

No. 09-520

Supreme Court, U.S.  
FD

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IN THE  
**Supreme Court of the United States**

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND  
TIM RUSSELL, COMMISSIONER OF THE ALABAMA  
DEPARTMENT OF REVENUE,

*Respondents.*

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

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**REPLY IN SUPPORT OF PETITION**

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## REPLY IN SUPPORT OF PETITION

Alabama concedes a circuit split on the question presented, acknowledging that two decisions of the Eighth Circuit conflict with decisions of the Ninth and Eleventh Circuits on whether a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge under § 11501(b)(4) of the 4-R Act. See BIO 4, 7-8. And Alabama does not deny that the Supreme Courts of Minnesota and Iowa are in accord with the Eighth Circuit. See Pet. 9. This mature and intractable conflict plainly warrants this Court's review.

Alabama asserts that the Eighth Circuit's decisions are unpersuasive because they fail to account for *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), which held that property tax exemptions are not subject to challenge under § 11501(b)(4). See BIO 4-8. Alabama is wrong on the merits, as the petition demonstrates. See Pet. 10-13. More to the point, Alabama's view of the merits does not undermine, and indeed confirms, the existence of a decisional conflict worthy of this Court's review. See BIO 4 ("it is the decisions of the Eighth Circuit that are in conflict with this Court's analysis, while the decision of the Eleventh Circuit is in accord with this Court's precedent"). This is not the time or place to debate the merits; Alabama can do that when it briefs the issue after certiorari is granted.

Alabama also maintains that the Eleventh Circuit did not "acknowledge a conflict" on the question presented. BIO 5. The conflict exists, of course, regardless of whether it is acknowledged. See Pet. 8-10. As it happens, the Eleventh Circuit recognized that its view of the scope of § 11501(b)(4) conflicts

with the view adopted by the Eighth Circuit and Minnesota Supreme Court. See App. 31a (“We recognize that some courts post-1994 ... have ... scrutinized exceptions to generally applicable non-property taxes.”); *id.* at 31a n.15 (citing *Union Pac. R.R. v. Minn. Dep’t of Revenue*, 507 F.3d 693 (8th Cir. 2007); *Burlington N. R.R. v. Comm’r of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984 (8th Cir. 1999)).

Finally, Alabama contends that the Eleventh Circuit’s judgment should be affirmed on “grounds[] not relied upon by the Eleventh Circuit”—*i.e.*, that the tax does not, in fact, discriminate against railroads. BIO 8. Alabama argues that its tax does not violate the 4-R Act because, while railroads must pay sales and use tax on diesel fuel even though their competitors are exempt, certain competitors are subject to a motor fuels excise tax that railroads do not pay. See *id.* at 9-10.

Again, Alabama is wrong on the merits. Even the Eleventh Circuit held that a court evaluating a tax imposed on railroads under the 4-R Act may not consider whether railroad competitors are subject to a different tax. App. 36a (“we decline to look past the particular tax at issue to analyze the overall state tax structure”); *accord, e.g., Union Pac. R.R.*, 507 F.3d at 696 (“only those taxes imposed upon the Railroads are taken into account in determining whether those taxes are discriminatory”). In any event, Alabama’s argument is beyond the scope of the petition. The Question Presented asks only whether exempting railroad competitors from a generally applicable sales and use tax “is subject to challenge” under § 11501(b)(4)—not whether the exemption would survive if actually scrutinized under the provision. Pet. i. If the Court grants review and holds that

CSXT's challenge may be entertained under § 11501(b)(4), Alabama may present on remand all of its arguments as to why its tax is not discriminatory.

### CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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