Case No. 19-949

# In the Supreme Court of the United States

WISCONSIN DEPARTMENT OF REVENUE, ET AL.,
*Petitioners,*
v.
UNION PACIFIC RAILROAD COMPANY,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that Wisconsin "impose[d] [a] tax that discriminates against a rail carrier" in violation of 49 U.S.C. § 11501(b)(4) by taxing the intangible property of railroads and a handful of other utilities while exempting the intangible property of all other taxpayers.

## STATEMENT REQUIRED BY RULE 29.6

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation. No other publicly held corporation has a 10% or greater ownership interest in Respondent.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

## STATUTES



## OTHER AUTHORITIES

## INTRODUCTION

Petitioners present no question worthy of this Court's review. The Seventh Circuit correctly held that Wisconsin's intangible property tax discriminates against railroads in violation of 49 U.S.C. § 11501(b)(4) because it only applies to railroads and a handful of other utilities and does not apply to all other taxpayers, including general commercial and industrial taxpayers.

This ruling does not conflict with any decision of this Court or any other court. Wisconsin argues that the Seventh Circuit's decision conflicts with *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), which held that subsection (b)(4) does not bar a state from levying a generally applicable tax on railroad property while exempting various classes of non-railroad property. However, *ACF Industries* also recognized that the statute can be violated where the challenged tax is not generally applicable but applies only to railroads, either alone or as part of some isolated group. The Seventh Circuit correctly held that Wisconsin's tax on intangible property is such a tax—it is not generally applicable and singles out railroads and certain utilities—and thus violates the statute.

There is no circuit split. The two other circuits that have addressed this question have reached the same conclusion as the Seventh Circuit. *See Burlington N. R.R. Co. v. Huddleston*, 94 F.3d 1413 (10th Cir. 1996); *Burlington N. R.R. Co., Inc. v. Bair*, 60 F.3d 410 (8th Cir. 1995).

Nor are there any other reasons for granting certiorari. There is no issue of exceptional federal

importance, and the question presented does not arise frequently. Wisconsin's tax scheme is unusual, as illustrated by the absence of a single amicus brief from another State (or from anyone else). There is simply no reason for this Court to decide an issue that rarely arises and that all circuit courts have resolved uniformly.

The petition should be denied.

## STATEMENT OF THE CASE

1. This is a tax discrimination case under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), Pub. L. No. 94-201, 90 Stat. 31. When Congress enacted the 4-R Act, many of the nation's railroads were bankrupt and the industry was near collapse. After an exhaustive fifteen-year investigation, Congress determined that discriminatory state and local taxes were a major cause of the industry's dramatic economic decline. *See Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987). The discrimination existed in part because railroads "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation" that cannot easily remove themselves from the locality. *W. Air Lines v. Bd. of Equalization*, 480 U.S. 123, 131 (1987). Congress found that State and local governments had engaged in a "widespread, long-standing and deliberate" practice of taxing railroad property differently than other commercial and industrial property. *Union Pacific R.R. Co. v. Utah*, 198 F.3d 1201, 1206 (10th Cir. 1999). To protect the economic viability of railroads as vital channels of interstate commerce, Congress enacted Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, to "put

an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district." *Id.* at 1206.

Section 11501 prohibits four types of discriminatory taxation of railroads that Congress declared "unreasonably burden and discriminate against interstate commerce," and authorizes federal courts to grant injunctive and declaratory relief to prevent violations of the statute. 49 U.S.C. § 11501(b) and (c). Paragraphs (1)-(3) of subsection (b) prohibit States and local governments from assessing railroad property at a higher proportion to fair market value than commercial and industrial property, or imposing higher tax rates on railroad property than commercial and industrial property. *Id.* § 11501(b)(1)-(3). Subsection (b)(4) is the catch-all provision that prohibits a State or local government from imposing "another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

2. This case involves Wisconsin's attempt to tax Union Pacific's custom computer software, which all parties agree is a species of intangible property. Wisconsin does not have a generally applicable tax on intangible property. The Wisconsin Supreme Court has held that the State's general tax statutes, contained in Chapter 70 of the Code, do not apply to intangible property. *Adams Outdoor Advertising, Ltd. v. City of Madison*, 717 N.W.2d 803, 818-19 (Wis. 2006).

As a railroad, Union Pacific ("UP") is not taxed under Chapter 70 but instead under the special property provisions of Chapter 76, Subchapter I,

which apply to railroads, water conservation and regulation companies, interstate air carriers, and pipeline companies. Wis. Stat. § 76.01. Chapter 76 provides that all of a railroad's real and personal property, "including all rights, franchises and privileges used in and necessary to the prosecution of the business" "shall be deemed personal property for the purposes of taxation, and shall be valued and assessed together as a unit." *Id.* § 76.03(1). The State's position is that, unlike the Chapter 70 provisions for general commercial and industrial taxpayers, this language taxes both the tangible and intangible property of Chapter 76 taxpayers, *i.e.*, railroads, water conservation and regulation companies, interstate air carriers, and pipeline companies.

This was not always the State's position. Beginning as early as 2006, UP reported its custom computer software as exempt property in its filings with the State Department of Revenue and provided the Department with a copy of a fair market valuation of its custom computer software performed by appraiser Robert Reilly, a recognized expert in the valuation of intangible assets. From 2006 to 2016 the Department accepted Mr. Reilly's valuations without question and treated UP's custom computer software as exempt by subtracting the value of UP's custom computer software from its overall unit valuation. However, in 2017, after completing an audit, the Department issued a notice stating it had determined the claimed exemption for custom software did not apply and the value of that custom software ($37,898,985 for 2014 and $57,961,406 for 2015) needed to be added back to UP's value for those tax

years, with the result that UP owed an additional $2,631,105 in taxes and interest for the 2014 and 2015 tax years combined.

3. UP sued in Wisconsin federal district court. It alleged that Wisconsin was singling out UP as a railroad, in violation of subsection (b)(4), to pay a tax on intangible property when that same class of intangible property was not being taxed for general commercial and industrial taxpayers. The district court found that because the contested tax on intangible property was being imposed on railroads as part of an isolated and targeted group and was not a tax of general applicability, the tax violated subsection (b)(4). Pet. App. B:30a.

4. A unanimous panel of the Seventh Circuit affirmed. Pet. App. A:9a. It began by reviewing *ACF Industries*. *Id.* at 6a. It acknowledged that *ACF Industries* established a narrow carve-out from the otherwise broad sweep of subsection (b)(4)'s prohibition on other "tax[es] that discriminate against a rail carrier." 49 U.S.C. § 11501(b)(4). In particular, States may impose a generally applicable property tax on railroads and others and then provide some exemptions for "certain other classes of commercial and industrial property." Pet. App. A:6a (quoting *ACF Industries*, 510 U.S. at 338-39). But the Seventh Circuit recognized that this rule does not protect all property-tax schemes that use exemptions to effectively discriminate against railroads. To the contrary, the *ACF Industries* Court noted that a State might still violate subsection (b)(4) if it "singled out" railroads—"either alone or as part of some isolated and targeted group"—for a property tax that does not

apply to other commercial entities. *Id.* (quoting *ACF Industries*, 510 U.S. at 346-47); *see also id.* at 7a.

The Seventh Circuit then held that *ACF Industries* does not protect Wisconsin's discriminatory tax scheme. First, UP's challenge is not to the disparate treatment of its property versus "*other* classes of commercial and industrial property," but to the disparate treatment of "the *same* class of property being taxed differently based on the owner's membership in a targeted and isolated group." *Id.* at 9a (emphasis in original). Second, Wisconsin's tax on intangible property is not generally applicable; instead, Wisconsin "systematically exempts from its intangible property tax all manufacturing and commercial taxpayers except for railroad and utilities companies." *Id.* at 10a. Thus, the "exemption" is "just a pretext for targeting railroads, either alone or as part of an isolated group." *Id.*

## REASONS FOR DENYING THE PETITION

### I. The Decision Below Does Not Conflict with Any Decision of this Court.

#### A. The Decision Below Does Not Conflict with *ACF Industries*.

Wisconsin wrongly argues that the Seventh Circuit's decision conflicts with the holding in *ACF Industries* that discriminatory exemptions from generally applicable property taxes do not violate subsection (b)(4). Pet. at 16. The Seventh Circuit correctly held that this carve-out to the broad reach of subsection (b)(4) does not apply here because Wisconsin's intangible personal property tax is not a generally applicable tax; rather, it is a targeted tax on rail carriers as part of a small and isolated group.

This is exactly the type of tax this Court anticipated when it limited its holding in *ACF Industries*.

1. *ACF Industries* involved Oregon's generally applicable tangible personal property tax, which was imposed on *all* tangible personal property in the state, except property expressly exempted. Various classes of business personal property were exempt, including agricultural machinery and equipment; nonfarm business inventories; livestock; poultry; bees; fur-bearing animals; agricultural products in the possession of farmers; standing timber, and motor vehicles. 510 U.S. at 336. Combined, these exemptions excluded between 25% to 32% of all non-railroad property in the state. *Id.* at 337-38. The plaintiff railroad carline companies claimed this tax scheme violated subsection (b)(4) because it exempted all of these classes of tangible personal property while railroad cars were taxed in full. *Id.* at 342-43.

The Court rejected the taxpayers' claims and held that subsection (b)(4) does not prohibit class-based exemptions to *generally applicable* property taxes:

> We hold that a State may grant exemptions from a *generally applicable* ad valorem property tax without subjecting the taxation of railroad property to challenge under the relevant provision of the 4-R Act, § 306(1)(d), 49 U.S.C. § 11503(b)(4).[1]

[1] Section 306 was once codified at 49 U.S.C. § 11503, but was recodified without substantive change at 49 U.S.C. § 11501.

*Id.* at 335 (emphasis supplied). The Court reached this holding after it noted that the definition of "commercial and industrial property" used in subsections (b)(1)-(3) to determine the class against which discrimination is measured did not include exempt property that would otherwise be within the scope of a generally applicable property tax. *Id.* at 342-43. The Court reasoned that it would be illogical to conclude that Congress, having permitted the States to grant such property tax exemptions in subsections (b)(1)-(3), would nullify its own choice in subsection (b)(4). *Id.* at 343-44. The Court did not, however, hold that a rail carrier could never challenge a property tax under subsection (b)(4) as discriminatory.

In fact, the Court identified an important exception to its holding, pointing out that the Oregon scheme was "*not* a case in which the railroads—either alone or as part of some isolated and targeted group—are the only commercial entities subject to an ad valorem property tax." *Id.* at 346 (emphasis supplied). The Court stated that "if such a case were to arise, it might be incorrect to say that the State 'exempted' the nontaxed property. Rather, one could say that the State had singled out railroad property for discriminatory treatment." *Id.* at 346-47.

2. As the Seventh Circuit correctly recognized, the Oregon tax challenged in *ACF Industries* is very different from the Wisconsin tax at issue here. Oregon's tax was a generally applicable tax on all tangible personal property; Wisconsin's tax on intangible property is a targeted tax imposed only on railroads and a small group of three other utilities. Thus, this is not a case of a state's selection of various

types of assets from a generally applicable tax for "exemption." Instead, Wisconsin's tax system treats railroads as "part of some isolated and targeted group," *id.* at 346, that are the only commercial entities subject to a tax on intangible property. Thus, as the Seventh Circuit found, the *ACF Industries* rule allowing discriminatory exemptions from *generally applicable* taxes does not apply here.

Wisconsin argues (at 21-24) that *ACF Industries*'s discussion of railroad-targeting schemes should be read narrowly as encompassing only those property-tax schemes that exempt all or almost all non-railroad property from any type of real or personal property tax at all, a scenario the State readily admits is an "unrealistic hypothetical" in light of all States' dependence on property taxes for basic working revenue. Pet. at 24. In other words, it asks this Court to expand the *ACF Industries* rule to protect nearly all discriminatory property-tax exemptions from the reach of subsection (b)(4), even where the State has exempted so many taxpayers that railroads, either alone or as part of an isolated group, are the only entities subject to a particular tax. Under Wisconsin's proposed reinterpretation, the only way a discriminatory property tax exemption could violate subsection (b)(4) is if the State did not impose any property tax at all on the real, personal, or intangible property of any taxpayer other than railroads, or an isolated group that included railroads. Wisconsin's argument amounts to asking this Court to reinterpret the targeted tax limitation on *ACF Industries*'s holding out of existence.

Wisconsin's proffered reinterpretation is also inconsistent with the 4-R Act's purpose of protecting

railroads from tax discrimination *within* the three traditional classes of property: real, personal, and intangible. Congress's intent is clear in the legislative history of Section 11501:

> As the opening witness for the railroads explained, subparagraph (c) of S. 927 (substantially similar to [§] 306 [now 11501]) is not intended to abrogate the right of a State to establish separate rates for the different traditional classes of property. That is, the language of subparagraph (c) is not intended to interfere with the classification of property by a State for rate purposes into *the traditional breakdown of real property, tangible personal property, and intangible property*, provided that carrier transportation real property is taxed at no higher rate than other real property; that carrier transportation personal property is taxed at no higher rate than other personal property; and, *that carrier transportation intangibles are taxed at no higher rate than other intangible property*.

S. Rep. No. 1483, 90th Cong., 2d Sess., at 10-11 (1968) (emphasis supplied), *quoted in Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 454 (D.N.D. 1980). Consistent with this legislative history, federal courts have unanimously rejected attempts like Wisconsin's to mask tax discrimination against one of the three traditional classes by viewing the contested tax in combination with the taxes on one or more of the two remaining traditional classes of property. *See*

*Clinchfield R.R. Co. v. Lynch*, 700 F.2d 126, 131 (4th Cir. 1983) (rejecting State attempt to aggregate real and personal property); *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222, 1225 (8th Cir. 1985) (same); *Bair*, 60 F.3d at 413 (refusing to aggregate intangible property with tangible personal or real property).

### B. The Decision Below Does Not Conflict with *CSX I*.

Wisconsin plucks a few sentences out of *CSX Transportation, Inc. v. Alabama Department of Revenue* (*CSX I*), 562 U.S. 277, 290 (2011) to argue that subsection (b)(4) is "best understood" as not applying to property taxes at all. Pet. at 25-27. But Wisconsin ignores that *ACF Industries* was itself a (b)(4) challenge to a property tax. If this Court believed that subsection (b)(4) did not apply to property taxes, it would have rejected the taxpayer's challenge on that ground, and would not have proceeded to analyze in depth the permissible and impermissible property taxes a State may impose under subsection (b)(4). *ACF Industries* makes clear that the broad anti-discrimination provision in subsection (b)(4) applies to property taxes.

Nothing in *CSX I* changed this or any other holding in *ACF Industries.* Indeed, in *CSX I* this Court specifically said, "We stand foursquare behind our decision in *ACF Industries*." 562 U.S. at 290. The Fourth Circuit rejected the same argument Wisconsin makes here in *CSX Transportation, Inc. v. South Carolina Department of Revenue,* 851 F.3d 320 (4th Cir. 2017). There the Fourth Circuit held that the notion that this Court held in *CSX I* that subsection (b)(4) does not apply to property taxes at all "is implausible for several reasons," including the fact

that *CSX I* involved sales and use taxes, and thus the Court had no reason to decide whether subsection (b)(4) applied to property taxes. 851 F.3d at 331.

The Fourth Circuit is correct. Nothing in *CSX I* changed the rules laid out in *ACF Industries* for challenging property tax exemptions under subsection (b)(4).

## II. There Is No Split Among the Courts of Appeals.

In holding that Wisconsin's tax on intangible property is a targeted tax that violates subsection (b)(4), the Seventh Circuit aligned itself with the only two Circuits that have addressed this issue. *See Huddleston*, 94 F.3d 1413; *Bair*, 60 F.3d 410. Like the Seventh Circuit, those courts held that a state violates subsection (b)(4) when it imposes a property tax only on railroads as part of an isolated group of disfavored taxpayers. There is no split in authority to warrant review by this Court.

In *Bair*, 60 F.3d 410, Iowa had repealed the personal property tax on general commercial and industrial taxpayers, but still taxed the personal property of railroads, public utilities, telephone and telegraph companies, express companies, electric companies and pipeline companies. Burlington Northern claimed the application of the personal property tax to its intangible custom computer software violated subsection (b)(4). *Id.* at 413. The Eighth Circuit agreed, holding that "subsection (b)(4) does apply to prohibit Iowa from taxing the intangible personal property of railroads since Iowa imposes this tax upon only a small, targeted group of businesses." *Id.*

The Eighth Circuit concluded that "Iowa's tax scheme fit[] within the narrow exception left open by the Supreme Court in *ACF*" because "Iowa ha[d] singled out for taxation all the personal property of railroads and a handful of interstate utilities, while leaving untaxed most of the personal property of every kind, *and all the intangible personal property*, of the vast majority of commercial and industrial enterprises in the state." *Id.* (emphasis supplied). When faced with the exact same argument Wisconsin asserts here, the Eighth Circuit concluded:

> It follows that in the granting of tax exemptions, *ACF* permits the States something less than the unfettered discretion for which the Director argues. Were it otherwise, the anti-discrimination purpose of the 4–R Act could utterly be eviscerated by a state that ostensibly imposed a tax of general applicability but then systematically exempted all but a targeted few taxpayers.

*Id.* (internal citations omitted).

The Eighth Circuit reasoned that "[t]o understand the reach of the *ACF* holding, it is necessary to observe the inverse relationship between the term 'exempt' and the phrase 'general application.' Practically speaking, if a state exempts sufficient property from a particular property tax, that tax no longer can be said to be one of general application." *Id.* The Eighth Circuit held that, in light of the extensive exemptions for all commercial and industrial taxpayers, Iowa's tangible and intangible personal property taxes were not generally applicable.

In *Huddleston*, the Tenth Circuit considered a Colorado law that "generally exempt[ed] from taxation the value of intangible personal property including computer software" for all taxpayers except for intangible personal property owned by "public utilities," defined as any "railroad company, airline company, electric company, rural electric company, telephone company, telegraph company, gas company, gas pipeline carrier company, domestic water company, pipeline company, coal slurry pipeline, or private car line company." 94 F.3d at 1414. That is, Colorado taxed custom computer software only if it was owned by a railroad or other public utility.

The Tenth Circuit held that "unlike the tax exemption at issue in *ACF*, Colorado's intangible property tax exemption applies to all commercial and industrial taxpayers other than 'public utilities'" and therefore "singles out Plaintiff as part of an 'isolated and targeted group' for discriminatory tax treatment in violation of § [11501(b)(4)] of the 4-R Act, as interpreted by the Supreme Court in *ACF*." *Id.* at 1417. Because the only intangible property Colorado taxed was that owned by railroads (and public utilities), the Tenth Circuit held the tax on intangible property discriminated against railroads and violated subsection (b)(4). *Id.*

Heeding the guidance of *ACF Industries*, the Tenth Circuit rejected the attempt to label discriminatory taxation as a permissible "exemption" that is denied to "isolated and targeted group[s]." *Id.* The court recognized that property tax "exemptions" could (and should) be subject to challenge under subsection (b)(4). The court reasoned that:

> Otherwise, states could circumvent § 306 simply by enacting a tax of "general application," and then "exempting" from the tax all but a certain class of taxpayers, which, as the Court noted in *ACF,* is really not an "exemption" at all, but a singling out of certain taxpayers for discriminatory treatment.

*Id.*

The Seventh Circuit, relying on *Bair* and *Huddleston*, became the third appellate court to hold that a tax on intangible personal property imposed only on a targeted group, of which rail carriers are a part, violates subsection (b)(4) of the 4-R Act. The unanimity among circuit courts obviates the need for this Court's review.

## III. The Decision Below Does Not Raise a Question of Exceptional Importance for this Court.

Wisconsin's claim (at 27) that this case presents significant questions of national importance is incorrect. This case involves an uncommon type of property tax scheme. Since the Court's 1994 decision in *ACF Industries*, only two other federal appellate courts have reviewed similar tax schemes, and both found that intangible personal property taxes imposed on targeted and isolated groups of which railroads are a part violate subsection (b)(4). *See Huddleston*, 94 F.3d at 1413; *Bair*, 60 F.3d at 410. The absence of amicus support from any other state or other taxing authorities underscores the limited reach and import of the decision below.

Wisconsin's claim (at 27) that the monetary importance of this case alone warrants certiorari

review is also unfounded. In fact, Wisconsin has repeatedly conceded, both in this Court as well as in the courts below, that the railroads' overall share of the State's tax revenue is insignificant. Pet. at 12 ("But under any view, railroads' share of the Wisconsin property tax levy is small."); Appellants' Brief, 2019 WL 2777385 at *17 (7th Cir. June 24, 2019) ("[R]ailroads still pay only a small portion of the total tax levy, whether defined as real and personal property taxes or only personal property taxes.").

Finally, Wisconsin's arguments (at 6, 15, 27) about state sovereignty provide no basis for review. Background principles of federalism cannot overcome subsection (b)(4)'s clear prohibition on "tax[es] that discriminate[] against a rail carrier," and in any event, the 4-R Act is a narrow limitation on state taxing authority because States retain the full discretion to fashion any kind of tax scheme they choose, as long as the tax scheme does not discriminate against rail carriers. *See CSX Transp., Inc. v. Ga. State Bd. of Equalization,* 552 U.S. 9, 22 (2007); *Okla. Tax Comm'n,* 481 U.S. at 464.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: March 26, 2020

Respectfully submitted,

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