No. 06-

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION of the State of Georgia; Jerry Jackson, as Commissioner of Revenue of the State of Georgia; Russell W. Hinton, as State Auditor of the State of Georgia; and Ray J. Crawford, as Director of the Georgia State Properties Commission,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501(b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner CSX Transportation, Inc. ("CSXT") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Eleventh Circuit is published at 472 F.3d 1281 (11th Cir. 2006), and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-23a. Its order denying rehearing is unpublished and is reproduced at Pet. App. 73a. The opinion of the United States District Court for the Northern District of Georgia is published at 448 F. Supp. 2d 1330 (N.D. Ga. 2005), and is reproduced at Pet. App. 24a-72a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on December 19, 2006. Pet. App. 1a. The Eleventh Circuit denied rehearing on February 12, 2007. Pet. App. 73a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act" or "the Act"), 49 U.S.C. § 11501 (2002), is reproduced at Pet. App. 75a-77a.[1]

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[1] There are some differences in language between Section 306 as originally enacted in § 306 of Pub. L. No. 94-210, 90 Stat. 31, 54-55 (1976), and as subsequently codified at 49 U.S.C. § 11503 (which was later redesignated as 49 U.S.C. § 11501). The recodification, however, was not intended to effect any substantive change. *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Section 11501 has not changed since 2002, the year in which the dispute arose.

STATEMENT OF THE CASE

The opening sentence of the opinion below succinctly states the reasons why this Court should grant certiorari: "This appeal presents a question about state taxation of railroad properties that was expressly left open by the Supreme Court of the United States, has since divided the federal appellate courts, and involves the traditional balance of federal and state power." Pet. App. 1a. This Court should grant review to resolve the acknowledged 2-2 split among the circuits on whether, under a federal statute prohibiting discriminatory state taxes, railroads are permitted to prove the true market value of their property by appraisal methods different from those selected by the State.

Congress enacted Section 306 of the 4-R Act to prohibit, and to provide a federal remedy against, discriminatory state taxation of interstate railroads—a widespread and long-standing practice that Congress found seriously weakened the Nation's railroads and "unreasonably burden[ed] and discriminate[d] against interstate commerce." 49 U.S.C. § 11501(b). Eleven years later, in *Burlington Northern Railroad* v. *Oklahoma Tax Commission*, this Court held that Section 306's clear language plainly "permits review by federal courts of alleged overvaluation of railroad property by state taxation authorities." 481 U.S. 454, 456, 461 (1987).

Oklahoma Tax expressly identified, but left open, a question not presented in that case—whether a railroad could challenge the methodology used by a State to value its property in proving that state taxation authorities had overvalued the railroad's property. *Id.* at 465 n.5. The decision below, over a strong dissent, has deepened an already existing split among the circuits on this open question. At present, the Second and Ninth Circuits have held that railroads can prove the true market value of their property by using appraisal approaches different from those used by state taxing authorities, while the Fourth and Eleventh Circuits have held that railroads cannot

challenge the States' chosen methods. Certiorari is warranted to resolve this fundamental split of authority.

Moreover, the decisions of the Fourth and Eleventh Circuits ignore the clear language of the statute and frustrate the statute's fundamental purpose, which is to prevent discriminatory taxation of railroad property. By ignoring the clear intent of Congress, the decisions open a gaping loophole through which States can extract a disproportionate share of tax revenue from interstate railroads without fear of federal remedy. Indeed, there is already evidence that States in the affected jurisdictions have become increasingly aggressive in valuing railroad property. This Court's immediate intervention is imperative.

A. Statutory Background

Nearly 40 years ago, Congress recognized that interstate railroads "are easy prey for State and local tax assessors." S. Rep. No. 91-630, at 3 (1969). And, more than 30 years ago, after years of careful study, Congress determined that excessive and discriminatory taxation "by at least $50 million each year" contributed to the financial hardship that then plagued the railroad industry. H.R. Rep. No. 94-725, at 78 (1975).

Congress enacted the 4-R Act to address myriad problems that had left virtually the entire railroad industry in precarious financial condition and had resulted in eight major railroad bankruptcies. H.R. Rep. No. 94-725, at 53; S. Rep. No. 94-499, at 2-3 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14, 15-17. Section 306 was a critical part of that reform, through which Congress intended "'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.'" S. Rep. No. 91-630, at 2.

Section 306 of the 4-R Act (hereinafter referred to as Section 11501, its present section within the U.S. Code) specifically outlaws four enumerated taxation practices of state and

local governments that "unreasonably burden and discriminate against interstate commerce," including:

> [a]ssess[ing] rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

49 U.S.C. § 11501(b)(1).

This statute, which is the focus of this dispute, thus prescribes a precise formula for determining the existence of discrimination. Discrimination is measured by the ratio of assessments to "true market value," and the true market value of the railroad's property is a necessary factual finding that a district court must make in resolving a Section 11501(b)(1) claim.

Notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341, Congress also granted federal district courts "jurisdiction . . . to prevent a violation of [Section 11501(b)]," but only "if 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." 49 U.S.C. § 11501(c). Finally, Congress specified that "[t]he burden of proof in determining assessed value and true market value is governed by State law." *Id.*

B. *Burlington Northern Railroad* v. *Oklahoma Tax Commission*

Eleven years after the 4-R Act became law, this Court granted certiorari to determine whether Section 11501 "permits review by federal courts of alleged overvaluation of railroad property by state taxation authorities." *Okla. Tax*, 481 U.S. at 456. This Court recognized that the 4-R Act's purpose was "'to provide the means to rehabilitate and maintain

the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States.'" *Id.* at 457 (quoting § 101(a) of the Act). Finding that "'railroads are over-taxed by at least $50 million each year,'" Congress chose to accomplish "the goal of furthering railroad financial stability" by prohibiting "discriminatory state taxation of railroad property." *Id.* (quoting H.R. Rep. No. 94-725, at 78). This Court acknowledged that Section 11501 was "Congress' solution to the problem of discriminatory state taxation of railroads." *Id.*

This Court stated that "the language of § 11503 [now § 11501] plainly declares the congressional purpose," holding that "[i]t is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are." *Id.* at 461. Although the court of appeals in that case had "found that its restrictions on valuation actions under § 11503 [now § 11501] [were] necessary in order to avoid 'an inevitable clog of federal dockets' and 'unreasonable delay of the state tax collection process,'" *id.* at 464, this Court rejected such considerations, stating:

> These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Id.

In passing, this Court briefly explained in a footnote an issue that had not been presented by petitioner and left that issue open for resolution another day:

> Petitioner has not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology . . . . This case therefore does not present the question whether a railroad may, in an action under [Section 11501] challenge in the district court the appropriateness of the accounting

> methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly, we express no view on that issue.

Id. at 463 n.5.

C. Factual Background

This case involves CSXT's challenge to the 2002 valuation of its property by the State Board of Equalization of Georgia ("the Board"), and raises the issue left open in *Oklahoma Tax*. Under Georgia law, most commercial and industrial property is locally assessed by county boards, but public utilities (including railroads) are centrally assessed by the State. Georgia counties are permitted, but not required, to use the State's proposed assessment for each county in imposing taxes. Pet. App. 2a-3a.

In Georgia, the Property Tax Division of the Georgia Department of Revenue ("the Department") prepares assessments for review and approval by the Board. In 2002, as in prior years, the Department calculated the market value of all public utilities using the unit rule. Under the unit rule, the value of the railroad as a whole is calculated, and the Georgia portion of that property is determined by multiplying the unit value by the percentage of CSXT rail miles in Georgia. Pet. App. 3a.

In 2002, the State's appraiser changed the valuation methods that the Department used to calculate value under the unit rule. Formerly, the Department used a yield capitalization method (an income approach), a direct capitalization method (an income approach), and a stock-and-debt method (a sales comparison approach). Each method generates a value that could be compared to the others. For the 2002 tax year, the appraiser replaced the first two of those methods with a discounted cash flow ("DCF") method (an income approach) and

a market multiples method (a sales comparison approach). Pet. App. 4a.

The appraiser generated five values from these approaches, ranging from $8.126 billion (using the DCF method) to $12.346 billion (using the market multiples method). Pet. App. 4a. The appraiser selected a unit value of $8.2 billion as close to the lower of his estimates.[2] *Id.* at 5a. The appraiser's 2002 overall unit value for CSXT of $8.2 billion was 47.1% higher than the 2001 valuation. *Id.* at 62a. After adjustments and deductions, the appraiser calculated taxable market value of CSXT in Georgia (based on the percentage of rail miles in the State) at $514.9 million. *Id.* That was an increase of 36.3% from the 2001 Georgia taxable value. Moreover, the 2002 taxable value would result in an increase in CSXT's property tax liability in Georgia to $6.5 million, whereas its 2001 liability was only $4.6 million.

D. Proceedings Below

1. *The District Court.* CSXT filed a complaint in the United States District Court for the Northern District of Georgia challenging the Department's valuation under Section 11501 of the 4-R Act. Pet. App. 5a.

CSXT argued that the proposed valuation violated Section 11501(b)(1) because the Railroad's true market value was $6 billion, not $8.2 billion, and thus "it was taxed at a higher ratio of assessed value to true market value than other commercial and industrial property." Pet. App. 7a. CSXT submitted an appraisal prepared by a valuation expert, Thomas Tegarden, whose credentials were described by the district court as "'impeccable.'" *Id.* (quoting 448 F. Supp. 2d at 1333). Tegarden used three different methods to approximate "true market value," but relied primarily on a yield capitalization approach. *Id.* at 7a-8a. Based on a unit value of $6 billion, he

[2] Georgia's 2002 unit value of $8.2 billion was the highest among the 15 States where CSXT operates that use the unit value method. Tr., vol. 11, at 578.

calculated the value of CSXT's Georgia property as worth $369.3 million. *Id.* at 25a.

The district court held that it was not permitted to consider Tegarden's appraisal because the 4-R Act barred consideration of appraisals "based on a valuation methodology different from the methodology used by the State, unless the methodology of the State is irrational or intentionally discriminatory." Pet. App. 7a. The district court elaborated:

> This is a case brought under the 4-R Act and the court must determine the true market value of CSXT. *CSXT, in turn, has the burden of proving by a preponderance of the evidence that the true market value of its property is $6 billion.* To do this, CSXT presented two types of evidence. First, it criticized the Department's calculations. Second, it presented a valuation of its property by Mr. Tegarden. *In a more typical case, the court would look to both Mr. Tegarden's appraisal and the Department's appraisal to determine the true market value of CSXT.* If the court found by a preponderance of the evidence that CSXT's true market value was $6 billion, as proposed by CSXT, then the court would compare the Department's Proposed Valuation to CSXT's true market value to determine if discrimination occurred. *However, as explained later in this order, the court cannot consider Mr. Tegarden's valuation because it was prepared using different valuation methods than the Department. The court, therefore, is limited to looking solely at CSXT's criticisms of the Department's valuation.*

Id. at 37a n.8 (emphases added).

The district court further rejected CSXT's argument that Tegarden's valuation methodology was a variant of the State's own methodology. Pet. App. 45a. Finally, the district court rejected CSXT's challenges to the Board's calculations, and found that the unit value of CSXT's property was $7.7

billion, and therefore the ratio of assessed to market value of CSXT's property did not exceed by more than 5% the same ratio for other commercial and industrial property. The district court accordingly entered judgment for the Board. Pet. App. 48a.

2. *The Eleventh Circuit.* A divided court of appeals affirmed. The court began by stating that "[w]hether a railroad may challenge, under the 4-R Act, the valuation methodology of a state is a question the Supreme Court has acknowledged but not decided." Pet. App. 9a (citing *Okla. Tax*, 481 U.S. at 462-63 & n.5). The Eleventh Circuit then expressly recognized a circuit split:

> Three of our sister circuits, following *Burlington Northern v. Oklahoma*, have split on whether railroads may challenge state valuation methodologies. The Fourth Circuit, on the one hand, has concluded that the 4-R Act does not permit a railroad to challenge the valuation methodology of a state. That circuit concluded that the text of the Act is ambiguous, and the court was "not inclined to disregard" the general policy of noninterference in matters of state taxation contained in the Tax Injunction Act "where § [11501] does not plainly authorize such an exception." *Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991); *accord Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993). The Second and Ninth Circuits, on the other hand, have repudiated *Chesapeake Western* and held that railroads may challenge valuation methodologies. In *Burlington Northern Railroad v. Department of Revenue*, the Ninth Circuit explained that section 11501(c) of the 4-R Act provides that state law governs the burden of proof in challenges to assessed value and true market value. 23 F.3d 239, 241 (9th Cir. 1994). Because determinations of property value by public officials in the State of Washington may be defeated by "clear, cogent and convincing evidence," the

> court reasoned that state valuation methodologies may likewise be defeated by clear, cogent, and convincing evidence. *Id.* In *Consolidated Rail Corp. v. Town of Hyde Park*, the Second Circuit held that, at least where states use a unique method to appraise railroads, the 4-R Act allows railroads to challenge valuation methodology. 47 F.3d 473, 482 (2d Cir. 1995).

Id. at 10a.

The Eleventh Circuit sided with the Fourth Circuit, applying the "clear statement rule" of *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991). Pet. App. 11a-12a. Citing *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), which involved a different subsection of Section 11501, Pet. App. 13a-14a, the court found no clear statement that railroads could challenge the methodology by which the valuation was made.

The court also rejected the argument of CSXT and *amicus curiae* Association of American Railroads "in the alternative, that the appraisal by Tegarden was based on the same methodology used by the State" and represented merely a different approach to applying the same "unit rule" methodology. Pet. App. 15a. The Eleventh Circuit interpreted the Supreme Court in *Oklahoma Tax* as drawing a distinction between "accounting methods" and "factual determinations," and the court below held that the former encompassed "all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be." *Id.* at 16a-17a. The railroad could not contest any such nonfactual determinations in proving "true market value" under Section 11501(b)(1).

Judge Fay concurred in part but dissented with regard to "the majority's holding that the 4-R Act bars the Railroad from challenging the valuation methodology chosen by the state," agreeing with the majority that "our sister circuits have split on this issue." Pet. App. 20a. Judge Fay declared that

"[t]he language of the statute is straightforward and prohibits states from assessing rail transportation property at a value that has a higher ratio to the true market value than the ratio that the assessed value of other commercial and industrial property has to its true market value." *Id.* Judge Fay concluded:

> Since the objective of any methodology is a determination of true market value, a railroad should be allowed to challenge the method used in an attempt to prove that the result of such a method was not the true market value of its property. . . . If the Railroad can prove that the method used by the state does not result in a fair appraisal of true market value and that the assessed value is in fact at a ratio higher than five percent of the ratio of true market value and assessed value of other commercial and industrial property, it is entitled to relief.

Id. at 23a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to resolve a clear and acknowledged conflict among the circuits over whether railroads may challenge the State's methodology in proving "true market value" under the 4-R Act. Since *Oklahoma Tax* identified the issue, courts of appeals have hopelessly divided in grappling with it. The Second and Ninth Circuits have properly ruled that railroads can prove the "true market value" of their property by use of appraisal methods different from those employed by the state tax authorities. In contrast, the Eleventh Circuit (in the decision below) and the Fourth Circuit have ruled that railroads may not challenge state methodologies in satisfying their "true market value" burden. Indeed, the Eleventh Circuit has gone the farthest of any court, eviscerating the discrimination protections of the Act by immunizing from federal court review "all nonfactual determinations involved in constructing a valuation process, regard-

less of how broad or narrow they may be." Pet. App. 16a-17a.

The Fourth and Eleventh Circuit's holdings are wrong because they cannot be reconciled with the plain language of the statute and with any meaningful policy of protecting railroads against discriminatory taxation. Section 11501 prescribes a precise formula for measuring discrimination. Under that formula, true market value is the economic standard by which the existence and degree of discrimination is determined. If States are free to define unalterably the methods by which the true market value of railroad property may be proven in court, railroads will be severely prejudiced in proving discrimination under the statute.

Moreover, such incorrect decisions create perverse incentives for States to pick methodologies that artificially inflate railroad property values. Indeed, there is already evidence that States are becoming more aggressive in their valuations of railroad property. See *infra*, at 19-22. Accordingly, this Court should grant review.

I. THE DECISION BELOW DEEPENS AN ALREADY EXISTING SPLIT AMONG THE CIRCUITS REGARDING THE RAILROADS' ABILITY TO CHALLENGE STATE METHODOLOGY.

As the Eleventh Circuit acknowledged (Pet. App. 10a, 13a-14a; *supra* at 9-10), there is a 2-2 split among the courts of appeals on the question left open by *Oklahoma Tax*:[3] whether

[3] It is notable that the Department of Justice, in a brief filed by the Solicitor General in the *Oklahoma Tax* case, has already advised this Court of its position that Section 11501(b)(1) permits challenges *both* to the methodology and to application of the methodology: "Section [11501] prohibits any overvaluation of railroad property that results from an assessment rule or *methodology* that—*either on its face or as applied*—systematically determines excessive values for railroad property." Brief for the United States as *Amicus Curiae* in Support of Petitioner at 12, *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454 (1986) (No. 86-337) (internal quotation marks and citation omitted) (emphasis added).

the railroad may fully adjudicate its true market value as part of its Section 11501 case by challenging the State's methodology. The Eleventh Circuit joined the Fourth Circuit in ruling that railroads may not prove true market value of railroad property except by the valuation methods the State employs. In stark contrast, the Second and Ninth Circuits have ruled to the contrary. This Court should resolve the mature and expanding conflict.

1. *Fourth Circuit*. The first court of appeals to address the issue left open by *Oklahoma Tax* was the Fourth Circuit. In that case, the plaintiff-railroads contended that "Virginia's valuation method for railroad property impermissibly discriminates against railroads by valuing railroad property in excess of its true market value." *Chesapeake W. Ry.* v. *Forst*, 938 F.2d 528, 529 (4th Cir. 1991). Rejecting the plaintiff-railroads' claim, the court of appeals explicitly held that "challenges to state valuation methodologies are not cognizable under § [11501]." *Id.*

The court of appeals explained that there were two methods of valuation in dispute in the case: "inventory and summation" and "unit method." *Id*. When Virginia replaced the unit method with the inventory and summation method, the plaintiff-railroads brought suit, "charging that valuation of railroad property under the inventory and summation methods results in such property being assessed at a greater than true market value." *Id.* at 530.

Specifically, the court concluded:

> § [11501] does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property. The statute simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value property. In light of Congress' expressed preference against federal interference in state taxation policy, we believe that § [11501] should

> be read narrowly, authorizing challenges to a state's calculation of fair market value, but not to a state's method for calculating such value. . . . The 4-R Act does not authorize the judiciary to undertake the difficult, and arguably impossible, task of determining which specific assessment methodology produces true market value of railroad property.

Id. at 533.

Although the Fourth Circuit later made clear that a plaintiff-railroad could file suit challenging the *application* of the State's methodology, it reaffirmed its holding in *Chesapeake Western* that "'§ [11501] does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property.'" *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 248-49 (4th Cir. 1993) (quoting *Chesapeake Western*, 938 F.2d at 533); see also *id.* at 250 ("Although a plaintiff railroad must accept a state's chosen methodology, § [11501] does not require that it accede to the state's application of that methodology.").

2. *Ninth Circuit*. The second court of appeals to address the issue was the Ninth Circuit, which expressly disagreed with the Fourth Circuit's reasoning. There, the plaintiff-railroad argued that the district court had "wrongly relied" on *Chesapeake Western* in "deferring to the state's choice of the valuation method used to set the market value of its property." *Burlington N. R.R.* v. *Dep't of Revenue*, 23 F.3d 239, 240 (9th Cir. 1994). The Ninth Circuit explained that *Chesapeake Western* had held that "although a railroad may challenge the application of the valuation method used by a state, it cannot challenge the method itself." *Id.*

The Ninth Circuit stated that it "need not decide whether *Chesapeake Western* should be followed in this circuit," *id.*, for the district court had not precluded the plaintiff-railroad "from challenging the state's method of valuation," but in-

stead had allowed the railroad "to present evidence of the railroad's value based on other valuation methods." *Id.* Importantly, the court of appeals held that it was "proper" that "the district court did not blindly accept the state's valuation method. It simply gave substantial deference to it" under Washington state law, where "the determination of the value of the property by public officials is presumed correct" and "[t]his presumption may be defeated only by evidence that is 'clear, cogent and convincing.'" *Id.* at 240-41 (quoting RCW 84.40.0301(1)); see also *id.* at 241 (holding that the district court had "correctly applied" the Washington law standard).[4] The Ninth Circuit rule, as summarized by the court below in rejecting it, is that "state valuation methodologies may . . . be defeated by" expert valuation evidence satisfying the applicable standard of proof. Pet. App. 10a.

3. *Second Circuit*. The Second Circuit then deepened the existing split between the Fourth and Ninth Circuits. The court recognized that in its case, the "controversy stems primarily from the difference in appraisal methods. The [State] had used the 'cost approach' method for determining true market value, while [the plaintiff's] experts have applied both the 'income capitalization method' and the 'stock and debt' method." *Consol. Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473, 480 (2d Cir. 1995).

"Relying primarily on" *Chesapeake Western*, the State in *Hyde Park* argued that the plaintiff-railroad was "bound by the method of appraisal the [State] ha[d] chosen, and that the court could not "consider any other method of valuation in fixing the 'true market value' of" the plaintiff-railroad's properties. *Id.* at 481-82. The Second Circuit explicitly rejected the *Chesapeake* court's view that "the method of appraisal as a matter of state policy . . . was beyond the reach of the 4-R

[4] Section 11501 provides that "[t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11501(c).

Act," holding unequivocally, "[w]e do not accept that interpretation of the statute." *Id.* at 482.

4. *Eleventh Circuit.* CSXT urged the Eleventh Circuit to steer clear of the error of the Fourth Circuit's *Chesapeake Western* decision, arguing that the income approach used by its appraiser was the same income "method" used by the State's appraiser. CSXT C.A. Reply Br. at 14-17. The Eleventh Circuit rejected that argument, sided with the Fourth Circuit on the methodological issue, and acknowledged a conflict with the Second and Ninth Circuits. Pet. App. 10a, 13a-14a. See *supra* at 9-11 (discussing decision below).

II. THE DECISION BELOW DIRECTLY CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND UNDERMINES THE FEDERAL ANTI-DISCRIMINATION REMEDY.

The mature and acknowledged 2-2 circuit split alone warrants issuance of the writ, but this Court's intervention is all the more imperative given the Eleventh Circuit's critical error in interpreting Section 11501 on this important and recurring issue of federal law.

The Eleventh Circuit's myopic interpretation of Section 11501(b)(1) cannot be reconciled with the plain language of the statute. The entire "true market value" of the railroad is an element of a Section 11501(b)(1) claim and a matter to be resolved by the courts; as this Court explained, "[i]t is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are." *Okla. Tax*, 481 U.S. at 461. True market value is a question of fact on which the railroad bears the burden of proof, 49 U.S.C. § 11501(c), and there is nothing in the statute that commands the trier of fact to defer to a state tax agency's choice of valuation methods.

A federal court cannot accomplish its statutory mandate of determining the ultimate fact of "*true* market value" if it is hamstrung by the Eleventh and Fourth Circuits' rule that the

reviewing court must accept the State's valuation methodology. As this Court recognized in *United States* v. *Miller* concerning the Just Compensation Clause, in the absence of a functioning market that prices the property, a jury determination of "fair market value" necessarily "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." 317 U.S. 369, 374 (1943). Even if the determination of overall "fair market value" in such circumstances is but "a guess by informed persons," *id.* at 374-75, it is still necessarily a question of fact within the fact finder's province, to be decided based on all relevant evidence. As the district court here recognized, that is the standard practice in every proceeding in which a property's market value is at issue. Pet. App. 37a n.8; *supra* at 8. As the Ninth Circuit has recognized:

> Complex factual inquiries such as valuation require the trial judge to evaluate a number of facts: whether an expert appraiser's experience and testimony entitle his opinion to more or less weight; whether an alleged comparable sale fairly approximates the subject property's market value; and the overall cogency of each expert's analysis. Trial courts have particularly broad discretion with respect to questions of valuation.

Ebben v. *Commissioner*, 783 F.2d 906, 909 (9th Cir. 1986) (determination of "fair market value" under federal tax laws). Congress clearly intended district courts to determine the "true market value" of railroad property with the aid of expert testimony, including expert testimony on appropriate valuation methods.

Thus, even if a "clear statement" were required, Congress's mandate that federal district courts determine the "*true* market value" of railroad property in resolving a claim of discriminatory property tax assessments amply suffices. See 49 U.S.C. § 11501(b)(1). Regardless, the Eleventh Circuit's invocation of the "clear statement rule" is improper. The court relied on *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332

(1994), but that case raised a much different question under the 4-R Act. At issue in *ACF* was subsection (b)(4), which prohibits "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). The question presented was "[w]hether a tax upon railroad property is even subject to challenge under subsection (b)(4) on the ground that certain other classes of commercial and industrial property are exempt." 510 U.S. at 339-40. This Court recognized that "Congress did not state whether exemptions are a form of forbidden discrimination against rail carriers, and further did not provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* at 343. This Court consequently held that § 11501(b)(4) "does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property." *Id.*

However, in recognizing this ambiguity of subsection (b)(4), this Court reiterated that Congress's intent was clear in subsections (b)(1) through (b)(3):

> *The reach of subsections of (b)(1)-(3) is straightforward:* These provisions forbid the imposition of higher assessment ratios or tax rates upon rail transportation property than upon "other commercial and industrial property." The scope of subsection (b)(4), which forbids the imposition of "another tax that discriminates against a rail carrier providing transportation," is not as clear.

Id. at 337 (emphasis added). This Court further recognized with regard to subsections (b)(1)-(3): "In drafting [section 11501], Congress prohibited discriminatory tax rates and assessment ratios *in no uncertain terms*, and set forth *precise standards for judicial scrutiny* of challenged rate and assessment practices." *Id.* at 343 (internal citations omitted) (emphasis added). As explained in *Oklahoma Tax*, one of those "precise standards for judicial scrutiny" is the Subsection (b)(1) formula, which requires proof of the railroad property's "true market value." See 481 U.S. at 461-62.

Congress made a clear choice to outlaw discrimination against railroads in property assessments, and granted railroads a remedy in federal court to enforce that antidiscrimination right. Congress defined a ratio of assessed to "true market value" as the measure of discrimination between railroad property and other commercial and industrial property, and committed the determination of "true market value" to the federal district court. It simply makes no sense to interpret Section 11501(b)(1) to disable railroads from challenging (and federal courts from reviewing) the principal means by which States may accomplish discrimination: by choosing improper methods that inflate estimations of the market value of railroad property.

* * * *

Section 11501 requires courts to determine the "true market value" of railroad property based upon any and all competent evidence. However, the decision of the court below, by forbidding consideration of appropriate "accounting methods," expansively defined as "all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be," Pet. App. 17a, effectively immunizes much discrimination from the federal judicial remedy of Section 11501. Consequently, States have an incentive to adopt discriminatory methods of valuing railroad property. Unless this Court grants this petition and strikes this judicially created "methodology" exception, Congress's intent to eliminate discriminatory taxation of the railroad industry will have been successfully thwarted by the States.

III. IMMEDIATE REVIEW IS NECESSARY BECAUSE THE RULE BELOW HANDCUFFS RAILROADS IN CHALLENGING THE RECENT RAPID AND AGGRESSIVE ESCALATION OF STATE PROPERTY VALUATIONS.

States revalue railroad property for tax assessments on an annual basis. The Eleventh Circuit's bar on valuation chal-

lenges openly invites state tax officials to devise discriminatory methods for valuing railroad property. Indeed, as discussed below, there is already evidence that state appraisers are becoming bolder in their determinations of "true market value" for railroads running through their States. These developments make this Court's immediate intervention all the more necessary.

With state governments under substantial fiscal pressure, it is not surprising that a judicial decision immunizing valuation methodologies from federal court review would spur States to become more aggressive in valuing railroad property, with dire financial consequences for the railroads. The Fourth Circuit's *Chesapeake Western* decision had just such an effect. After the Fourth Circuit issued *Chesapeake Western* on July 12, 1991, the Virginia Department of Taxation certified revised assessments for the 1988 and 1989 tax years on August 23, 1991, barely enough time to let the ink dry on the *Chesapeake Western* opinion. *Forst*, 4 F.3d at 247. The Fourth Circuit recognized that "[t]he revisions produced substantial increases in the assessed values of [the plaintiff-railroad's] property." *Id.* Specifically, the Fourth Circuit highlighted that Virginia had changed its methods when it certified the revised assessments and that under the revised method, the plaintiff-railroad's assessment for tax year 1988 in Alexandria increased from $15,293,168 to $111,663,882—an increase of 730 percent over the original assessment. *Id.*

Similarly, in the wake of the district court decision in this case, Georgia has substantially increased its estimation of the unit value of CSXT and other railroads. As noted above, the 2002 Georgia taxable value for CSXT was $514.9 million, 36.3% higher than the 2001 value. See *supra*, at 7. In 2006, the Georgia appraiser used a new appraisal method, which resulted in an average Georgia taxable value increase of 46.6% for properties of all railroads operating in the State. See State Bd. of Equalization, *Public Utility and Airline Flight Equipment Digest* 2 (2006). By contrast, the average

Georgia taxable value for all other centrally assessed properties increased by only 5.6%. See *id.* For CSXT, Georgia's new appraisal method resulted in a unit value of $11.2 billion, and consequently a Georgia taxable value of $762 million. That was a 40.6% increase over the 2005 Georgia taxable value. If the Eleventh Circuit's decision stands, railroads will be handcuffed in remedying such discrimination, because of these limitations placed on challenges to the values as fixed by the States.

Nor are the recent jumps in estimated unit value isolated occurrences limited to Georgia. For the 2003 tax year, Florida initially valued CSXT at $13 billion, which resulted in a Florida taxable value of about $723 million. CSXT brought suit in federal court to challenge that overvaluation, and the parties subsequently settled at a Florida taxable value of $488 million. The $488 million settlement was part of a three-year settlement, in which the CSXT taxable value in Florida dropped to $478 million for 2004 and to $468 million for 2005. The settlement was executed before the district court issued its decision below in this case. Subsequently, when the settlement expired in 2006, Florida valued CSXT at approximately $12.9 billion, which was a 57% increase over the unit value found by the district court below. The new unit value resulted in a Florida taxable value in 2006 that was 49% higher than the 2005 settlement value. CSXT's property tax in Florida rose from $8.7 million in 2005 to $13.2 million in 2006, an increase of 52%. Yet CSXT may be impermissibly precluded by the decision below from challenging in federal court anything but the state appraiser's "factual determinations."

The portrait in the States where CSXT operates is not only one of rapid and unjustifiable inflation of railroad property valuations, but also increasing arbitrariness. CSXT's national unit value in a given year is, in theory, a single number. In practice, however, each year some States adopt breathtakingly high unit values that far exceed the range of values adopted

by most States. In the 2006 tax year, for example, Georgia and Florida had adopted CSXT unit values of $11.2 and $12.9 billion respectively, which far exceeded the average value of $7.1 billion in the other States in the Fourth and Eleventh Circuits that use the unit value method. Such prejudicial and arbitrary variation in valuations of railroad property could be remedied if the 4-R Act were given its intended scope, and if federal district courts were given proper latitude to determine the "true market value" of railroad property, rather than deferring to the self-interested valuation methods employed by state tax agencies.

In the face of the aggressive and discriminatory escalation of railroad property valuations and tax burdens, this Court should not leave unsettled the important question of the scope of the federal antidiscrimination remedy of Section 11501(b)(1) of the 4-R Act on which the lower courts are divided. The amount of taxes that are now being discriminatorily assessed on railroad property far exceed the $50 million in overtaxation that prompted Congress to pass the 4-R Act in the 1970's. H.R. Rep. No. 94-725, at 78. Discrimination in property tax assessments is particularly insidious because state taxable values tend inexorably to increase over time. Discriminatory assessments for tax years that are currently in litigation or settlement negotiations will be forever lost to railroads if this Court were to defer review. Intervention by this Court is imperative to resolve the circuit conflict, and to rectify the state methodology abuses that are currently practiced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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