsuit. More generally, the very existence of the 4-R Act belies any suggestion that state taxation of water carriers is subject to greater federal-law constraints than state taxation of railroads. And if the possibility of litigation on claims by rail-carrier competitors were sufficient to justify a State's disfavored tax treatment of railroads, without regard to the actual merit of the competitors' potential claims, Congress's prohibition against state taxes that "discriminate[] against a rail carrier" would be largely negated, since a State could almost always hypothesize *some* legal challenge that the competitor might bring.

c. Most of Alabama's remaining contentions are premised on the State's litigation-cost-and-risk justification. Alabama argues (Pet. 25-28) that repealing the water-carrier exemption would "expose" it to litigation on potential claims by water carriers. Pet. 25. But Alabama "believes that it *should* prevail" on all such claims, *ibid.*, and the court below concluded that the State would not violate federal law if it imposed its sales and use tax on diesel used by interstate water carriers. Indeed, Alabama makes no meaningful effort to show

that the water-carrier challenges it hypothesizes would even present close or fairly debatable questions.

Although Alabama states (Pet. 22) that it "had to" enact its tax exemption for water carriers "in March 1939" in order to "compl[y] with state and federal law" at that time, it does not argue that the exemption is *currently* required. For instance, Alabama invokes (*ibid.*) the Commerce Clause as interpreted in *Helson* v. *Kentucky*, 279 U.S. 245 (1929). But Alabama recognizes that this Court's Commerce Clause jurisprudence has evolved since that time, see Pet. 25 (citing *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995)); see also *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and it identifies no substantial ground for doubting that a state tax on water-carrier diesel would comply with more recent precedents. See Pet. App. 31a-37a (applying test articulated in *Complete Auto Transit* and concluding that state tax on water-carrier fuel is permissible).

Alabama's reliance (Pet. 22) on the 1819 Act admitting it to the Union, and on a corresponding provision in the State's constitution, is misplaced for similar reasons. The 1819 Act requires that "all navigable waters within [Alabama] shall for ever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor." Act of Mar. 2, 1819, ch. 47, § 6, 3 Stat. 492; see Ala. Const. Art. I, § 24 ("[A]ll navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll."). The district court held that the 1819 Act (which the State's constitution merely follows) would not prohibit the State from applying a generally applicable tax to fuel used by water carriers, Pet. App. 72a-73a, and

Alabama agrees (Pet. 25) that "it *should* prevail" against a water-carrier challenge based on those provisions.

To the extent Alabama contends that its exemption for water carriers is still justified because the State in 1939 reasonably would have believed that the law required it, see Pet. 22, that too is incorrect. Congress enacted the 1976 prohibition against tax discrimination now codified at Section 11501(b)(4) in order to preempt then-existing state provisions that ran afoul of the 4-R Act's prohibitions. *CSX I*, 562 U.S. at 293. Congress delayed the effective date of that provision for "3 years after [its] date of enactment," 4-R Act § 306, 90 Stat. 54, to provide affected States sufficient time "to change their practices." H.R. Rep. No. 725, 94th Cong., 1st Sess. 76 (1975). Whatever Alabama's reasons for exempting water carriers in 1939, those reasons do not justify its present imposition of a tax that discriminates against rail carriers and is not presently required by federal law. Cf. *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (holding that plaintiff suing under Section 11501(b)(1) need not establish "intentional discrimination").

d. Finally, Alabama argues (Pet. 23-24; Reply Br. 6) that water carriers have a "unique relationship with the federal government," and that a State may "defer [its own] taxation" of diesel used by water carriers in light of the 29.1¢ federal tax thereon and the limited nature of the financial burdens that water-carrier operations impose on the State. That is incorrect.

First, that rationale does not explain why the State "declin[es] to provide the exemption at issue to rail carriers." *CSX I*, 562 U.S. at 288 n.8; see p. 15, *supra*. Second, neither Section 11501(b)(4) nor any other 4-R Act provision suggests that a State can justify its own tax

discrimination against railroads by pointing to ways in which federal law treats railroads more favorably than their competitors. See pp. 12-13, *supra*. Alabama acknowledges, moreover, that its "4% sales-and-use tax 'is not calibrated to account for varying burdens'" imposed on the State by different taxpayers, Pet. 24 (quoting Pet. App. 43a), and it ignores the various services it makes available to everyone in the State, water carriers included. In sum, Alabama identifies no sufficient justification for its disparate taxation of rail carriers vis-à-vis the interstate water carriers with which they compete.

2. Alabama's certiorari petition should be denied

The court of appeals' decision rejecting Alabama's "exposure to [litigation] risk" (Pet. App. 31a, 44a) and federal-relationship (*id*. at 40a-44a) arguments does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

The $28 million in tax refunds apparently at issue, Pet. 17, does not change that result. A court in a future refund suit can determine the appropriateness of retrospective tax refunds, and that remedial issue is distinct from Section 11501(b)(4)'s substantive prohibition on discrimination against rail carriers. Alabama's suggestion (Pet. 16-17) that other States could be affected likewise does not provide a persuasive ground for this Court to grant review. No other State has filed an amicus brief supporting Alabama's certiorari petition in this case, and the idiosyncratic justifications proffered by Alabama here do not appear to reflect central arguments made by other States in similar Section 11501(b)(4) actions.[3]

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[3] See, *e.g.*, *BNSF Ry. Co.* v. *Tennessee Dep't of Revenue*, 800 F.3d 262, 273-275 (6th Cir. 2015) (upholding denial of preliminary injunc-

B. CSX's Cross-Petition Should Be Denied Even If This Court Grants Alabama's Petition

CSX agrees (Cross-Pet. 4) that this Court should deny certiorari. CSX contends (Cross-Pet. 16-24), however, that if the Court grants Alabama's petition, it should also review the court of appeals' holding that Alabama's taxing scheme does not discriminate in favor of motor carriers. CSX's challenge to that holding lacks merit and does not warrant this Court's review.

1. Section 11501(b)(4) does not restrict a State's ability to decide how to spend state revenue

CSX does not challenge the court of appeals' holding that Alabama imposes "roughly equivalent" diesel taxes on rail and motor carriers. Pet. App. 16a-17a. CSX instead argues (Cross-Pet. 16-24) that the inquiry under Section 11501(b)(4) must take account of the State's use of the revenue generated by such taxes, and that Alabama impermissibly favors motor carriers by allocating

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tion because state tax on consumption of diesel applied to commercial carriers generally; remanding for consideration of water-carrier exemption); Br. for Defs.-Appellees, at 15-16, 29-32, *BNSF Ry. Co.*, *supra* (No. 14-6401) (justifying water-carrier exemption on grounds that water carriers pay a separate sales and use tax on their fuel; that competition between water and rail carriers "is insignificant"; that water and rail carriers are distinct in numerous other ways; and that it would be difficult to apply the State's diesel tax to water carriers because they travel waterways like the Mississippi River located between States, making it difficult to determine where they consume the fuel); see also, *e.g.*, *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693, 694-695 (8th Cir. 2007) (addressing sales and use tax imposed equally on fuel used by rail and water carriers; rejecting State's defense that its exemption for competing motor and air carriers was justified by distinct fuel excise taxes imposed on those carriers), abrogated in part by *CSX II*, 135 S. Ct. at 1143-1144 (approving of such a defense).

revenue from motor-fuel taxes to public roads. That argument lacks merit.

Section 11501(b)(4) simply prohibits a State from "[i]mpos[ing] [a] tax" that discriminates against a rail carrier. 49 U.S.C. 11501(b)(4). Nothing in that language, or in Section 11501(b) more generally, addresses "revenue allocation or spending that discriminates against rail carriers." Pet. App. 21a; see *id.* at 18a-21a.

CSX contends (Cross-Pet. 16-19, 21-23) that Section 11501(b)(4) should be read to reflect Commerce Clause precedents that have scrutinized state spending decisions when determining whether the State has impermissibly discriminated against forms of interstate commerce. But Section 11501(b)(4) identifies the imposition of a discriminatory non-property *tax* as *one* "act[] [that] unreasonably burden[s] and discriminate[s] against interstate commerce." 49 U.S.C. 11501(b). That text does not suggest that Section 11501(b)(4) prohibits *all* state acts that so discriminate. To the contrary, Section 11501(b)'s identification of four discrete types of proscribed taxing practices belies any suggestion that the 4-R Act bars all state laws that discriminate against railroads. Thus, although Commerce Clause jurisprudence can be instructive when construing Section 11501(b)(4), the statute's more modest textual scope focuses exclusively on the "impos[ition]" of state "taxes," not on the allocation of state revenues.

Respondent's approach, moreover, would embroil courts in an extraordinarily difficult task of comparing relative benefits from different public expenditures. A State's use of revenues for public road infrastructure benefits the entire body public, including motor carriers and rail carriers that utilize motor vehicles. Attempting to value the relative benefits of those expenditures to

different categories of users would be an analytical morass. If Congress had intended that courts engage in such inquiries, it presumably would have expressed that intent directly, by enacting a (more or less detailed) prohibition on state *spending policies* that discriminate against railroads. There is no sound basis for reading such a prohibition into Section 11501(b)(4)'s ban on discriminatory state *taxes*.

2. Even if the Court grants Alabama's certiorari petition, the conditional cross-petition should be denied

The question presented in CSX's conditional cross-petition does not warrant this Court's review. Since this Court issued its decisions in *CSX I* and *CSX II*, only one other court of appeals has addressed a similar revenue-use challenge under Section 11501(b)(4). Like the court below, that court held that "how Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4-R Act." *BNSF Ry. Co.* v. *Tennessee Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015); see *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, 748 Fed. Appx. 26, 30 (6th Cir. 2018) (same), petition for cert. pending, No. 18-866 (filed Jan. 2, 2019).

CSX contends (Cross-Pet. 20-21) that *Atchison, Topeka & Santa Fe Railway Co.* v. *Bair*, 338 N.W.2d 338 (Iowa 1983) (en banc) (*Atchison*), cert. denied, 465 U.S. 1071 (1984), reflects a division of authority. That is incorrect. The nine-justice court in *Atchison* did not produce a majority opinion. Four justices dissented, *id.* at 349-351 (dissenting opinion), and Justice Carter's special concurrence emphasized that he did "[]not accept [Justice Uhlenhopp's] reasoning" for the four-justice plurality. *Id.* at 348; see *id.* at 340 (headnotes reflecting

that only three justices concurred in Justice Uhlenhopp's opinion).

Respondent relies (Pet. 20-21) on the *Atchison* plurality's view that the tax scheme at issue there impermissibly gave "trucks a distinct competitive advantage" over railroads because the revenue from fuel taxes paid by trucks was used for road infrastructure. 338 N.W.2d at 346-347. But a majority of the *Atchison* court rejected that theory. The dissenting justices concluded that "the disposition of the [tax] revenues is [not] relevant." *Id.* at 350. And Justice Carter concluded that the plurality's focus on "supposed competitive disadvantage" from state spending was "not a practical standard," adding that "[t]oo many variables are involved to make such comparisons meaningful." *Id.* at 348. He instead determined that the State's "tailored tax" on railroad fuel use was discriminatory because it applied only to railroads, regardless of "other taxes levied incident to truck, barge, and air transportation." *Id.* at 348-349.[4] It is therefore far from clear that the Iowa Supreme Court would follow the *Atchison* plurality's expenditure-focused approach in any future controversy.

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[4] Justice Carter suggested that a State could enact a "special tax" on rail carriers, but that such a "tailored tax" would be lawful only if rail carriers received from the resulting fund "benefits which are proportionate to the tax imposed." *Atchison*, 338 N.W.2d at 349.

CONCLUSION

The petition and the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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