SUPREME COURT OF THE UNITED STATES

No. 09–520

CSX TRANSPORTATION, INC., PETITIONER *v.*
ALABAMA DEPARTMENT OF REVENUE
ET AL.

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

[February 22, 2011]

JUSTICE THOMAS, with whom JUSTICE GINSBURG joins, dissenting.

I agree with the Court that Alabama's sales and use taxes are "another tax" within the meaning of 49 U. S. C. §11501(b)(4) and that a scheme of tax exemptions is capable of making a tax discriminatory. *Ante*, at 6–8. As a general matter, therefore, I agree that Alabama's sales and use taxes could potentially violate subsection (b)(4), and would do so if their exemptions "discriminate[d] against a rail carrier." §11501(b)(4). The majority's holding stops there, see *ante*, at 10, n. 8, but I would go on.

I would hold that, to violate §11501(b)(4), a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers. Although parts of the majority's discussion appear to question this standard, see *ante*, at 8–11, the limited holding does not foreclose it. Because CSX cannot prove facts that would satisfy that standard in this case, I would affirm.

I

In my view, "another tax that discriminates against a rail carrier" in §11501(b)(4) means a tax—or tax exemption scheme—that targets or singles out railroads as

compared to other commercial and industrial taxpayers. That reading settles the ambiguity in the word "discriminates" by reference to the rest of the statute and gives subsection (b)(4) a reach consistent with the problem the statute addressed.

A

"Discriminates," standing alone, is a flexible word. Compare, *e.g.*, *Clackamas Gastroenterology Associates, P. C.* v. *Wells*, 538 U. S. 440, 446 (2003) ("[T]he statutory purpose of [the Americans with Disabilities Act of 1990 is] ridding the Nation of the evil of discrimination"), with *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence"); and *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 338 (2007) ("In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (some internal quotation marks omitted)).

Even though "discriminate" has a general legal meaning relating to differential treatment, its precise contours still depend on its context. See *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 592 (1983) (opinion of White, J.) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 284 (1978) (opinion of Powell, J.) ("The concept of 'discrimination' . . . is susceptible of varying interpretations"). Here, the word "discriminates" in subsection (b)(4) is ambiguous as to the appropriate comparison class. *Burlington Northern R. Co.* v. *Commissioner of Revenue*, 509 N. W. 2d 551, 553 (Minn. 1993) ("To be discriminatory, a tax must be discriminatory as compared to someone else"). It is also ambiguous as to

what type of difference is required to violate the statute—*e.g.*, any distinction, singling out, or something in between.

Therefore, I would use the context to resolve the meaning of the word as it is used in subsection (b)(4). See *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997) (statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). We did precisely that in *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332 (1994), where we similarly faced a question about the meaning of subsection (b)(4). In that case, our structural analysis of §11501(b) was "central to the interpretation of subsection (b)(4)." *Id.,* at 340.

1

The structure of §11501(b) is straightforward. Subsections (b)(1) through (3) instruct that States may not assess railroad property at "a higher ratio to the true market value . . . than . . . other commercial and industrial property," 49 U. S. C. §11501(b)(1), collect taxes based on those inflated assessments, §11501(b)(2), or set property tax rates for railroad property higher than that "applicable to commercial and industrial property" in the same assessment jurisdiction, §11501(b)(3). Subsection (b)(4) then forbids "[i]mpos[ing] another tax that discriminates against a rail carrier."

I would look to subsections (b)(1) through (3) to determine the meaning of "discriminates" in (b)(4). As many lower courts have correctly recognized, subsection (b)(4) is a residual clause, naturally appurtenant to subsections (b)(1) through (3).[1] Moreover, the phrase "another tax that discriminates" in subsection (b)(4) suggests that the previ-

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[1] See, *e.g., Kansas City Southern R. Co.* v. *McNamara*, 817 F. 2d 368, 373–374 (CA5 1987); *Burlington Northern R. Co.* v. *Superior*, 932 F. 2d 1185, 1186 (CA7 1991); *Alabama Great Southern R. Co.* v. *Eagerton*, 663 F. 2d 1036, 1041 (CA11 1981).

ous subsections all describe taxes that "discriminate" in a manner similar to that forbidden by subsection (b)(4). See *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003) (reading the phrase "other legal process" restrictively because "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (internal quotation marks and brackets omitted)).

Subsections (b)(1) through (3) each prohibit particular types of state taxes that target or single out railroad property for less favorable tax treatment than other commercial and industrial property. First, the "discriminat[ion]" addressed in subsections (b)(1) through (3) can only be described as taxes that target or single out railroad property. Those subsections specifically concern taxes that affect railroad property differently from the way they affect a larger class of comparative taxpayers' property. See §§11501(b)(1)–(3); cf. *ante*, at 9 ("[E]ach of subsection (b)'s provisions proscribes taxes that specially burden a rail carrier's property or otherwise discriminate against a rail carrier" (emphasis deleted)). Second, each subsection refers to the same comparison class—other "commercial and industrial property." §§11501(b)(1)–(3).

I think it follows that, under subsection (b)(4), a tax "discriminates against a rail carrier" if it similarly targets railroads for tax treatment less favorable than other commercial and industrial taxpayers. As we found in *ACF Industries*, the structure of the statute provides a light by which to navigate the meaning of subsection (b)(4).

2

The background of §11501(b) also supports this understanding of subsection (b)(4). In previous cases, we have identified the problem that made subsection (b) necessary.

At the time the Railroad Revitalization and Regulatory Reform Act (4–R Act) was enacted, it was clear that "railroads '"are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.'" *ACF Industries*, *supra,* at 336 (quoting *Western Air Lines, Inc.* v. *Board of Equalization of S. D.*, 480 U. S. 123, 131 (1987) (quoting, in turn, S. Rep. No. 91–630, p. 3 (1969))). The "temptation to excessively tax nonvoting, nonresident businesses . . . made federal legislation in this area necessary." *Western Air Lines*, *supra,* at 131; see also *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U. S. 454, 457 (1987) (noting that "[a]fter an extended period of congressional investigation, Congress concluded that 'railroads are over-taxed by at least $50 million each year'" (quoting H. R. Rep. No. 94–725, p. 78 (1975))).

In other words, §11501(b) responded primarily to what its text describes—property taxes that soaked the railroads. The obvious rationale supporting subsections (b)(1) through (3) is that the "way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers." *Kansas City Southern R. Co.* v. *McNamara*, 817 F. 2d 368, 375 (CA5 1987); see also *Atchison, T. & S. F. R. Co.* v. *Arizona*, 78 F. 3d 438, 441 (CA9 1996). In this way, subsections (b)(1) through (3) establish a political check on the taxation of railroads. States cannot impose excessive property taxes on the nonvoting, nonresident railroads without imposing the same taxes more generally on voting, resident local businesses.

Absent any indication that subsection (b)(4), as a residual clause, has any different aim, it is reasonable to conclude that it shares the same one as subsections (b)(1) through (3). See, *e.g., Kansas City Southern R. Co.*, *supra,* at 373–374 (Congress included subsection (b)(4) "to ensure

that states did not shift to new forms of tax discrimination outside the letter of the first three subsections"); *Burlington Northern R. Co.* v. *Superior*, 932 F. 2d 1185, 1186 (CA7 1991) ("Subsection (b)(4) is . . . designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax"). Subsection (b)(4) should be understood to tackle the issue of systemic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence. Thus, a "tax that discriminates against a rail carrier" is a tax that targets or singles out rail carriers compared to commercial and industrial taxpayers.

B

Under this test, CSX's complaint was properly dismissed. CSX has not alleged that Alabama's sales and use taxes target railroads compared to general commercial and industrial taxpayers. See *ACF Industries*, 510 U. S., at 346–347 (leaving open a case in which "railroads—either alone or as part of some isolated and targeted group—are the only commercial entities" subject to a tax); *Norfolk Southern R. Co.* v. *Alabama Dept. of Revenue*, 550 F. 3d 1306, 1316 (CA11 2008). CSX alleges that it paid a tax on its fuel that certain rail competitors did not have to pay. But it concedes, as it must, that the sales and use taxes are "generally applicable." Pet. for Cert. i; see Ala. Code §40–23–2(1) (2010 Cum. Supp.) (imposing a four percent sales tax on "every person, firm, or corporation . . . selling at retail any tangible personal property whatsoever"); §40–23–61(a) (2003); see also *Norfolk Southern R. Co.*, *supra,* at 1316; Tr. of Oral Arg. 36.

Discrete exemptions for certain railroad competitors—namely, fuel exemptions for interstate motor carriers and interstate ships and barges—do not make a generally applicable tax "discriminat[ory]" under subsection (b)(4).

Widespread exemptions could theoretically cause a facially general tax to target railroads, but the limited exemptions at issue here do not suggest that, and CSX has not argued it.[2] Accordingly, CSX has not stated a cognizable claim for discrimination under §11501(b)(4).

II

The Court does not settle the ambiguity in the word "discriminates" in subsection (b)(4)—leaving open both the appropriate comparison class and the type of differential treatment required to constitute discrimination.[3] The majority "hold[s] only that §11501(b)(4) enables a railroad to challenge an excise or other non-property tax as discriminatory on the basis of the tax scheme's exemptions." *Ante*, at 10, n. 8. Thus, when the majority says that "a state excise tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4)," *ante*, at 10, it must mean only that a tax exemption scheme could potentially violate subsection (b)(4).

As I understand it, the majority does not decide whether

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[2] Although the majority rightly observes that whether a given tax is discriminatory may often be a difficult question, see *ante*, at 19, this is not a close case. I therefore need not define the exact boundaries of what constitutes targeting or singling out. See, *e.g., Norfolk Southern R. Co.* v. *Alabama Dept. of Revenue*, 550 F. 3d 1306, 1316, n. 16 (CA11 2008) (listing examples of courts finding railroads targeted by various state tax schemes).

[3] The majority declines to reach the comparison class issue. But the question presented was: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U. S. C. §11501(b)(4) as 'another tax that discriminates against a rail carrier.'" The question presented thus asks whether CSX can challenge a "generally applicable" tax based on exemptions granted to rail competitors—a straightforward comparison class issue. The lower courts have split over the proper scope of the comparison class, and the issue was presented in this case. I would decide it.

CSX has stated a claim even in this case but instead leaves that issue for remand. Accordingly, States remain free to argue—and lower courts to hold—that complaints like CSX's should be dismissed for failing to state a "discriminat[ion]" claim under §11501(b)(4) when they do not allege that railroads are targeted or singled out compared to commercial and industrial taxpayers generally.

Nonetheless, despite the majority's assertion that it is "inappropriate" to address whether Alabama's tax scheme actually discriminates within the meaning of §11501(b)(4), *ante,* at 10, n. 8, parts of its opinion suggest an answer to that question that I believe is incorrect. Relying on the second definition in Black's Law Dictionary, the majority defines "discriminates" as "'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *Ante*, at 8. This definition of "discriminate," combined with the majority's insistence that the "distinctions drawn in §11501(b) are . . . between railroads and other actors, whether interstate or local," suggests that the comparison class could be *anyone*.[4] *Ante,* at 10. The majority ultimately implies that "another tax that discriminates against a rail carrier" is any tax that draws a distinction between a rail carrier and anyone else without sufficient justification. See *ante,* at 10, n. 8 ("Whether the railroad will prevail . . . depends on whether the State offers a sufficient justification for de-

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[4] A comparison class of "anyone" is broader than either of the sides in the lower courts' split on this issue. Courts usually disagree over whether to use commercial and industrial taxpayers or railroad competitors as the comparison class. Compare *Burlington Northern, S. F. R. Co.* v. *Lohman,* 193 F. 3d 984, 985–986 (CA8 1999) (applying a comparison class of rail competitors); *Burlington Northern R. Co.* v. *Commissioner of Revenue*, 509 N. W. 2d 551, 553 (Minn. 1993) (same), with *Kansas City Southern R. Co.*, 817 F. 2d, at 375 (using commercial and industrial taxpayers as the comparison class); *Atchison, T. & S. F. R. Co.* v. *Arizona*, 78 F. 3d 438, 441 (CA9 1996) (same).

clining to provide the exemption at issue to rail carriers").

I do not read subsection (b)(4) so independently of (b)(1) through (3). Perhaps, as the majority asserts, subsection (b)(4) is not an ideal candidate for *ejusdem generis*. *Ante*, at 16–17. But given the ambiguity of subsection (b)(4), (b)(1) through (3) are the best guides for understanding its proper scope—something we recognized in *ACF Industries*. 510 U. S., at 343. It is more reasonable to discern the meaning of "discriminates" in subsection (b)(4) using the preceding subsections than to pluck from the dictionary a definition for such a context-dependent term.

Detaching subsection (b)(4) from the rest of the section would expand its meaning well beyond the scope of the problem that necessitated §11501(b). Instead of simply eliminating the particular vulnerability of railroads by tying their tax fate to that of general commercial and industrial taxpayers, railroads would receive a surprising windfall: most-favored taxpayer status. This would convert subsection (b)(4) from a shield into a sword.

The implication of the majority opinion is that if every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt, CSX could sue under subsection (b)(4) and require the State to either exempt CSX also or "offe[r] a sufficient justification" for the distinction. See *ante*, at 10, n. 8. Although the majority denies that this would provide railroads most-favored-taxpayer status, see *ibid.*, it acknowledges that States would have to justify any tax distinction that railroads argue may disfavor them.

The only bulwark against requiring States to give railroads every tax exemption that anyone else gets would be open-ended judicial determinations of what is "sufficient justification" for such distinctions. *Ibid.* Unsurprisingly, the statute provides no guidance for what "sufficient justification" might mean, but neither does the majority. There are all sorts of reasons that might lead a State to

distinguish between railroads and others for tax purposes. See Tr. of Oral Arg. 58. For instance, in this case, Alabama points out that motor carriers and interstate water carriers pay a separate—and frequently higher—tax on fuel from which railroads are effectively exempt. Brief for Respondents 12–16, 59–60. That might be a "sufficient justification" for their exemptions from the taxes here, but the majority expressly disclaims reaching that question. *Ante*, at 5, n. 5.[5] Of course, logically extending the meaning of "discriminates" from subsections (b)(1) through (3) would avoid this problem, as there is no need for "justification" at all: A tax either targets railroads by comparison to commercial and industrial taxpayers or it does not.

* * *

I disagree with the meaning of "discriminat[e]" in subsection (b)(4) that the majority seems to imply. The rest of §11501(b) provides a logical and coherent way to determine what subsection (b)(4) means, and we have used that methodology before. See *ACF Industries*, 510 U. S., at 340. The best way to read subsection (b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers. That is the test I would establish, and I do not understand the majority to foreclose the lower courts from utilizing it. Under that test, CSX's challenge to Alabama's sales and use taxes was properly dismissed. Accordingly, I respectfully dissent.

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[5] The majority appears to consider "sufficient justification" as a potential defense for the State, see *ante*, at 10, n. 8, but since it derives from the meaning of "discriminates," a lack of sufficient justification would seem to be a part of what a railroad would have to plead in order to state a claim for a violation of §11501(b)(4).