No. 13-553

IN THE
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF STATE & LOCAL GOVERNMENT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's fifty States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing State issues. NCSL advocates for the interests of State governments before Congress and federal agencies, and regularly submits *amicus* briefs to this

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[1] Pursuant to Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of *amicus* briefs are on file with the Court.

Court in cases, like this one, that raise issues of vital State concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to pro-

vide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

SUMMARY OF THE ARGUMENT

Subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R") prohibits a state from imposing "[a] tax that discriminates against a rail carrier." 49 U.S.C.A. § 11501(b)(4). Congress passed 4-R to "restore the financial stability of the railway system of the United States" by rooting out State and local taxation schemes that discriminated against rail carriers. 90 Stat. 33; *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S.Ct. 1101, 1105 (2011); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

Rail carriers have long benefited from special treatment by governments. The federal government granted railroad developers "thousands of miles of rights-of-way across . . . public lands" in the nineteenth century, and up through the twentieth century, it transferred "millions of acres of public land" to them. Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the*

Myth of Congress's '1871 Shift,' 82 U. COLO. L. REV. 85, 85 (2011). Alabama, the petitioner here, was no exception to this trend. *See, e.g.*, *Montgomery v. Alabama Power Co.*, 34 So.2d 573, 575 (Ala. 1948) ("[W]e also have a well-established rule that, while a railroad company has no right to enter upon and take the lands of another without his consent or without condemnation proceedings . . . if it does enter and construct its track upon the land of another, and the owner has knowledge . . . and he allows it to spend large sums of money on improvements . . . he will be estopped from ousting the company").

Today, Alabama levies a 4 percent sales tax on rail carriers for diesel fuel they purchase. Ala. Code Ann. §§ 40-23-2(1), 40-23-61(a). This tax is paid by Alabama's commercial and industrial taxpayers in general, and its proceeds go into the State's general revenue fund. Ala. Code Ann. §§ 40-23-35, 40-23-85. Additionally, the State also assesses a tax on motor carriers. Here, motor carriers pay a nineteen-cent-per-gallon excise tax in lieu of a sales tax on diesel fuel, the proceeds of which support road maintenance. Ala. Code Ann. § 40-17-325(a). Interstate water carriers are exempted from Alabama's diesel fuel sales tax and have been for over half a century, possibly because of constitutional

concerns about taxing vessels in navigable waters at the time. Ala. Code Ann. §§ 40-23-4(a)(10), 40-23-62(12); Pet. for a Writ of Cert. at 5. CSX Transportation, Inc. ("CSX"), a large nationwide rail carrier, argues that this tax scheme is pre-empted by 4-R because it is discriminatory.

This Court should reject CSX's claim and reverse the Eleventh Circuit's ruling striking down Alabama's tax scheme. States have traditional power over taxation that this Court's federalism jurisprudence respects. This power is an important part of the power of the States, as coequal sovereigns, to experiment with solutions to policy problems. Additionally, this Court must not find preemption where State and federal policies—like Alabama's tax scheme and 4-R here—do not conflict with each other.

Alabama's tax scheme does not discriminate against rail carriers simply because it subjects them to a general sales tax while tailoring the tax scheme's application to other taxpayers. This Court must interpret 4-R as a narrow statute, not a sweeping mandate for courts to redesign State tax schemes. There are three ways to do this: (1) comparing the tax treatment of rail carriers to the general base of commercial and industrial taxpayers in the State; (2)

requiring calculation of the actual amounts rail carriers and other taxpayers pay; or (3) noting relevant differences between rail carriers and other taxpayers.

Ruling in favor of CSX would threaten States' ability to take in tax revenue, an ability already impeded by current economic conditions. This Court must not allow 4-R to shield CSX—a $12 billion nationwide corporation—and other rail carriers from paying millions of dollars in taxes that fund vital public services. Congress did not intend for 4-R to enrich large corporations by impoverishing the States.

ARGUMENT

I. THIS COURT SHOULD NARROWLY CONSTRUE 4-R BECAUSE STATES HAVE TRADITIONAL POWER OVER TAXATION.

This case operates against a backdrop of federalism, which contemplates a balance between national, State, and local governments. While it is true that this Court rejected federalism arguments

in *CSX I*, 4-R is not nearly as clear as applied here.[2] *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1112 (2011). This Court should reject CSX's interpretation because of federalism. First, this case implicates this Court's respect for the traditional State power to tax. Second, the Court's ultimate interpretation of 4-R implicates preemption rules, under which there is no preemption unless Congress has clearly stated there to be or a State law so disrupts the federal purpose behind federal law that it cannot stand. Both principles require this Court to interpret 4-R's antidiscrimination provision as narrowly as possible in order to respect these principles.

The Constitution does not grant the federal government exclusive taxing power.[3] Rather, "the

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[2] *See Dep't of Revenue of Oregon v. ACF Indus.,* 510 U.S. 332, 345, 353 (1994) (placing great emphasis on federalism principles by construing 4-R to avoid making States choose between exempting railroads and removing all of their tax exemptions).

[3] *See* U.S. CONST. art. I, § 10 (listing powers prohibited of States, not including taxation); THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasizing the importance of having the concurrent jurisdiction to tax).

right of taxation is concurrent, and may be exercised by both [the federal and State governments] upon the same person and property." *Thurlow v. Massachusetts*, 46 U.S. 504, 531—32 (1847). The fact that the Framers intended for taxation to be concurrent among the federal government and the States—as opposed to simply vesting the power with the federal government alone—demonstrates that Congress and this Court should not lightly intrude upon it.

This Court has long presumed that States, as sovereign entities, have the power to tax, a power at the heart of federalism. States must have wide authority to tailor their tax schemes to meet their expenditures. Given the complexities inherent in taxation, States must be afforded latitude "to serve as 'laboratories' to experiment with procedures" and craft policies. *Crist v. Bretz*, 437 U.S. 28, 40 (1978). "Denial of the right to experiment," in taxation more than in most areas, "*may be fraught with serious consequences*." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 216 (1994) (emphasis added). "It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory, and try novel . . . economic experiments without risk." *Id.*; *cf. Smith v. Robbins*, 528 U.S. 259, 273 (2000) (expressing an unwillingness to contravene the established practice,

"rooted in federalism, of allowing States wide discretion . . . to experiment with solutions to difficult problems of policy").

This Court most clearly showed its concern for traditional State taxation power in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977). That case created a bright line rule recognizing State power to tax, limited only by very few exceptions: the taxed activity must have a substantial nexus to the taxing State, the tax must be fairly related to the benefits provided the taxpayer, it must not discriminate against interstate commerce, and it must be fairly apportioned.[4] Alabama's tax scheme is well within this power to tax.

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[4] *Id.* The *Complete Auto Transit, Inc.* test is basically a culmination of past Court exceptions centered around taxation on incidents sufficiently tied to interstate commerce, negatively impacting foreign corporations: (1) States may not tax the privilege of interstate commerce. (2) States may not tax local incidents involved in interstate commerce or property beyond the State's borders. *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925). (3) States may not tax in a manner that discriminates against or unduly burdens interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963).

Moreover, this Court—out of respect for the States' status as independent sovereigns within the federal system[5]—has adhered to the clear statement rule by refusing to allow federal statutes to supersede the traditional powers of States without a clear statement of Congressional intent. *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2188 (2014) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This Court is reluctant to upset the constitutional balance of Federal and State powers without such a statement. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Put another way, there is a presumption against preemption that requires courts to read federal statutes' preemption clauses narrowly so as not to encroach on State power. *Altria Group, Inc. v. Good*, 555 U.S. 70, 70 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'") (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). This presumption doubtless applies when the State

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[5] *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other*.") (emphasis added).

power in question is one as central to the functioning of State government as taxation. This Court should interpret 4-R narrowly to avoid encroaching on the traditional State power of taxation.

II. ALABAMA'S TAX SCHEME DOES NOT DISCRIMINATE AGAINST RAIL CARRIERS.

Success of a 4-R claim turns on the meaning of "discriminate." In an earlier appeal in this case, this Court concluded that discrimination is "the failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011). 4-R is not a broad preemption of State tax power, but a narrow statute targeting a narrow problem.

This Court can read 4-R narrowly to uphold its meaning alongside States' ability to fashion their taxation schemes in three ways. First, this Court could adopt the Seventh and Ninth Circuits' functional approach, comparing the tax treatment of rail carriers to the general base of commercial and industrial taxpayers in the State. Second, it could require calculation of the actual amounts paid under the excise tax to which motor carriers are subject and

the sales tax to which rail carriers are subject, which will show that no actual discrimination has occurred. Third, it could take into account the relevant differences between rail carriers, motor carriers, and water carriers, which, under the totality of the circumstances, justify Alabama's tax scheme.

A. This Court Should Adopt the Functional Approach to Tax Discrimination.

The Seventh and Ninth Circuits have adopted a "functional" approach that compares rail carriers to the general base of commercial and industrial taxpayers within the state. *Kansas City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (7th Cir. 2011); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (9th Cir. 1996). The functional approach accords with the fundamental principle that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). Subsection (b)(4) of 4-R—at issue here—must be interpreted in light of subsections (b)(1) through (b)(3), each of which adopts the functional

approach. 49 U.S.C.A. § 11501. These subsections prevent discrimination against rail carriers compared to "other commercial and industrial property" in general. 49 U.S.C.A. § 11501(b)(1)—(b)(3). "Discrimination" for the purposes of subsection (b)(4) is limited to comparison with the general base of commercial and industrial taxpayers by the context and structure of 4-R.

The Eleventh Circuit held that limiting the comparison class to direct competitors would best accomplish Congress's purpose of ensuring "financial stability" for railroads under the 4-R Act. *CSX Transp., Inc. v. Alabama Dep't Revenue*, 720 F.3d 863, 869 (11th Cir. 2012). Additionally, the court stated that it would prove too burdensome to assess Alabama's tax scheme by comparing CSX to the general base of commercial and industrial State taxpayers. *Id.* It held that limiting the comparison class to direct competitors would best accomplish Congress's purpose of ensuring "financial stability" for railroads under 4-R. *Id.*; *contrast with Kansas City S. Ry. Co.*, 653 F.3d at 509 ("*[T]he only simple way* to prevent tax discrimination against the railroads is to tie their fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against unfair distribution of the tax

burden.") (emphasis added) (internal quotation marks omitted).

This rejection of the functional approach does not further the statute's aims. 4-R was enacted to protect the financial stability of interstate railroads in the face of in-state protectionism. S. Rep. No. 90-1483 (1968) at 2. Interpreting 4-R to require comparison to interstate competitors, rather than in-state taxpayers, thwarts the statute's purposes. *Kansas City S. Ry. Co.*, 653 F.3d at 509 (noting that "Congress certainly did not intend" to give rail carriers preferential treatment compared to other interstate carriers). The functional approach, by contrast, ties the discrimination analysis to the statute's purpose by comparing railroads to the in-state businesses Congress feared States would favor.

The functional approach does not inappropriately burden the court. As described in Section B below, a calculation of comparative tax liabilities is manageable.[6] Moreover, 4-R's focus on local bias

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[6] In fact, the practical challenges of ascertaining any given taxpayer's competitors quickly exceed any challenges inherent in comparison with the general base of commercial and industrial taxpayers. Here, the parties have stipulated as to which entities are CSX's competitors. *CSX Transp., Inc.*, 720

requires it. Indeed, Eleventh Circuit's refusal to undertake the "Sisyphean burden of evaluating the fairness of the State's overall tax structure" is a refusal to effect the statute altogether. *CSX Transp., Inc.*, 720 F.3d at 871.

The functional approach is further commended by Congress's intent that 4-R "balance the needs of carriers, shippers, and the public; [and] foster competition among all carriers by railroad and other modes of transportation." 45 U.S.C.A. §§ 801 (b)(1)—(2). The functional approach honors this spirit of flexibility toward competing needs.

The functional approach will also protect States' ability to enact tailored tax exemptions. For instance, 2012 amendments to the Georgia tax code included a four-year phase-out for sales taxes on energy use for manufacturers, and discretionary

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F.3d at 869. There is no guarantee that future litigants will be able to do the same. This threshold question will inhere in every claim and will spawn a new subclass of 4-R Act litigation. Is an airline a competitor of a rail carrier? Is Overstock.com a competitor of Walmart?

exemptions for energy taxes for "projects of regional significance." Daniel French & Jesika Wehunt, *Revenue and Taxation: Sales and Use Taxes*, 29 GA. ST. U.L. REV. 112, 131—32 (2012). As a result, Caterpillar, Inc. built a manufacturing plant in the State. *Id.* at 132. Under the model adopted by the Eleventh Circuit, the competitor class for manufacturing projects of regional significance would be impossible to determine in advance, and ensuing litigation under any anti-tax discrimination law could eliminate the exemption's ability to achieve its goals.

B. This Court Should Require Calculation of the Actual Tax Amounts Levied, if It Adopts the Competitive Approach.

If this Court adopts the Eleventh Circuit's competitive approach, it should calculate the amounts paid under the excise tax levied on motor carriers and the sales tax imposed on rail carriers. This comparison will show that there is no actual discrimination against rail carriers.

Alabama subjects motor carriers' purchase of diesel fuel to a nineteen-cent-per-gallon excise tax, proceeds from which fund road maintenance. ALA. CODE ANN. § 40-17-325(a)(2). CSX and other rail

carriers are exempt from this excise tax. According to the uncontested evidence, the per-gallon after-tax price of the dyed diesel fuel used by rail carriers for the period covering December 25, 2009 was $2.0760. Def. Tr. Exh. 1. The after-tax price for the diesel fuel used by motor carriers was $2.1862. *Id.* Thus, simple math defeats CSX's discrimination claim: As the district court found, CSX's tax liability is actually *less* than that of motor carriers. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 892 F. Supp. 2d 1300, 1312 (N.D. Ala. 2012).

Contrary to the Eleventh Circuit's holding, courts are capable of comparing different tax liabilities. In fact, they already do this kind of calculation under 4-R. 49 U.S.C.A. § 11501(c) (directing district courts to grant 4-R relief only if "the random-sampling method known as a sales assessment ratio study" shows that "the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction."); *cf. Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (holding that the pertinent question in tax discrimination is "whether

the tax produces a forbidden effect," as opposed to mere formalism).

A basic calculation is enough to show that no actual discrimination has occurred. If CSX were subject to the excise tax to which motor carriers are subject—and thus required to pay for the maintenance of roads that it does not use—then its tax liability would be higher than it is now. *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 875 (11th Cir. 2013) (Cox, J., dissenting) ("I fail to see how a tax that places rail carriers in the same tax position as their competitors—or a better one—could threaten railroads' financial stability.").

C. This Court Should Note Relevant Differences between Rail Carriers and Other Interstate Carriers, If It Adopts the Competitive Approach.

This Court could also read "discrimination" narrowly by limiting it to inequality in treatment where there is "no reasonable difference" between taxpayers. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011). Here, there are common sense differences between railway carriers, motor carriers, and water carriers. Rail carriers are not subject to the motor carriers' excise

tax because they do not use the roads whose maintenance it funds.

Contrary to CSX's argument that they it is discriminated against because motor carriers benefit from State highway maintenance funding, it makes no difference how the State spends money collected under these taxes:

> [T]hat burden is not a tax burden that the 4-R Act prohibits, and no tax affects that burden. Say, for example, that the State eliminated both the motor-fuel excise tax and the motor-carrier exemptions in the sales and use taxes, leaving a system in which rail carriers and motor carriers paid identical 4% taxes on the purchase and use of their fuel. By CSX's logic, even that totally equal tax scheme would disadvantage railroads in violation of the 4-R Act because railroads have higher overhead expenses. . . .
>
> The difference in right-of-way maintenance costs has no place in the comparison of tax burdens. That railroads must pay for their own tracks

> is the inherent burden of operating a transportation network on private rights-of-way. In other words, it is a fundamental competitive disadvantage that railroads face. Congress did not intend the 4-R Act to eliminate *all* of railroads' competitive disadvantages, only those created by taxes.

CSX Transp., Inc., 720 F.3d at 875 n.5 (Cox, J., dissenting).

CSX's argument is even less plausible because rail carriers rely on highways, too: motor carriers move rail-shipped goods to their final destinations. Additionally, Alabama treats rail carriers and water carriers differently because of the constitutional history of taxing interstate water carriers, a history that has led to their exemption from taxes in many States. Pet. for a Writ of Cert. at 5.

This Court can interpret 4-R's antidiscrimination provision narrowly in three ways so that it more faithfully adheres to the policy behind the statute, while still respecting the proper balance between federal interests and the State's traditional taxing power.

III. CSX'S INTERPRETATION THREATENS CRUCIAL STATE REVENUE.

CSX's interpretation of 4-R will grant rail carriers perpetual freedom from State sales taxes on fuel. Because CSX will likely resist paying the Alabama excise tax to which motor carriers are subject, it will escape paying any taxes at all on fuel purchases.

If upheld, the Eleventh Circuit's ruling below will annually cost the State of Alabama and its counties millions in lost taxes from CSX alone: CSX paid $4.108 million on local and state diesel fuel sales and use taxes in Alabama in 2006 and $3.022 million in 2007. Joint App'x at *36, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, No. 09-520, 2010 WL 3198848 (N.D. Ala. Aug. 12, 2010). The ruling will result in refund litigation from every major rail carrier in every State that collects sales tax from railroads on diesel fuel. In 2013, the Illinois Central Railroad Company ("ICCR") prevailed against the Tennessee Department of Revenue on an analogous claim, claiming that it was wrongly charged more than $9.4 million in sales tax on fuel from 2006–2010. *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892, 896 (M.D. Tenn. 2013). The court in that case relied heavily on the Eleventh Circuit's reasoning in its holding permanently en-

joining the State from collecting any sales tax on fuel. The court's finding that all rail carriers are at an "overall disadvantage" by paying general sales taxes will ensure that no railroad pays tax for fuel in Tennessee again. *Id.* at 901.

Lost revenue from local governments would compound State losses. In 2010, CSX sought refunds of more than $5.8 million from local governments, including more than $1 million from Jefferson County and more than $3 million from the City of Birmingham. Brief of Alabama Education Association et. al in support of Respondents at 3 n.4, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, No. 09-520 (N.D. Ala. October 4, 2010). Such a loss presents a serious impediment to resourcing State and local services: the $2 million that CSX has claimed for 2007 could pay the salaries of fifty-five new teachers or forty-nine firefighters in Alabama. Aff. of Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. for Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue,* No. 2:08-cv-655-UWC (N.D. Ala. May 29, 2008); National Education Association, *2012—2013 Average Starting Teacher Salaries by State*, http://www.nea.org/home/2012-2013-average-starting-teacher-salary.html; United States Department of Labor Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013*, *available*

at http://www.bls.gov/oes/current/oes_nat.htm#21-0000. Similarly, the $9.4 million refund demanded by ICRR would cover the cost of a school social worker and healthcare social worker for every county in Tennessee. National Education Association, *2012—2013 Average Starting Teacher Salaries by State*, http://www.nea.org/home/2012-2013-average-starting-teacher-salary.html; United States Department of Labor Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013*, *available at* http://www.bls.gov/oes/current/oes_nat.htm#21-0000. At the local level, the $624,000 refund for which CSX sued the City of Montgomery in 2010 could have funded the city's Emergency Management Agency for the entire Fiscal Year 2011. Adopted Operating and Debt Service Budget, Ordinance # 38-2010, City of Montgomery, AL, Fiscal Year 2011 (September 28, 2010), *available at* http://www.montgomeryal.gov/index.aspx?page=657.

If applied nationwide to all rail carriers, this tax-free status will significantly hamper States' abilities to generate critical tax revenue.

The ramifications of the Eleventh Circuit's ruling are not limited to railroads. 4-R-type legislation across industries, when read broadly under the Eleventh Circuit's reasoning and applied to States

and localities across the country, could have devastating economic consequences. Broad interest group exemptions have contributed to serious "concern about the long-term prospects for sales tax revenue." G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 799 (2011–12).

Of particular note is the longstanding success of e-commerce providers in escaping sales tax liability. Since 1998, Congress has preempted state and local authority from taxing Internet access services. Enacted because of alleged concerns that taxation would damage the Internet's growth and chill technological advances, the moratorium remains in place. The original purposes, however, no longer apply because the Internet has matured into a fundamental infrastructure that helps generate billions of dollars in annual revenues for businesses and service providers that use it.

The Senate Commerce Committee, reporting on the proposed 4-R bill, recognized that at the time, interstate railroads were "easy prey" for tax assessors and should be "accorded equal tax treatment with other taxpayers." S. Rep. No. 90-1483, at 2, 14 (1968). In stark contrast, CSX generated more than $12 billion in revenue and $2.9 billion in pre-tax earnings in 2013, yet it seeks to evade the basic sales

tax applied to interstate and local taxpayers of all sizes. CSX Corp., Annual Report (Form 10-K), 27, 92 (Feb. 12, 2014), *available at* https://www.sec.gov/Archives/edgar/data/277948/000027794814000011/csx-12272013x10k.htm.

CSX cannot claim that it is the target of discrimination simply because it pays the same business sales tax that Alabama imposes on everything from accordions to zoom lenses. By affirming the functional approach to tax discrimination, this Court would help uphold the traditional state power to tax and signal to Petitioners and all other industry sectors that Congress did not intend for the 4-R Act to grant giant national corporations most favored taxpayer status in perpetuity.

The uncertain future of State sales taxes presents an issue of concern in light of the fact that general sales taxes accounted for more than 30 percent of total State tax collection in 2013. U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2013 (2014). The great recession has multiplied the financial pressure on state governments: between 2008 and 2010, general fund revenues dropped more than $70 billion, and the effects of the recession continue to linger. National Association of State Budget Officers, *The Fiscal*

Survey of States: Spring 2014 34 (2014). Combined state spending, when adjusted for inflation, still has not recovered to pre-recession levels. *Id.* at ix. State budgets have seen only a 1.9% real increase since 1979, with the nominal increase in 2015 the lowest it has been since 2010. *Id.* at 2.

While States have offset losses through tax rate increases in the past, "continued rate increases are unlikely to be politically viable." Tarr, 100 KY. L.J. at 800. This is demonstrated by Alabama Governor Robert Bentley's 2012 statement "that he will 'absolutely not' raise taxes" despite a $100 million shortfall in use tax collection. J. Sims Rhyne, *Comment: A Useless Use Tax: Why Alabama Is the Poster Child for the Streamlined Sales and Use Tax Agreement*, 42 CUMB. L. REV. 337, 338 (2011-2012).

States must retain the power to craft their tax schemes in response to the policy challenges they face, rather than be confined to a mandated overbroad reading of a federal statute intended to cure other ills. This Court must afford States discretion to levy the general taxes on which they depend.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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