No. 18-447

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 a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

NATHAN D. GOLDMAN
JOEL W. PANGBORN
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 359-3200

STEPHEN D. GOODWIN*
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
165 Madison Avenue
Suite 2000
Memphis, TN 38103
(901) 577-2141

Counsel for Respondent

* Counsel of Record

[Additional counsel listed on inside cover]

December 6, 2018

JAMES W. MCBRIDE
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
901 K Street, N.W.
Suite 900
Washington, DC 20001
(202) 508-3467

MISTY SMITH KELLEY
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
633 Chestnut Street
Suite 1900
Chattanooga, TN 37450
(423) 209-4148

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Ave.,
N.W.
Washington, DC 20004
(202) 783-8124

CARTER G. PHILLIPS
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

QUESTION PRESENTED

Whether the court of appeals correctly held that Alabama failed to meet its burden to sufficiently justify its facially discriminatory sales and use tax on railroad diesel fuel that violates 49 U.S.C. § 11501(b)(4), by exempting interstate water carriers, a principal competitor of railroads.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption identifies all parties to this proceeding.

CSX Corporation is the parent company of Respondent. No other publicly held corporation has a 10% or greater ownership interest in Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITY

OPINIONS BELOW

The Petition omits citation to the modified opinion the Eleventh Circuit issued in response to CSX's petition for rehearing. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 891 F.3d 927 (11th Cir. 2018). In that modified opinion, reproduced in the Appendix to this Brief, the Eleventh Circuit specified the language of the injunctive and declaratory relief it directed the district court to enter. Its specific direction was:

> As long as the State retains the sales and use tax exemption for diesel fuel used by water carriers "engaged in foreign or international commerce or in interstate commerce," [cites omitted], the 4-R Act forbids it from imposing the sales and use tax on diesel fuel used by rail carriers "engaged in foreign or international commerce or in interstate commerce."

App. 3a (quotation marks original).

STATEMENT REGARDING JURISDICTION

The Petition's statement is adequate, with the addition of the Eleventh Circuit's decision on CSX's petition for rehearing referenced *supra*.

STATUTORY PROVISION INVOLVED

The Petition accurately states the codification of the most relevant provision of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976).

INTRODUCTION

The State's petition for a writ of certiorari presents no question worthy of this Court's review. The

Petition asks this Court to review the Eleventh Circuit's "water carrier" ruling, which held that Alabama failed to sufficiently justify its facially discriminatory sales and use tax on railroad diesel that violates 49 U.S.C. § 11501(b)(4) by exempting interstate water carriers, a principal railroad competitor.[1] The Eleventh Circuit's water carrier ruling does not conflict with a decision of any other circuit or state supreme court, and is not contrary to any decision of this Court. The State's Petition therefore should be denied.

Alabama is one of fewer than a handful of states that imposes a sales and use tax on railroad diesel fuel, one of the largest railroad operating expenses, while exempting water carriers from that same tax. In the second of its two previous opinions in this case, this Court held this disparate treatment of railroads versus their competitors violates Section 11501(b)(4), unless the State can establish a sufficient justification for the taxing disparity. *Ala. Dep't of Revenue v. CSX Transp., Inc.,* 135 S. Ct. 1136, 1143 (2015) *("CSX II").* This Court recognized that although Alabama could not claim that water carriers pay another comparable, roughly equivalent state tax on their diesel fuel that might justify the facial discrimination, the State offered other non-tax justifications- "for example, that the water carrier exemption is compelled by federal law," that the Eleventh Circuit failed to consider. *Id.* This Court remanded the case and directed the Eleventh Circuit

---

[1] As does the Petition, this brief will use the monikers "water carriers" and "water carrier exemption" to refer to water vessels engaged in foreign, international, or interstate commerce in Alabama, and the sales tax exemption for diesel fuel used in such commerce.

to consider the State's proffered justifications for its discriminatory sales tax scheme. *Id.*

In compliance with that direction, the Eleventh Circuit in turn remanded the case to the district court "for further proceedings consistent with [*CSX II*]." *CSX Transp., Inc. v. Ala. Dep't of Revenue,* 797 F.3d 1293, 1294 (11th Cir. 2015). A second trial on the merits ensued, and a fully developed record was considered by the district court and reviewed on appeal by the Eleventh Circuit.

The State offered three justifications for its exemption of water carrier fuel from the sales tax imposed on railroad diesel fuel:

(1) water carriers might claim that a tax on their fuel violates the Commerce Clause or the federal Maritime Transportation Security Act, and although the State believes such claims would fail, the State might have to incur litigation costs to defend against them;

(2) the federal government taxes water carrier fuel, and the State has a purported interest in avoiding "double taxation" of items already taxed by the federal government; and

(3) water carriers do not impose the same financial burdens on the State as rail carriers.

The Eleventh Circuit considered and rejected each of these justifications. *CSX Transp., Inc. v. Ala. Dep't of Revenue,* 886 F.3d 974 (11th Cir. 2018). The State's Petition seeks review of the Eleventh Circuit's rejection of these justifications for its discriminatory water carrier exemption even though the decisions below represent the first and only time the lower courts have been faced with a post-*CSX II* case that

considered a state's justification for taxing railroad fuel but not water carrier fuel. As an issue of first impression, the court of appeals' resolution is inherently a weak candidate for this Court's review.

The Petitioners' argument that this case constitutes the culmination of twenty years of litigation is simply inaccurate. The decision below is not part of a long string of cases with unsettled questions concerning when discriminatory exemptions for water carriers are justified. As the Petition acknowledges, prior to *CSX II*, courts did not examine a state's justifications for discriminatory exemptions. Pet. at 15. Accordingly, the courts have not decided like cases differently, and there is no disagreement among them that warrants this Court's attention with respect to water carriers.

The Eleventh Circuit also has not decided an important federal question concerning taxation of water carriers in a way that conflicts with any decision of this Court or any other court. The Respondent does not disagree that cases decided under Section 11501 can raise important questions of federal law. In fact, the Respondent as Cross-Petitioner has filed a conditional cross-petition asking the Court to review the motor carrier portion of the Eleventh Circuit's ruling should the Court grant the instant Petition. The Eleventh Circuit's motor carrier ruling held that the State's highway motor fuel tax is a comparable, roughly equivalent tax that justifies exempting motor carriers from the sales tax even though the two taxes are imposed at different rates (19 cents per gallon for motor carriers versus up to 10% of the fuel purchase price for railroads), tax different activities (fuel consumed on state roadways versus fuel purchased or used in the

state), and are dedicated for different purposes (state highway construction and maintenance versus general fund and education purposes). The motor carrier ruling is directly contrary to a similar decision by the Iowa Supreme Court and also directly contradicts this Court's well-established precedent, referenced in *CSX II*, on when an alternative tax can justify a facially discriminatory tax that burdens interstate commerce, including opinions requiring that courts, when judging discrimination, examine how tax proceeds are applied. *See* Dkt. 18-612.

However, unlike the *tax-based* justifications the State raised to defend the motor carrier exemption, the State's *non-tax-based* justifications for the water carrier exemption have not been discussed in any decision of this or any other court. There is therefore no disagreement or conflict that warrants this Court's review of the water carrier portion of the Eleventh Circuit's opinion. Moreover, the Eleventh Circuit's water carrier ruling is correct and fully consistent with Congress's purposes in enacting Section 11501. The State's Petition should be denied.

STATEMENT OF THE CASE

A. Statutory Background

In the 1970s, many of the nation's railroads were bankrupt and the industry was near collapse. After more than 15 years of investigation, Congress determined that state and local taxes were in part to blame, noting that discriminatory tax schemes had exacerbated the inherent competitive disadvantage railroads have because they must build, fund, and pay taxes on their own tracks and rights-of-way,

whereas their competitors—the trucks and barges—operate on publicly-funded infrastructure.[2]

Congress responded with the 4-R Act, legislation designed "to restore the financial stability of the railway system of the United States while fostering competition among all carriers by railroad and other modes of transportation." *CSX II*, 135 S. Ct. at 1142 (internal citations omitted). One method Congress chose to accomplish these goals, particularly the goal of furthering railroad financial stability, was to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of railroads. *Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987). Declaring that state tax discrimination against railroads "unreasonably burden[s] and discriminate[s] against interstate commerce," the Act confers jurisdiction on federal district courts to enjoin state and local taxes that discriminate against railroads in violation of the Act. 49 U.S.C. § 11501.

Among the acts that Congress prohibited is the imposition of a state or local tax that discriminates against a rail carrier. As this Court held in *CSX II,* in light of the 4-R Act's stated purpose of fostering competition between railroads and other modes of transportation, a state or local government that facially discriminates against a railroad by imposing a tax on railroads that is not imposed on railroad competitors violates 49 U.S.C. § 11501(b)(4), unless

---

[2] S. Rep. No. 87-445 (1961) ("the Doyle Report"), at 449-66, *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015023117982. *See also W. Air Lines, Inc. v. Bd. of Equalization of S.D.,* 480 U.S. 123, 131 (1987); H.R. Rep. No. 94-725 (1975), at 78; S. Rep. No. 91-630 (1969), at 1.

the government can prove a sufficient justification for the discrimination. *CSX II*, 135 S. Ct. at 1143.

B. Alabama's Sales and Use Tax

As the Petition correctly points out, Alabama subjects railroad diesel fuel to its generally-applicable sales and use tax. But Alabama exempts motor carriers and water carriers, the railroads' principal competitors. Motor carriers pay a motor fuel tax for fuel consumed on the state roadways, while interstate water carriers pay no state tax on their fuel. In its current version, the exemption for water carrier fuel includes "sales of fuel and supplies for use or consumption aboard [water vessels] engaged in foreign or international commerce or in interstate commerce." Ala. Code § 40-23-4(10). As this Court has already ruled, this disparity requires the State to prove a "sufficient justification" for this facial discrimination to avoid violating Section 11501(b)(4). 135 S. Ct. at 1144.

While Alabama does not impose any state tax on water carrier fuel, its sales tax on railroad diesel fuel, one of CSX's largest operating expenses, is substantial. In Birmingham and Montgomery, where CSX purchases over 95% of its Alabama fuel, the combined state and local sales tax rate is 10%, and statewide, CSX pays approximately $5 million per year in diesel fuel sales tax.[3]

Alabama attempts to justify its facially discriminatory water carrier exemption by pointing to federal taxes on water carrier fuel. Section 11501, however, only prohibits discriminatory *state and local*

---

[3] Agreed Facts (Doc. 137) ¶16; Pls. Tr. Ex. 1 at 000182; Trial Tr. (Doc. 139) (July 12, 2016) (Friedman) p. 467.

taxation of railroads; federal taxes (such as the federal excise tax on water carrier fuel, *see* Pet. 6-7) are completely irrelevant and should not be considered. *Atchison, Topeka & Santa Fe Ry., v. Bair*, 338 N.W.2d 338, 346 (Iowa 1983), *cert. denied*, 465 U.S. 1071 (1984), *citing Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979). Consistent with this principle, this Court's decision in *CSX II* makes no mention of federal taxes. Instead, after noting that water carriers pay no state tax on fuel, this Court held that the State cannot argue that another tax justifies its sales tax exemption for water carriers. 135 S. Ct. at 1144.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER COURT.

This case is the first post-*CSX II* decision to examine non-tax-based justifications for facially discriminatory taxes and the first post-*CSX II* decision to decide "sufficient justifications" in the context of a tax that facially discriminates against railroads vis-à-vis water carriers. Thus, there are no circuit or state supreme court conflicts, and Alabama cites none. Instead, Alabama attempts to manufacture a conflict with one of this Court's cases. It weakly asserts that the Eleventh Circuit's ruling "conflicts in principle" with a single statement in a footnote in *Oregon Waste Systems, Inc. v. Oregon Department of Environmental Quality*, 511 U.S. 93 (1994). Pet. 24. There is no conflict.

In *Oregon Waste,* this Court held that a hazardous waste "surcharge" on the in-state disposal of solid waste generated in other states discriminated against

out-of-state operators in violation of the dormant Commerce Clause. 511 U.S. at 95. Alabama now focuses on dicta in a footnote of that decision, which theorized that a state could potentially recover the "increased cost" of disposal of out-of-state waste if in fact such waste imposed higher costs on Oregon than in-state waste. 511 U.S. at 101 n. 5. Alabama argues that the Eleventh Circuit's rejection of its attempt to justify its discriminatory water carrier exemption by the different "cost" burdens railroads and water carriers impose on the State "conflicts in principle" with this footnote.

The State's reliance on dicta in a footnote to *Oregon Waste* is disingenuous, because the State ignores the rule announced in the opinion itself. The opinion held that where a tax is facially discriminatory, like the sales tax at issue here, the court should not examine the relative burdens and benefits. Instead, a facially discriminatory tax "is virtually per se invalid," unless the State "can show it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101-02. The State fails to acknowledge this strict scrutiny standard, much less explain how the State's justifications satisfy it.

The Eleventh Circuit correctly held that the cited footnote in *Oregon Waste* does not support the State's justifications for its discriminatory water carrier exemption. First, the footnote's "musing about what might have been if something were different is doubtless dicta." Pet. App 42a. This Court's opinion noted Oregon did not claim that out-of-state waste imposed higher costs on Oregon than in-state waste. The waste surcharge in *Oregon Waste* was in the nature of a user fee, and the footnote was simply

suggesting that fees calibrated to recoup actual costs could be permissible. But most importantly, as both the district court and the Eleventh Circuit observed, Alabama's sales and use tax is a general tax that applies to all non-exempt goods purchased or used in the State and it is neither "cost-based" nor calibrated to account for varying burdens to the State. *Id.* at 43a, 74a.

The Petition claims that the Eleventh Circuit "misses the point" because Alabama has a "legitimate reason" to exempt from a state tax a taxpayer who pays for (through a federal excise tax) and receives its services from the federal government. Pet. 24. This purported "legitimate reason" strains credulity because, as the Eleventh Circuit noted elsewhere in its opinion, the State offered no evidence of such a policy, and in fact the State routinely adds its state taxes to federal taxes. *Id.* at 41a. In addition, the State's position expands the dicta in the footnote from a hypothetical blessing of cost-based surcharges to a wholesale validation of any facially discriminatory tax exemption from a general tax where the state can point to some alleged difference in the comparative costs to provide services to different taxpayers. The State's interpretation of the dicta in the footnote would create an exception that swallows the rule set forth in the opinion itself.

II. THE ELEVENTH CIRCUIT'S DECISION FAITHFULLY COMPLIES WITH THIS COURT'S DIRECTION IN *CSX II* TO EXAMINE AND DECIDE ALABAMA'S WATER CARRIER JUSTIFICATIONS.

It is noteworthy that the State does not argue that the Eleventh Circuit in any way failed to comply with this Court's mandate on remand. Space constraints

preclude a full presentation of the merits of CSX's claims, but what is fundamental for purposes of certiorari is that the Eleventh Circuit's examination of Alabama's justifications of its discriminatory water carrier exemption was correct and consistent with *CSX II*. Alabama's assertions to the contrary are unavailing.

A. The "need for an answer"

The Petition argues that the water carrier issue has "recurred for more than 20 years and threatens millions of public dollars." Pet. 14. But even Alabama concedes that *CSX II* altered the legal landscape in the fuel tax cases, and that, prior to *CSX II*, courts did not examine a state's justifications for discriminatory exemptions. Pet. 15. Thus, although the first cases challenging discriminatory sales tax exemptions for motor and water carriers were filed 20 years ago, litigation examining proffered non-tax justifications for water carrier exemptions under Section 11501(b)(4) is brand new. Indeed, the rulings below are the first cases to discuss such non-tax justifications following the opinion in *CSX II*.

The fact that lower courts have stayed similar cases awaiting the result of this litigation does not make this case worthy of further review on the water carrier issues. The Eleventh Circuit's ruling rejecting the particular justifications raised by Alabama does not require any further "guidance" from this Court in order for lower courts to resolve pending cases, which may or may not involve similar non-tax-based justifications for discriminatory water carrier exemptions. And if a circuit conflict arises from one

of those cases, that will be the proper vehicle for review of the issue by this Court.

B. Millions of public dollars are at stake

Alabama is correct on this point, but ignores the victim of its illegal taxing scheme. The railroads have been in the past, and continue to be, beleaguered by what Congress determined was "widespread, long-standing and deliberate" discriminatory state and local taxation. *See Union Pac. R.R. v. Utah,* 198 F.3d 1201, 1206 (10th Cir. 1999) (discussing the legislative history of Section 11501). When a state chooses to apply a 10% sales tax on the millions of gallons of diesel fuel purchased by railroads in its jurisdiction, the stakes will be high. Because of the scale of their operation, the economic impact of such taxes on the railroads is enormous. The railroads' particular vulnerability to discriminatory taxation is one of the reasons Section 11501 was enacted in the first place. *See W. Air Lines v. Bd. of Equalization of S.D.,* 480 U.S. 123, 131 (1987). But that is exactly why it is important that Section 11501(b)(4) be construed and applied to fulfill Congress's purpose "to restore the financial stability of the railway system of the United States while fostering competition among all carriers by railroad and other modes of transportation." *CSX II*, 135 S. Ct. at 1142 (internal citations omitted). The Eleventh Circuit's water carrier ruling does just that. And a state should not be heard to complain of "lost tax revenue" from its own discriminatory tax. If Alabama is facing a revenue shortfall, the solution is to eliminate the water carrier and motor carrier exemptions to its sales tax.

C. The proper vehicle to resolve the question presented

The Petition argues that this case is the "ideal vehicle" for this Court to intervene (Pet. 18); that the case "turns entirely on the question presented" (*id.* at 19); that the case "is clean" (*id.* at 20); and that the "record is fully developed" (*id.*). Although these factors would weigh in favor of reviewing the Eleventh Circuit's motor carrier ruling, they do not justify review of the water carrier ruling in the absence of a conflict or split in authority.

III. THE ELEVENTH CIRCUIT'S DECISION AS TO THE WATER CARRIERS IS CORRECT.

Finally, Alabama seeks certiorari on the basis that the Eleventh Circuit's decision is "wrong" and (presumably) the Eleventh Circuit's rejection of its justifications for the discriminatory water carrier exemption must be reversed. Pet. 21. Error correction of course is not the business of this Court. In any event, the Eleventh Circuit's decision is not "wrong" as to the water carrier issue. That court correctly rejected Alabama's asserted justifications.

A. The exemption of water carrier fuel from the Alabama sales tax is not "compelled by federal law"

Alabama argues that its water carrier exemption is compelled by federal law because of a heretofore nonexistent "threat" of litigation by water carriers, claiming that such a tax violates either the Commerce Clause or the Maritime Transportation Security Act. It is no small irony that the State chooses to discriminate against railroads, in violation of a federal anti-discrimination statute, because of a fear of potential claims from water carriers, but

Alabama nevertheless is quite willing to litigate with railroads over the validity of its taxes. This is the type of deeply ingrained anti-railroad bias that prompted Congress to pass the 4-R Act in the first place. In any event, the Eleventh Circuit correctly rejected both of these legal "compulsion" arguments.

Alabama asserts that the Eleventh Circuit "read too much" (Pet. 26) into the word "compelled" because this Court in *CSX II* left open the door for the State to show that exempting water carriers is "compelled" by federal law. 135 S. Ct. at 1144. According to Alabama, its mere "concerns" that litigants may argue that federal law would prohibit taxing water carriers, or the State's alleged "exposure" to or "articulable risk" of litigation, meet the standard of compulsion required by *CSX II*. Pet. 27. The Eleventh Circuit properly applied this Court's instruction when it said: "For 4-R Act justification purposes exposure to a risk is not compulsion; compulsion requires legal obligation." Pet. App. 31a. This conclusion does not "read too much" into the Court's ruling in *CSX II*; to the contrary, it is faithful to this Court's holding that federal compulsion could be a sufficient justification for discrimination. Furthermore, equating "compulsion" with "legal obligation" is certainly consonant with the Congressional goals to end the longstanding discriminatory state taxation of railroads. Employing a standard any less than a "legal obligation" would leave a loophole for make-weight arguments by states claiming that "risk of litigation" by other taxpayers justifies discrimination against railroads.

The Petition's citation to *Shaw v. Hunt*, 517 U.S. 899 (1996), is unavailing. Pet. 27. *Shaw* was a Voting Rights Act case that *rejected* the state's

contention that its discriminatory redistricting plan was "compelled" by the "risk" of liability under the Act. 517 U.S. at 915. Thus, Alabama offers no authority for the proposition that "compelled" means anything short of the actual legal "compulsion" standard used by the Eleventh Circuit and this Court in *CSX II*.

At most, the Petition speculates that a water carrier "may argue" that federal law prohibits taxation of water carriers. Pet. 25. This is woefully short of federal compulsion, and would constitute a meaningless standard, because parties to a lawsuit "may argue" just about anything.

1. Commerce Clause

Alabama correctly argues that it should prevail against claims by water carriers that the Commerce Clause prohibits application of the sales tax to their fuel, but Alabama nevertheless argues that "the cost and risk of litigation are legitimate reasons not to pick the fight." Pet. 25. This specious reasoning was correctly rejected by the Eleventh Circuit.[4]

The Eleventh Circuit carefully analyzed the State's claim that taxation of water carriers by Alabama might violate the dormant Commerce Clause under the fourth prong of this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), which requires that a state tax must be "fairly related to services provided by the State." The Eleventh Circuit correctly rejected the notion that a sales tax on water carrier fuel could fail to meet this

[4] The Multistate Tax Commission, as *amicus curiae* to Alabama, understandably refrains from casting any doubt on a state's power to impose a properly apportioned sales tax on water carrier fuel, which several of its member states do.

requirement.[5] Under this Court's decision in *Commonwealth Edison Company v. Montana*, 453 U.S. 609 (1981), the fourth prong of the *Complete Auto Transit* test does not require that the amount of general revenue taxes collected from a particular activity be reasonably related to the value of services provided to the activity. Instead, the fourth prong requires only that the measure of the tax be reasonably related to the taxpayer's activities or presence in the state, in which case the taxpayer will realize, in proper proportion to the taxes it pays, the only benefit to which the taxpayer is constitutionally entitled: the benefits derived from the taxpayer's enjoyment of the privileges of living in an organized society. Pet. App. 33a-35a.

As the Eleventh Circuit pointed out, water carriers purchasing or using diesel fuel in Alabama benefit from those privileges, including regular landfalls in Alabama while competing with CSX in "head-to-head competition." Pet. App. 35a. Water carriers also benefit from their "river-to-truck competition" into and out of Alabama, as well as the State's provision of emergency services, roads, access to the judicial system, and other advantages of a civilized society. Pet. App. 35a. And in any event, the Eleventh Circuit recognized that this Court has never

---

[5] In its first ruling in this case, even the district court acknowledged that it is "now axiomatic" that no federal or constitutional rule categorically prevents Alabama from requiring water carriers to pay an apportioned share of taxes for activities occurring within the State. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 892 F. Supp. 2d 1300, 1316 (N.D. Ala. 2012).

invalidated a state tax under the fourth prong of the *Complete Auto Transit* analysis. Pet. App. 36a.[6]

Thus, the Eleventh Circuit correctly concluded that levying Alabama's (or any state's) sales and use tax on water carrier fuel would not offend the Commerce Clause. Exempting those carriers from the Alabama sales tax as sufficient justification to tax railroads cannot be countenanced under the 4-R Act.

2. Maritime Transportation Security Act

Alabama's reliance on the Maritime Transportation Security Act ("MTSA"), 33 U.S.C. § 5(b), is likewise futile. Alabama argues that it could run afoul of this statute, which prohibits taxes "upon or collected from any vessel or other water craft, or from its passengers or crew" by any non-federal interest. The unambiguous language used by Congress in the MTSA deals with taxes levied upon "any vessel" or "passengers or crew." Obviously, the purpose of the MTSA is to prohibit so-called "head taxes" on passengers or state taxes on vessels for the privilege of plying the navigable waters of their state. The Eleventh Circuit cited two state appellate cases so holding. Pet. App. 39a.[7]

---

[6] Alabama's implicit reliance on *Helson v. Kentucky*, 275 U.S. 245 (1929), ignores decades of subsequent jurisprudence which has long ago superseded the previous ban on taxing interstate carriers imposed by *Helson*. At least since this Court's decision in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), there has been no question about this. *See also* 1 J. Hellerstein & W. Hellerstein, State Tax Taxation ¶18.03[2], 1999 WL 1399024, pp. *2-*5 (3d ed. 2018).

[7] *Commercial Barge Line Co. v. Dir. of Revenue*, 431 S.W. 3d 479, 484 (Mo. 2014); *Reel Hooker Sportsfishing, Inc. v. Dep't of Taxation*, 236 P.3d 1230, 1232 (Haw. Ct. App. 2010).

The Eleventh Circuit correctly distinguished the meager authority cited by Alabama in which courts have struck down taxes on "passengers" of vessels under the MTSA. *Id.* And as the Eleventh Circuit observed, the Petitioner's suggestion that the MTSA has broad preemptive reach would forbid the collection of state sales or use taxes or any kind of tax on tangible personal property bought or used by water carriers, resulting in the water carriers becoming "floating tax free zones." Pet. App. 39a. The Eleventh Circuit correctly rejected the State's attempt to justify its discriminatory water carrier exemption based on a fanciful assertion of a violation of the MTSA.

3. The Enabling Act

In two fleeting and isolated references, Alabama cites the Congressional Act admitting Alabama to the Union, which allegedly "prohibited taxation of Alabama's rivers." Pet. 5, 22.[8] The district court rejected this argument (Pet. App 72a), and the Eleventh Circuit correctly ignored it as this alleged "prohibition" was barely mentioned in the Petitioners' Eleventh Circuit Brief. Brief of Appellees at 31, *CSX Transp., Inc. v. Ala. Dep't of Revenue,* No. 17-11705 (11th Cir., June 23, 2017). What the Petition fails to mention—but is noted by the district court (Pet. App. 72a)—is that Alabama's own supreme court has held that this "prohibition" does not prevent the State from subjecting water carriers to a generally applicable tax. *Battle v. Corp. of Mobile*, 9 Ala. 234, 238 (1846) (holding that a city tax on the real and personal property of water carriers was "free from

[8] The Petition refers to this resolution as the "Enabling Act," and so will this brief.

constitutional objection."). Even more detrimental to the State's position is the fact that, notwithstanding this alleged obligation not to tax water carriers, Alabama claims the power to tax fuel and supplies of water carriers engaged in intrastate commerce on Alabama's navigable waterways. *See*, *e.g.*, *Bean Dredging, LLC v. Ala. Dep't of Revenue*, 855 So. 2d 513 (Ala. 2003).

At the end of the day, the Eleventh Circuit correctly rejected the only potential justification specifically mentioned by this Court in *CSX II*—that the water carrier exemption is "compelled by federal law."

B. The unfounded proposition that water carriers impose virtually no financial burden on the State is not a justification for discrimination

The district court rejected this asserted "relative burdens" justification, and it fared no better at the Eleventh Circuit. Pet. App. 74a, 44a. The alleged "disparity in burdens" on the State by water and rail traffic cannot justify discrimination between water carriers and railroads because Alabama's sales and use tax is not "cost-based," nor calibrated to account for varying burdens imposed by Alabama taxpayers. Instead, the Alabama sales tax is a flat rate tax imposed on taxpayers without reference to the burdens generated by the taxpayer's activity that are borne by the State.

In this same vein of "relative burdens," Alabama repeats its unsuccessful arguments below that the purportedly different "federal relationship" with waterways sufficiently justifies discrimination against railroads. Pet. 23-24. This argument, however, is only a variation of the argument

foreclosed by the holdings of both the Eleventh Circuit and *CSX I* that railroads and water carriers are similarly situated competitors in the transportation of interstate freight. For Alabama to continue to assert a "unique" relationship between water carriers and the federal government as a "justification" to discriminate against railroads is simply another attempt to undermine and avoid the law of this case that railroads and water carriers are "similarly situated." 135 S. Ct. at 1141-43.

Thus, in conjunction with its earlier rulings concerning "compulsion" of federal law, the Eleventh Circuit correctly analyzed and rejected all of the "alternative rationales" asserted in this Petition.

C. The result in this case does not result in "most favored taxpayer" status for railroads

A consistent theme by Alabama during the entire life of this litigation has been that it must discriminate against railroads in order to avoid elevating their status to "most favored taxpayer." As early as *CSX I*,[9] this Court explained why eliminating the discrimination between two similarly situated taxpayers does not render one of the taxpayers "most favored" over the other. Alabama's insistent argument is simply an attempt to revise the argument it unsuccessfully made in *CSX I*—that is, the state sales tax that applies to railroads but exempts their interstate competitors cannot be a "tax that discriminates against a rail carrier." Contrary to the dissent in *CSX I* and to Alabama's continuing argument on this point, this Court rejected the notion

---

[9] *CSX Transp., Inc. v. Ala. Dep't of Revenue,* 562 U.S. 277 (2011) (*"CSX I"*).

that enjoining a discriminatory sales tax that treats railroads differently from a similarly situated comparison class renders railroads "most favored taxpayers." 562 U.S. at 288 n. 8. The railroads do not obtain an unjustified "windfall" when they are relieved of the obligation to pay a tax that is not paid by their competitors on diesel fuel. And this is certainly not a case where the railroad is attempting to exempt a major purchase (diesel fuel) based on some inconsequential exemption granted to other non-similar taxpayers. The illustrative example of an exemption beyond the reach of Section 306 used by the Court in *CSX I* was a railroad challenge to a tax where every person in Alabama would pay a $1.00 annual tax, except for the exemption of one person. *Id.* That is not this case.

D. There is no requirement for proof of intent to discriminate in Section 11501

Much of the State's Petition is devoted to the argument that Alabama has constructed its sales tax regime without any intent to discriminate against railroads or, as articulated by the Petition, Alabama has purportedly legitimate reasons for its tax scheme's discrimination against railroads "having nothing to do with railroads." Pet. 21.[10] First of all, the discriminatory tax regime has everything to do with railroads. *CSX II* has conclusively held that, for purposes of this case, water carriers and railroads are

---

[10] Alabama's current explanation for the water carrier exemption stands in stark contrast to its previous representation to this Court that "no one appears to know precisely why the legislature created" it. Petition for a Writ of Certiorari, Case No. 13-553 (October 30, 2013), p. 5. In any event, as discussed *infra*, Alabama's purpose in creating the exemption is irrelevant.

similarly situated transportation companies purchasing and using huge quantities of diesel fuel in Alabama to transport property. Exempting the water carriers but not the railroads from the sales tax on that fuel cannot be a decision "having nothing to do with railroads." Numerous government reports, including those that led to the enactment of Section 11501, specifically recognize that taxes that discriminate against railroads vis-à-vis their competitors exacerbate the inherent competitive disadvantage railroads face because they must build, fund, and pay taxes on their own tracks and rights-of-way, while their competitors, the trucks and barges, operate on publicly-funded infrastructure.[11]

But more importantly, the State's alleged benign intentions in establishing the water carrier exemption while taxing railroads is irrelevant in the Section 11501 analysis. This Court has heard and decided five cases under this statute without the slightest suggestion that any "intent to discriminate" against railroads need be established.[12] And no court of appeals has ever read an "intent" requirement into the Act. In fact, at least two circuit courts have explicitly rejected the argument that "intent" to discriminate must be established in Section 11501 cases. *Louisville & Nashville R.R. v. Dep't of Revenue*, 736 F.2d 1495, 1496 (11th Cir. 1984); *Gen. Am. Transp. Co. v. Kentucky*, 798 F.2d 38, 42 (6th Cir. 1986).

---

[11] Pls. Tr. Ex. 57 (2006 GAO Report) at p. 000067; S. Rep. No. 87-445 (1961) ("Doyle Report"), at 450-51.

[12] *Burlington N. R.R. v. Okla. Tax Comm'n,* 481 U.S. 454 (1987); *Dep't of Revenue of Or. v. ACF Indus., Inc.,* 510 U.S. 332 (1994); *CSX Transp., Inc, v. Ga. State Bd. of Equalization*, 552 U.S. 9 (2007); *CSX I; CSX II.*

CONCLUSION

For the foregoing reasons, Alabama's petition for certiorari should be denied. If, however, the Court grants the petition on the water carrier exemption, it should grant CSX's cross-petition and decide the motor carrier exemption as well.

Respectfully submitted,

NATHAN D. GOLDMAN
JOEL W. PANGBORN
CSX CORPORATION
500 Water Street
Jacksonville, FL 32202
(904) 359-3200

STEPHEN D. GOODWIN*
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
165 Madison Avenue
Suite 2000
Memphis, TN 38103
(901) 577-2141

JAMES W. MCBRIDE
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
901 K Street, N.W.
Suite 900
Washington, DC 20001
(202) 508-3467

MISTY SMITH KELLEY
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
633 Chestnut Street
Suite 1900
Chattanooga, TN 37450
(423) 209-4148

PETER J. SHUDTZ
CSX CORPORATION
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 783-8124

CARTER G. PHILLIPS
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Respondent

December 6, 2018

* Counsel of Record

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11705

D.C. Docket No. 2:08-cv-00655-AKK

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

ALABAMA DEPARTMENT OF REVENUE
AND VERNON BARNETT, COMMISSIONER OF
THE DEPARTMENT OF REVENUE,

Defendant-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

May 31, 2018

ON PETITION FOR REHEARING

Before ED CARNES, Chief Judge, BLACK, Circuit Judge, and MAY,* District Judge

* Honorable Leigh Martin May, United States District Judge for the Norther District of Georgia, sitting by designation.

PER CURIAM:

CSX Transportation, Inc. (CSX) filed a petition for rehearing after we issued a substitute opinion granting the State's petition for rehearing. We issued that substitute opinion to clarify that the water carrier exemption from the sales and use tax applies only when those carriers purchase or use diesel fuel to ship freight interstate, as opposed to shipping it intrastate. See CSX Transp., Inc. v. Ala. Dep't of Revenue, 888 F.3d 1163 (11th Cir. 2018).

CSX worries that our substitute opinion may imprecisely describe the scope of the water carrier exemption. That exemption applies to diesel fuel used by water carriers "engaged in foreign or international commerce or in interstate commerce." Ala. Code §§ 40-32-4(a)(10). 40-23-62(3). CSX asserts that Alabama courts broadly interpret the phrase "engaged in interstate commerce," and that our substitute opinion may suggest that the scope of the exemption is more narrow by referring to exempted activity as, among other things, "haul[ing] freight interstate" or "transport[ing] freight interstate." E.g., CSX Transp., Inc., 888 F.3d at 1170-71, 1179, 1183, 1187.

We doubt that, but the State does not oppose CSX's petition. Instead, it filed a responsive motion to apprise the Court of a newly discovered fact that it says warrants granting CSX the relief it requests. In keeping with the finest tradition of the legal profes-

sion, the attorneys for the State disclosed in its motion that after successfully seeking rehearing, they learned that the Department of Revenue has inconsistently applied the statutory language "engaged in interstate commerce" with respect to water carriers. To avoid further inconsistencies, the State agrees with CSX that quoting the statutory language will help the district court fashion relief consistent with our opinion.

In light of CSX's petition and the State's motion, our substitute opinion is modified to add, immediately before the last paragraph on page 1187:

> As long as the State retains the sales and use tax exemption for diesel fuel used by water carriers "engaged in foreign or international commerce or in interstate commerce," Ala. Code §§ 40-23-4(a)(10), 40-23-62(3), the 4-R Act forbids it from imposing the sales and use tax on diesel fuel used by rail carriers "engaged in foreign or international commerce or in interstate commerce." Our opinion should be read with that imperative in mind.

The petition for rehearing is otherwise DENIED.