No. ________

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND
VERNON BARNETT, COMMISSIONER, DEPARTMENT OF
REVENUE, IN HIS OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Write of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Steve Marshall*
Attorney General

Andrew L. Brasher
Solicitor General

Corey L. Maze
Special Deputy Atty Gen'l
*Counsel of Record

Mark Griffin
Chief Legal Counsel

Margaret Johnson
McNeill
Keith Maddox
Ass't Attorneys General

STATE OF ALABAMA
DEP'T OF REVENUE
P.O. Box 32001
Montgomery, AL 36132
(334) 242-9690

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
smarshall@ago.state.al.us

October 5, 2018

Counsel for Petitioners

QUESTION PRESENTED

The Court has heard this case twice before. In its first opinion, the Court held that CSX Transportation could challenge Alabama's sales-and-use tax as "another tax that discriminates against a rail carrier" in violation of 49 U.S.C. § 11501(b) because Alabama exempts trucks and water carriers—but not rail carriers—from paying the tax when purchasing diesel fuel to transport goods interstate. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2010). In its second opinion, the Court held that the lower courts must look outside the challenged sales-and-use tax to determine whether Alabama could justify the exemptions. *See Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136 (2015).

On remand, the district court held a 4-day trial and found that Alabama justified both exemptions. The Eleventh Circuit agreed that Alabama justified the truck exemption but held that Alabama had not justified the water carrier exemption. It therefore ordered the district court to enjoin the tax.

Rail carriers and States have fought over water carrier exemptions for more than 20 years. The issue is presently pending in multiple actions that lower courts have stayed pending resolution of this case.

The question left open by the Court in *CSX II* and presented here is

> Under 49 U.S.C. § 11501(b)(4), when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers?

PARTIES TO THE PROCEEDINGS

The caption identifies all parties to this proceeding.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
APPENDIX TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
STATEMENT REGARDING JURISDICTION 1
STATUTORY PROVISION INVOLVED 2
INTRODUCTION 3
STATEMENT OF THE CASE 5
A. The tax 5
B. The 4-R Act 7
C. The Railroads' Litigation 7
1. *CSX I* 8
2. *CSX II* 9
3. *CSX III* 10
REASONS THE COURT SHOULD GRANT CERTIORARI 14
I. The question presented has recurred for more than 20 years and threatens millions of public dollars 14
A. Lower courts have stayed cases with the same question to watch this case 16

B. Millions of public dollars are at stake 17

II. The case is an ideal vehicle for resolving the question presented 18

A. The case turns entirely on the question presented 19

B. The case is clean 20

C. The record is fully-developed 20

III. The Eleventh Circuit's decision is wrong 21

A. Alabama passed the water carrier exemption to comply with state and federal law 22

B. Alabama may choose not to repeal the water carrier exemption for reasons that have nothing to do with railroads 23

CONCLUSION 29

APPENDIX TABLE OF CONTENTS

Opinion, *CSX Trans, Inc. v. Ala. Dept. of Revenue, et al.,* No. 17-11705 (CA11 2018) 1a

Opinion, *CSX Trans, Inc. v. Ala. Dept. of Revenue, et al.,* No. 2:08-CV-00655-AKK (N.D. AL., Mar. 29, 2017) 47a

List of Related Cases 77a

TABLE OF AUTHORITIES

Cases

Alabama Dep't of Revenue v. CSX Transp., Inc., 135 S.Ct. 1136 (2015) ....*passim*

Atchison, Topeka & Santa Fe Ry. Co. v. Bair, 338 N.W.2d 338 (Iowa 1983)..........................5

Burlington Northern, Santa Fe Ry. Co. v. Lohman, 193 F.3d 984 (CA8 1999) 15

CSX Transp., Inc. v. Alabama Dep't of Revenue, 720 F.3d 863 (CA11 2013)......................10

CSX Transp., Inc. v. Alabama Dep't of Revenue, 797 F.3d 1293 (CA11 2015).............11, 20

CSX Transp., Inc. v. Alabama Dep't of Revenue, 892 F. Supp. 2d 1300 (N.D. Ala. 2012). 9

CSX Transp., Inc. v. Alabama Dep't of Revenue, 888 F.3d 1163 (CA11 2018)......................1

CSX Transp., Inc. v. Alabama Dep't of Revenue, 562 U.S. 277 (2010)........................*passim*

CSX Transp., Inc. v. Alabama Dep't of Revenue, 247 F. Supp. 3d 1240 (N.D. Ala. 2017) 1

Helson & Randolph v. Kentucky, 279 U.S. 245 (1929)...5, 22

Kansas City Southern Ry. Co. v. Bridges, No. 04-2547, 2007 WL 977552 (W.D. La. March 30, 2007) 15

Norfolk Southern Ry. Co. v. Alabama Dep't of Revenue, 550 F.3d. 1306 (CA 11 2008)..........8, 27

Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995)..........25

Oregon Dep't of Revenue v. ACF Industries, 510 U.S. 332 (1994)..........8

Oregon Waste Systems, Inc. v. Oregon Dep't of Environmental Quality, 511 U.S. 93 (1994)..........24

Shaw v. Hunt, 517 U.S. 899 (1996) 27

Statutes

26 U.S.C. § 4042 6

28 U.S.C. § 4081 6

33 U.S.C. § 5 .... 12, 25-28

49 U.S.C. §11501 .... 1-3, 7

Ala. Code § 40-17-325..........6

Ala. Code § 40-23-2.......... 5-6

Ala. Code § 40-23-4..........6

Ala. Code § 40-23-35..........17

Ala. Code § 40-23-61.......... 5-6

Ala. Code § 40-23-62..........6

N.Y. Tax Law §1115(8)..........16

Va. Code Ann. § 58.1-609.3(4)..........16

Other Authorities

Ala. Act 1939-127 (Gen. Laws, p. 170) 5

Ala. Act 1939-18 (Gen. Laws, p. 16) 5

Ala. Act 1939-590 (Gen. Laws, p. 958) 6

Ala. Act 1950-902, §2 (Ala. Laws, p. 1539)..................6

Ala. Const. Art. I, § 24 (1901) 5, 22

Eugene Gressman & Kenneth Geller,
Supreme Court Practice, 480 (9th ed.
2007)...18

George D. Brabson, *Analysis of Sales and
Use Tax Exemptions—with Comment as
to More Uniform Applications*, 9 Vand.
L. Rev. 294, 300 (1956) 16

Res. of Mar. 2, 1819, 15th Cong. (1819),
3 Stat. 489, 492 ....5, 22, 25

S. Rep. No. 92-1085, at 7-8 (1972) 4

PETITION FOR A WRIT OF CERTIORARI

The Alabama Department of Revenue and its Commissioner, Vernon Barnett, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 888 F.3d 1163 (CA11 2018), and reproduced at App. 1a-46a. The District Court's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 247 F. Supp. 3d 1240 (N.D. Ala. 2017), and reproduced at App. 47a-76a.

STATEMENT REGARDING JURISDICTION

CSX filed this action against the Department and Commissioner under the 4-R Act, which gives district courts subject-matter jurisdiction over these kinds of cases. *See* 49 U.S.C. §11501(c). The district court entered final judgment in the Department and Commissioner's favor. *See* App. 75-76a. CSX took a timely appeal, and the Eleventh Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). The Eleventh Circuit entered final judgment reversing the district court on June 8, 2018. *See* App. 45-46a.

This Court has certiorari jurisdiction under 28 U.S.C. §1254(1). Supreme Court Rule 13 made this petition due on September 6, 2018, but Justice Thomas granted the State's request to extend the time to file until October 8, 2018. *See* Order of September 7, 2018, Case No. 18A235. This petition is filed on October 5th.

STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976 provides in relevant part:

49 U.S.C. §11501. Tax discrimination against rail transportation property.

. . .

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(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.

INTRODUCTION

The Court has heard this case twice.

The Court has reversed the court of appeals twice.

If the Court doesn't grant review and reverse a third time, this decade-old case (and many just like it) will drag on for years to come. This petition provides the Court with a clean vehicle to finish what it started in 2010—*i.e.* resolving a 20+ year, multi-million-dollar dispute between States and rail carriers.

—

Rail carrier CSX Transportation claims that Alabama discriminates against it by requiring CSX to pay the State's generally-applicable 4% sales and use tax on its purchases of diesel fuel, while exempting trucks and interstate water carriers from paying the same 4% tax on their fuel purchases. *See* 49 U.S.C. §11501(b)(4) (forbidding a state tax that "discriminates against a rail carrier"). This Court concluded its second opinion by instructing the Eleventh Circuit to determine whether the State could justify the truck and water carrier exemptions. *See Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136, 1144 (2015) ("*CSX II*"). The Eleventh Circuit remanded to the district court for a trial on the justification issues.

After a 4-day trial, the district court found that the State justified both exemptions. The Eleventh Circuit agreed with the district court that trucks' payment of the State's 19¢ per gallon fuel excise tax justified exempting trucks from paying the 4% sales tax. But it held that the State could not justify the water carrier exemption and thus ordered the district court to enjoin Alabama from collecting sales tax from CSX.

Enjoining the State from collecting any tax on CSX's fuel purchases would make CSX the State's most-favored taxpayer by a wide margin:

	State tax (per gallon)	State + Local + Federal (per gallon)
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
CSX Trains	0¢	0¢

This is precisely the outcome that the Court assured Alabama and dissenting Justices Thomas and Ginsburg would not happen when the Court allowed CSX to proceed with its claim in 2010: "This conclusion does not, as Alabama and the dissent contend, turn railroads into 'most-favored-taxpayers,' entitled to any exemption (or other tax break) that a State gives to another entity." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 288 n.8 (2010) ("*CSX I*"). It is also the outcome Congress expressly rejected when it passed the 4-R Act: "the measure grants no favored status to transportation property nor any windfall to carriers. It merely provides for equal treatment." S. Rep. No. 92-1085, at 7-8 (1972).

Granting CSX most-favored status among carriers punishes both the State and CSX's competitors—not because the State played favorites, but because the State passed a tax exemption 79 years ago to comply with state and federal law. The question presented is whether Congress mandated that States repeal such historic exemptions to comply with the 4-R Act.

STATEMENT OF THE CASE

A. The tax

Alabama has a typical sales-and-use tax. Like many States, Alabama taxes goods that businesses and people purchase or use in the State. *See* Ala. Code §§ 40-23-2(1) & -61(a). Diesel fuel is one such good; its purchase or use is taxed at the generally-applicable 4% rate unless otherwise exempted.

1. The interstate water carriers' exemption

Alabama enacted its sales tax in February 1939. *See* Ala. Act 1939-18 (Gen. Laws, p. 16). Just one month later, the State Legislature exempted from the tax fuel used by ships to transport goods between Alabama ports and ports in another State or country. *See* Ala. Act 1939-127 (Gen. Laws, p. 170).

Alabama did not publish legislative history in 1939, so we cannot say with 100% certainty why the legislature added this exemption. But two reasons are most plausible. First, the Congressional Act that admitted Alabama to the Union prohibited taxation of Alabama's rivers, *see* Res. of Mar. 2, 1819, 15th Cong. (1819), 3 Stat. 489, 492, a prohibition that was carried over into the State's Constitution. *See* Ala. Const. Art. I, § 24 (1901). Second, the State had to comply with this Court's holding in *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), that States could not tax fuel used by a ferryboat to transport persons across state lines. *See Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983) (citing *Helson* for the proposition that "[a]t one time barges in navigable waters were considered immune from state taxation of fuel by virtue of the Commerce Clause").

Alabama has maintained the interstate exemption ever since. *See* Ala. Code §§40-23-4(a)(10) & -62(12). Alabama taxes fuel used for intrastate shipments.[1]

2. The motor fuels exemption

Alabama enacted a motor fuels excise tax during the same session it enacted the sales-and-use tax. *See* Ala. Act 1939-590 (Gen. Laws, p. 958). The excise tax did not—and still does not—apply to fuel used for purposes other than "the operation of motor vehicles on the highways of this State." *Id.* §10. In 1951, the legislature added a provision stating that any fuel subject to the excise tax would not be subject to any other state tax. *See* Ala. Act 1950-902, §2 (Ala. Laws, p. 1539). Alabama has maintained that exemption ever since. *See* Ala. Code §40-17-325(a).

3. The carriers' respective tax liabilities

Today, the state sales tax rate is 4%, Ala. Code §§ 40-23-2(1) (sales tax), 40-23-61(a) (use tax), and the state fuel excise tax is 19¢ per gallon. *See* Ala. Code §40-17-325(b). Local governments may also levy sales and use taxes and motor fuels taxes at varying rates.[2]

The Federal Government levies a 29.1¢ per gallon excise tax on fuel used by water carriers, 26 U.S.C. § 4042(b), and a 24.3¢ per gallon excise tax on fuel used on highways. 28 U.S.C. § 4081(a)(2)(A). Trains do not pay a federal tax on their fuel purchases.

---

1 From here forward, the monikers "water carriers" and "water carrier exemption" refer only to interstate shipments.

2 The district court's pre-trial order contains all relevant local tax rates. *See* 2016 pre-trial order 9, 11 (stipulations 16, 21).

Applying these rates to fuel prices from 2007-2016, the carriers pay the following tax per gallon:

	State	State + Local + Federal
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
Trains	9.85¢	23.48¢

See App. 55-56a (district court's factual finding).

B. The 4-R Act

Congress enacted the Railroad Revitalization and Regulatory Reform Act ("4-R Act") in 1976. *See* 49 U.S.C. § 11501, *et. seq*. The 4-R Act prohibits four state tax practices. The first three regard property taxes. *See* 49 U.S.C. § 11501(b)(1-3). The fourth is a residual clause that proclaims a State may not:

> 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)(4).

C. The Railroads' Litigation

Rail carriers began citing the residual clause to challenge state taxes on diesel fuel in the 1990's. *See infra* at 14-15 (discussing the early cases). The claim reached Alabama in 2008, when seven rail carriers filed four lawsuits claiming that imposition of Alabama's sales-and-use tax on rail carrier's purchases of diesel fuel violates the residual clause because

Alabama historically exempts trucks and water carriers from paying the sales-and-use tax on their purchases of diesel fuel.[3]

The first ruling of consequence was the district court's denial of Norfolk Southern's application for a preliminary injunction of the sales-and-use tax. *See Norfolk Southern Ry. Co. v. Alabama Dep't of Revenue*, 550 F.3d. 1306, 1307 (CA 11 2008), *reversed by CSX I, supra*. The Eleventh Circuit affirmed, holding that this Court's decision in *Oregon Dep't of Revenue v. ACF Industries*, 510 U.S. 332 (1994), that rail carriers could not challenge property tax exemptions under the 4-R Act's residual clause foreclosed the rail carriers' attempt to challenge sales tax exemptions under the same residual clause. 550 F.3d. at 1313-19.

1. *CSX I*

Following the Eleventh Circuit's ruling against Norfolk Southern, the district court in this case dissolved its preliminary injunction in favor of CSX.[4] CSX appealed. The Eleventh Circuit affirmed the decision in an unpublished *per curiam* opinion that its prior opinion in *Norfolk Southern* was binding.

---

[3] Alabama has been sued by CSX Transportation; Norfolk Southern Railway Company, *see* Case No. 2:13-cv-1305 (N.D. Ala.); BNSF Railway Company, *see* Case No. 2:11-cv-1047 (N.D. Ala.); and Alabama Southern Railroad LLC, Alabama Warrior Railway LLC, Autauga Northern Railroad LLC, and Birmingham Terminal Railway LLC. *See* Case No. 2:14-cv-283 (N.D. Ala.).

[4] The four lawsuits filed by the rail carriers are assigned to four different district court judges, thus explaining the conflicting rulings on preliminary injunctions in 2008. The non-CSX district courts have since stayed their proceedings pending the outcome of the CSX litigation.

After issuing a CVSG, this Court granted cert and reversed. While agreeing with Alabama that it "makes not a whit of sense" why Congress would allow rail carriers to challenge sales-and-use tax exemptions but not property tax exemptions, *CSX I*, 562 U.S. at 295, the Court held that result was dictated by the residual clause's plain language. *Id* at 296-97.

Justices Thomas and Ginsburg dissented. They reasoned that the residual clause applied only if the State "targets or singles out railroads as compared to other commercial and industrial taxpayers," *id.* at 298 (Thomas, J. dissenting). To instead allow rail carriers to hand-pick individual taxpayers as comparators would grant "a surprising windfall: most-favored taxpayer status." *Id.* at 305 (Thomas, J. dissenting).

2. *CSX II*

The district court held a trial in 2012, at which the parties introduced evidence regarding the alleged discrimination *vis-à-vis* trucks, but not water carriers. The district court held that trucks and water carriers could be an appropriate comparison class (as opposed to the general mass of taxpayers) but rejected CSX's arguments for discrimination. *CSX Transp. v. Alabama Dep't of Revenue*, 892 F. Supp. 2d 1300 (N.D. Ala. 2012). The district court held that the State justifiably exempted trucks from paying the sales tax because the fuel excise tax rate was "substantially similar." *Id.* at 1313-14. Regarding water carriers, the district court found that (a) CSX failed to offer any evidence of discriminatory effects and (b) the State could justifiably decide not to revoke the interstate water carrier exemption to avoid potential commerce clause litigation. *Id.* at 1315-17.

The Eleventh Circuit reversed. It agreed that CSX could choose individual competitors as comparators. *CSX Transp. v. Ala. Dep't of Revenue*, 720 F.3d 863, 867-69 (CA11 2013). But it held that the State could not cite the trucks' payment of the 19¢ fuel excise tax as a justification for their sales tax exemption, *id.* at 869-71, and thus the State was discriminating in the trucks' favor. *Id.*

After issuing a CVSG, this Court again granted cert and reversed. The Court agreed that CSX could pick individual competitors as comparators. *CSX II*, 135 S.Ct. at 1141-43. But the Court held that trucks' payment of fuel excise tax could justify their exemption from paying the sales-and-use tax, if the excise and sales taxes were "roughly equivalent." *Id.* at 1143-44. Accordingly, the Court remanded the case to determine whether the alternative taxes were "roughly equivalent." *Id.* The Court then noted that the Eleventh Circuit "failed to examine" the State's justifications for the water carriers' exemption and ordered the court to do that as well. *Id.* at 1144.

Justices Thomas and Ginsburg again dissented. As they did in *CSX I*, the Justices noted that allowing rail carriers to hand-pick individual taxpayers as comparators likely granted CSX "most-favored taxpayer status" and "could result in tax schemes that *impede* competition between interstate carriers rather than promote it." *Id.* at 1148 (Thomas, J. dissenting).

3. *CSX III*

The Eleventh Circuit granted the State's request to remand the case back to the district court to take evidence and make factual findings regarding the

water carriers' exemption. *CSX Transp. v. Alabama Dep't of Revenue*, 797 F.3d 1293 (CA11 2015).

The district court conducted a 4-day trial, during which the parties introduced evidence regarding the trucks' and water carriers' exemptions. The court rejected CSX's arguments regarding trucks for two reasons. First, the court determined that the trucks payment of the 19¢ per gallon fuel excise tax justified their exemption from paying the 4% sales-and-use tax, which averaged out to just 9.85¢ per gallon since 2007. App. 54a. Second, the court held that CSX could not claim "discrimination" when it could choose to pay the same fuel excise tax as trucks but chooses instead to pay the cheaper sales-and-use tax. App. 58a.

The district court rejected CSX's arguments regarding water carriers for two reasons. First, the court held that the threat of Commerce Clause litigation justified the State's refusal to revoke the interstate water carriers' exemption. App. 67-70a. Second, the court found that the exemption does not injure CSX because enjoining CSX's payment of the sales-and-use tax would not affect "the level of competition between CSX and water carriers." App. 74-75a. The district court rejected the States' third argument that the federal government's exclusive jurisdiction over federal waters, and the federal government's assumption of the financial burden caused by vessels on those waters, justified allowing water carriers to pay only the 29.1¢ federal excise tax.

The Eleventh Circuit affirmed the district court's holding that the trucks' payment of a "roughly equivalent" motor fuels excise tax justified the trucks'

exemption from paying sales-and-use tax.[5] App. 14-27a. But it reversed on the water carrier issue. The court of appeals held that the district court's lack of injury ruling was foreclosed by this Court's reliance on the parties' stipulation from the 2012 trial that interstate water carriers were a "principal competitor" of CSX. App. 28-30a (citing *CSX II*, 135 S.Ct. at 1143).

As for the State's justifications—the only issue presented by this petition—the Eleventh Circuit rejected each of them. First, the court stated that "exposure to a lawsuit alone" is not sufficient justification under the 4-R Act; the State must instead show that the refusal to revoke the water carriers' exemption is literally "compelled by federal law." App. 31a, 38a. Using this standard, the court rejected the State's desire to avoid potential litigation against the water carriers under the Commerce Clause and the Maritime Securities Act because such litigation "would not, in our view, succeed."[6] App. 31-39a.

Second, the court rejected avoidance of double taxation—*i.e.* forcing the water carriers to pay both the 29.1¢ federal excise tax and the State's 4% sales-and-use tax—as a justification for the exemption because

---

[5] The circuit court held that the district court's alternative ruling that CSX was not being discriminated against *vis-à-vis* trucks because CSX could choose to pay the same motor fuels excise tax as trucks was outside the scope of this Court's mandate. App. 14-16a.

[6] The Maritime Securities Act provides that "[n]o taxes … shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel is operating on any navigable waters subject to the authority of the United States[.]" 33 U.S.C. § 5(b).

(a) the state and federal taxes "are of different types and serve different purposes," App. 40-41a and (b) the State has not adopted "a policy of avoiding double taxation." App. 41-42a.

Third, the court rejected the State's argument that it could justifiably decide to maintain the interstate water carriers' exemption because water carriers "impose virtually no financial burden on the State." App. 42-44a. According to the Eleventh Circuit, "[b]ecause the sales and use tax does not account for the relative burdens imposed by taxpayers," App. 43a, the fact that water carriers impose virtually zero costs on the State is irrelevant as a justification. App. 43-44a.

The court gave the State two options to remedy the discrimination it found: (1) stop collecting sales-and-use tax from CSX or (2) revoke the water carriers' exemption. App. 45a. Using the district court's fact findings, *see* App. 55-56a, the following chart shows the relative tax burdens for fuel used to transport goods interstate under both options:

Alabama stops collecting sales tax from CSX		
	State tax (per gallon)	State + Local + Federal (per gallon)
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
CSX Trains	0¢	0¢
Alabama revokes the water carriers' exemption		

	State tax (per gallon)	State + Local + Federal (per gallon)
Barges	9.85¢	52.58¢
Trucks	19.00¢	47.40¢
CSX Trains	9.85¢	23.48¢

Under either option, CSX would be the most-favored-taxpayer by a wide margin. *But see CSX I,* 562 U.S. at 288 n.8 ("This conclusion does not, as Alabama and the dissent contend, turn railroads into 'most-favored-taxpayers,' entitled to any exemption (or other tax break) that a State gives to another entity.").

REASONS THE COURT SHOULD GRANT CERTIORARI

The Court should finish what it started in *CSX I* by definitively answering whether and when sales-and-use tax exemptions violate the 4-R Act. The question clearly has national importance; the Court has heard this case twice and the United States appeared at the petition and merits stages both times. More importantly, States have been waiting for an answer for more than 20 years; years we have spent litigating cases that have cost taxpayers millions of dollars.

I. The question presented has recurred for more than 20 years and threatens millions of public dollars.

Alabama is just one stop on a long litigation track. Rail carriers have been suing States on the theory that generally applicable sales-and-use taxes with exemptions for trucks and water carriers violate the 4-R

Act's residual clause since the 1990's. *See, e.g., Burlington Northern, Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984 (CA8 1999) (enjoining Missouri's sales-and-use tax as applied to fuel); *Kansas City Southern Ry. Co. v. Bridges*, No. 04-2547, 2007 WL 977552 (W.D. La. March 30, 2007) (enjoining Louisiana's sales-and-use tax as applied to fuel). The rail carriers won these early cases, in part, because the lower courts failed to judge—or even acknowledge—the State's justification for passing and/or maintaining the exemptions. The courts simply said that differential treatment equaled discrimination. *See Lohman*, 193 F.3d at 986 (limiting review to the challenged sales-and-use tax); *Bridges*, 2007 WL 977552 at *8 (failing to acknowledge justification as a defense).

The Court changed that in *CSX I* and *II* when it said that States can prevail with proper justification. *See CSX I*, 562 U.S. at 288 n.8 ("Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers."); *CSX II*, 135 S.Ct. at 1143 ("A State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers.").

The Court acknowledged that "knotty questions" would arise when judging "whether and when dissimilar treatment is adequately justified." *CSX I*, 562 U.S. at 297. When it comes to the 4-R Act, however, lower courts have oft avoided knotty questions, or gotten them wrong, hence our previous two trips to this Court. They need guidance, and they are looking for the Court to once again provide it in this case.

A. Lower courts have stayed cases with the same question to watch this case.

Alabama is neither the first nor the last State that rail carriers sued under the 4-R Act's residual clause. But Alabama is the case that this Court has heard twice, making Alabama the *de facto* bellwether for pending and future 4-R Act fuel tax cases.

To wit, state and federal courts in the Eleventh Circuit have stayed more than 30 actions for refunds and injunctions against Alabama, Georgia, and city and county governments, pending resolution of this case. *See* App. 77a-82a (listing the cases). Each of the stayed actions features the question presented here.

The State does not know whether similar actions are pending in other circuits. But we know that sales tax exemptions for water carriers' fuel purchases are common. *See, e.g.,* N.Y. Tax Law §1115(8); Va. Code Ann. § 58.1-609.3(4); George D. Brabson, *Analysis of Sales and Use Tax Exemptions—with Comment as to More Uniform Applications*, 9 Vand. L. Rev. 294, 300 (1956) (stating that, in 1956, "the most prolific source of exemptions from sales and use taxes" among all the states was "in the field of interstate commerce . . . [due to the constitutional limitations against burdening or interfering with the flow of commerce between the States."). We also know that rail carriers have a 20+ year history of suing States that have them.

Granting review to answer the decades-old question thus provides the opportunity to resolve multiple pending cases and prevent new ones.

B. Millions of public dollars are at stake.

Alabama dedicates most of its sales-and-use tax revenues to fund public schools. Ala. Code § 40-23-35(f). This case puts education dollars at risk in two ways: (1) tax refunds and (2) lost future tax revenue.

1. *Tax refunds*: Eight rail carriers have sued Alabama in state court, seeking refunds of the following payments of sales-and-use taxes, plus interest:

Rail Carrier	Refund (w/out interest)
CSX Transportation	$ 10,977,699.63
Norfolk Southern	$ 10,816,318.31
Alabama Gulf Coast	$ 1,529,118.74
Alabama Southern	$ 312,784.97
Birmingham Terminal	$ 272,016.13
Eastern Alabama	$ 195,488.93
Autauga Northern	$ 35,316.50
Alabama Warrior	$ 25,371.32
Total	**$ 24,164,114.53**

See App. 77a. (citations for each state case). Petitions filed directly with the Department seek an additional $4 million, plus interest. Should the rail carriers prevail, the refunds would be paid out of Alabama's Education Trust Fund, which funds public schools.

Our Eleventh Circuit sister, Georgia, stands to lose even more. CSX has filed three refund petitions that seek a total of $34.47 million dollars, plus interest, for taxes paid between October 2010 and December 2014. *See* App. 78-79a (citing Georgia refund cases). Assuming other rail carriers have sued, or will sue, Georgia, the value of this issue could push $75 to $100 million in the Eleventh Circuit alone.

2. *Lost tax revenue*: The States also stand to lose tax revenue in two ways. First, the rail carriers owe several years' worth of unpaid taxes. CSX, for example, stopped paying Alabama state tax on its fuel purchases in January 2011. *See* State's Tr. Ex. 16. In response to pre-trial discovery, CSX reported that it withheld $11.5 million in taxes owed from January 2011 to January 2016. *Id.* Should the State prevail, it would seek payment of all such withheld taxes, plus interest. Second, States would lose millions in tax revenues going forward, like the "roughly $5 million per year in sales and use tax on diesel fuel" that CSX pays to Alabama and its local governments. App. 13a.

* * *

"Decisions invalidating Acts of Congress, or state statutes (particularly where the statutes are representative of those in other states), are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict." Eugene Gressman & Kenneth Geller, *Supreme Court Practice*, 480 (9th ed. 2007). We have met that standard twice. The present question meets it too, as it would resolve a decades-old attack on state tax codes that has cost States millions of dollars in tax revenues.

II. This case is an ideal vehicle for resolving the question presented.

The Court knows this case well, having heard it twice before. The Court also knows the question presented well, having expressly left it open at the end of *CSX II*. *See CSX II*, 135 S.Ct. at 1144. There is no better vehicle to answer the question.

A. The case turns entirely on the question presented.

This case was always going to end here. The Court stated in *CSX I* that the State's justification(s) would ultimately resolve it: "Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers," *CSX I*, 562 U.S. at 287, n.8. And the Court concluded *CSX II* by ordering the court of appeals to judge the State's justifications for exempting trucks and water carriers. *See CSX II*, 135 S.Ct. at 1144.

The Court practically settled the truck issue in *CSX II* when it held that Alabama justifiably exempts trucks from paying sales tax if the fuel excise tax that trucks pay instead is "roughly equivalent." *See CSX II*, 135 S.Ct. at 1143-44. On remand, both the district court and the court of appeals found as a matter of fact that Alabama's 19¢ fuel excise tax was "roughly equivalent" to Alabama's 4% sales-and-use tax.[7] App. 16-27a (CA11), 59-67a (district).

But this Court gave no such guidance on what amounts to justification regarding water carriers:

> The State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law. The Eleventh Circuit failed to examine these justifications,

---

[7] The district court found that the average sales-and-use tax on a gallon of diesel fuel from 2007 to 2016 was 9.85¢. App. 55a.

> asserting that the water carriers were the beneficiaries of a discriminatory tax regime. We do not consider whether Alabama's alternative rationales justify its exemption, but leave that question for the Eleventh Circuit on remand.

CSX II, 135 S.Ct. at 1144. By failing to address justifications for water carrier exemptions in *CSX II*, the Court made it the ultimate issue in this case.

B. The case is clean.

There are no disputed facts on appeal. And while the State intends to raise them against other rail carriers should the Court deny review here, the State has dropped all ancillary legal arguments—*e.g.*, lack of competitive injury and the failure to be "similarly situated" to the comparator. As a result, the only question raised by this petition is "whether Alabama's alternative rationales justify its [water carrier] exemption," *id.*, the question this Court left open in *CSX II*.

C. The record is fully-developed.

This case has become the *de facto* bellwether for 4-R Act challenges to state fuel taxes. Realizing this, the courts and parties below developed a record fit for the case's eventual return to this Court.

After seeking the parties' opinion, the court of appeals granted the State's request to remand the case for a trial that would flesh out the factual basis for the State's arguments regarding water carriers. *See CSX II*, 797 F.3d at 1293 (on return from remand). That trial lasted four days and resulted in factual findings not challenged on appeal. *See* App. 54-57a.

As a result, the Court needn't speculate about issues such as the effect of exclusive federal jurisdiction over the rivers; the record answers those questions. For example, the district court found that the State "does not budget funds for commercial water traffic regulation or enforcement," App. 57a, because the federal government pays for everything (*e.g.* "river dredging," "lock and dam maintenance projects," and the cost of responding to "accidents involving water carriers") and charges water carriers with a 29.1¢ per gallon tax in return. *Id.* So, when the State argues that it treats water carriers differently "for some reason having nothing to do with railroads," *CSX I*, 562 U.S. at 288, n.8, the State can point to a factual record to back up those reasons.

III. The Eleventh Circuit's decision is wrong.

In *CSX I*, Justices Thomas and Ginsburg echoed Alabama's concern that allowing CSX to challenge a single competitor's exemption "would turn railroads into 'most-favored-taxpayers,' entitled to any exemption (or other tax break) that a State gives to another entity." *Id.* (quoting *CSX I*, 562 U.S. at 305, Thomas J, dissenting). The Court rebuffed the dissent and Alabama by stating that "we presume the suit would be promptly dismissed" if a State granted the challenged exemption to a single comparator "for some reason having nothing to do with railroads." *Id.*

The Court presumed wrongly. The Eleventh Circuit found discrimination even though Alabama cited multiple reasons it exempted water carriers in 1939 and multiple reasons it does not repeal the exemption in 2018, none of which have anything to do with railroads. *Id.*

A. Alabama passed the water carrier exemption to comply with state and federal law.

Alabama had three non-discriminatory reasons to exempt water carriers when it did so in March 1939. First, maintaining tax-free rivers was a condition of Alabama joining the Union. *See* Res. of Mar. 2, 1819, 15th Cong. (1819), 3 Stat. 489, 492. Second, Alabama included the same tax-free rivers provision in its constitution. *See* Ala. Const. Art. I, § 24 (1901). Third, this Court had recently held that the Commerce Clause prohibited States from taxing fuel used by vessels to transport persons across state lines. *See Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929).

In other words, Alabama did not exempt water carriers to disadvantage trains. We did it because we had to. That should be enough, as the Chief Justice suggested during the *CSX II* oral argument:

> CHIEF JUSTICE ROBERTS: I might have missed it, but why isn't it a sufficient justification for different treatment of the water carriers that the statute admitting Alabama to the union said they couldn't tax traffic on the river?
>
> MR. PHILLIPS: Well, I think because the – the chain – because the Constitution has changed.
>
> CHIEF JUSTICE ROBERTS: The Constitution might have changed, but the statute didn't.

Transcript of Oral Argument at 50-51, *CSX II*. The Chief Justice was right; neither the Congressional Act that admitted Alabama to the Union nor Alabama's Constitutional provision have changed since 1939. Using the standard the Court articulated in *CSX I*, compliance with state and federal law is a justifiable

"reason having nothing to do with railroads." *CSX I*, 562 U.S. at 288, n.8.

B. Alabama may choose not to repeal the water carrier exemption for reasons that have nothing to do with railroads.

Even if Alabama's original justifications were insufficient, Alabama's Legislature has other legitimate reasons not to repeal the historic water carrier exemption that "hav[e] nothing to do with railroads." *Id.* We briefly discuss two below.

1. *Federal relationship*: Rivers are different. Unlike the land upon which train tracks lay, the federal government has exclusive jurisdiction over the navigable waters that vessels use to transport goods interstate. Thus, water carriers engaged in interstate commerce have a unique relationship with the federal government that trains do not share. For example:

- Federal officials alone police commercial traffic on rivers, *see* State's Tr. Ex. 25 (Memorandum of Agreement between the U.S. Coast Guard and Alabama regarding the policing of vessels); state and local officials police the lands used by trains;[8]
- Federal agencies alone conduct and pay for river dredging and lock and dam maintenance projects, *see* App. 56a; the State

[8] Over a 10-year span, state and local officials responded to 703 "train-involved" automobile accidents that resulted in 92 deaths and 316 casualties. App. 56a. During the same period, zero interstate water carriers collided with an Alabama citizen on an Alabama river. *Id.*

spends millions of dollars on projects at or near railroad crossings;[9] and,

- Water carriers pay a 29.1¢ per gallon federal excise tax on fuel to pay for these federal projects; rail carriers pay no federal tax on their fuel purchases. App. 56a.

If the federal government shoulders the burden created by water carriers, and taxes their fuel at 29.1¢ per gallon to help alleviate that burden, then States should be allowed to defer taxation of the water carriers' fuel to the federal government, if States so choose.

The Eleventh Circuit's contrary ruling conflicts in principle with this Court's statement in *Oregon Waste Systems, Inc. v. Oregon Dep't of Environmental Quality*, 511 U.S. 93 (1994) that one justification for imposing a higher state tax is that the Plaintiff taxpayer "imposes higher costs" on the State than its comparison class. *Id.* at 101, n.5. We agree with the Eleventh Circuit that Alabama's 4% sales-and-use tax "is not calibrated to account for varying burdens," App. 43a, because it would be impossible to tailor sales tax rates to each individual taxpayer's level of enjoyment of state services. But that misses the point. If one taxpayer gets its services from the federal government, and it pays a federal excise tax on fuel to pay for those services, then the State has a legitimate reason to single out that taxpayer as one who will pay only federal taxes on its fuel purchases. And, back to the primary point, recognizing the water carriers' unique

---

[9] For example, in a 3-year span, Alabama spent approximately $200 million on highway maintenance projects at railroad crossings. *See* 2016 Trial Transcript 94.

relationship with the federal government has "nothing to do with railroads." *CSX I*, 562 U.S. at 288, n.8.

2. *Risk of litigation*: Repealing the exemption for water carriers engaged in interstate commerce could expose Alabama to another round of federal litigation based on multiple theories:

- Maritime Securities Act: Water carriers may argue that a tax on their fuel purchases is an unlawful "tax … levied upon or collected from any vessel or other water craft, or from its passengers or crew by any non-Federal interest[.]" 33 U.S.C. § 5(b).

- Commerce Clause: Water carriers may argue that a tax on fuel used to traverse federal waters is not "fairly related to the services provided by the State." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (discussing the fourth element of the *Complete Auto* test).

- Congressional Enabling Act: Water carriers may argue that a tax on their fuel purchases is an unlawful "impos[ition]" of "any tax" on the "navigable waters within said state." Res. of Mar. 2, 1819, 15th Cong. (1819), 3 Stat. 489, 492.

While the State believes that it *should* prevail against these claims, the cost and risk of litigation are legitimate reasons not to pick the fight.

Take the potential Maritime Securities Act claim, for example. The statute provides that:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters[.]

33 U.S.C. § 5(b).[10] Taxing fuel used to transport cargo interstate arguably violates the statute's plain text: Alabama would be a "non-Federal interest" that "collect[s]" "taxes" from the "crew" of vessels "operating on any navigable waters subject to the authority of the United States" when shipping cargo interstate. *Id.* At the very least, the plain text creates a plausible argument that Alabama may justifiably choose to avoid.

The Eleventh Circuit, however, held that avoidance of the cost and risk of litigation is not enough; Alabama must show a court-compelled "legal obligation." *See* App. 31a ("for 4-R Act purposes exposure to a risk is not compulsion, compulsion requires legal obligation"); App. 38a ("But, as we have already explained, exposure to a lawsuit alone is not compulsion under *CSX II*."). The Eleventh Circuit's obligation standard is wrong for two reasons.

First, the Eleventh Circuit read too much into the Court's use of the word "compelled" in the following

---

[10] The Act contains three exceptions to the prohibition on state taxes and fees, none of which applies here: (1) port or harbor fees or tonnage duties dedicated to pay the State's share of harbor maintenance projects, (2) fees "used solely to pay the cost of a service to the vessel or water craft," and (3) property taxes. 33 U.S.C. §§ 5, 2236.

statement from *CSX II*: "The State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law." *CSX II*, 135 S.Ct. at 1144. As it does here, the State argued in *CSX II* that taxing water carriers raised federal law "concerns," Blue Br. 57, *CSX II*, and "questions," Reply Br. 10-11, *CSX II*, that do not exist with taxing trains. That's the justification argument that "the Eleventh Circuit failed to examine" in *CSX II*, 135 S.Ct. at 1144, and thus the question this Court remanded to be considered in *CSX III*. *Id.* Requiring Alabama to show compulsion—rather than an articulable risk of litigation—conflicts not only with the argument this Court remanded in *CSX II*, but also in principle with instances where this Court and the United States have treated avoiding litigation risk as a valid government interest. *See, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996) (assuming *arguendo* "avoidance of § 2 liability to be a compelling state interest" when judging North Carolina's redistricting plan); Petition for a Writ of Certiorari before Judgment at 24-30, *United States Dep't of Homeland Security v. Regents of the University of California*, Supreme Court Case No. 17-1003 (United States defending wind-down of DACA policy due to "litigation risk").

Second, the Eleventh Circuit's dismissal of Alabama's concern about litigating the Maritime Security Act's plain text because "any such lawsuit would not, in our view, succeed," App. 38a, ignores the lesson of this case. Ten years ago, the Eleventh Circuit held that rail carriers could not raise a 4-R Act claim against state sales-and-use tax exemptions. *See Norfolk Southern Ry. Co. v. Alabama Dep't of Revenue*, 550 F.3d 1306 (CA11 2008) *rev'd by CSX I*, 562 U.S.

277. Yet, ten years, two trials, and countless public dollars later, Alabama stands on the brink of losing tens of millions of public dollars based on a plain reading of the 4-R Act that this Court admitted "makes not a whit of sense" considering the statute's treatment of property tax exemptions. *CSX I*, 562 U.S. at 277.

So, respectfully, Alabama takes with a grain of salt the Eleventh Circuit's assurance that Alabama would win Maritime Securities Act litigation because "the Act forbids taxes imposed on the vessel itself, or on its crew members themselves, or on the passengers themselves—not taxes imposed on property purchased for use on or by a vessel, or by its crew, or by its passengers." App. 39a. We agree that the Act's prohibition *should* be limited to state taxes "imposed on" the vessel or its crew. *Id.* But that's not what the statute says; the statute speaks in the disjunctive: "No taxes … shall be *levied upon or collected from* any vessel or other water craft, or from its passengers or crew." 33 U.S.C. §5(b) (emphasis added).

If any State can justifiably choose to avoid a fight over the plain text of a federal statute that prohibits state taxation of a common carrier, it's Alabama. We have been through it once—10 years and counting. We shouldn't be required to go through it again.[11]

---

[11] To be clear, if the Court denies review and Alabama repeals the water carrier exemption to comply with the ruling below, Alabama will argue the Eleventh Circuit correctly read the MSA. *See* App. 45a (noting one permissible remedy is that "the State could repeal the water carrier exemption"). The point is that the 4-R Act should not be read to force States into making Hobson's Choice: Do we prefer being sued by rail or water carriers?

* * *

Rail carriers have been suing States over fuel tax exemptions for more than 20 years. Alabama has suffered through 10 of them. The Court can resolve this issue, once and for all, by granting cert to finish what it started in *CSX I*. As the court of appeals put it: "It's time to put this one in the shed." App. 45a n.13.

CONCLUSION

The Court should grant the petition for certiorari review.

Respectfully submitted,

Steve Marshall*
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General

Corey L. Maze
Special Deputy Attorney General
*Counsel of Record

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
smarshall@ago.state.al.us

Mark Griffin
Chief Legal Counsel

Margaret McNeill
Keith Maddox
Ass't Ala. Attorneys Gen'l

STATE OF ALABAMA DEP'T OF REVENUE
P.O. Box 32001
Montgomery, AL 36132
(334) 242-9690

October 5, 2018

Counsel for Petitioners