FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BNSF RAILWAY COMPANY, *Plaintiff-Appellee*, v. COUNTY OF ALAMEDA; COUNTY OF CONTRA COSTA; COUNTY OF FRESNO; COUNTY OF KERN; COUNTY OF MADERA; COUNTY OF MERCED; COUNTY OF ORANGE; COUNTY OF PLUMAS; COUNTY OF RIVERSIDE; COUNTY OF SAN BERNARDINO; COUNTY OF SAN JOAQUIN; COUNTY OF STANISLAUS; COUNTY OF TULARE, *Defendants-Appellants*, and COUNTY OF SAN DIEGO, *Defendant.*	No. 20-15896 D.C. No. 4:19-cv-07230-HSG

BNSF RAILWAY COMPANY,
Plaintiff-Appellee,

v.

COUNTY OF SAN DIEGO,
Defendant-Appellant,

and

COUNTY OF ALAMEDA; COUNTY OF CONTRA COSTA; COUNTY OF FRESNO; COUNTY OF KERN; COUNTY OF MADERA; COUNTY OF MERCED; COUNTY OF ORANGE; COUNTY OF PLUMAS; COUNTY OF RIVERSIDE; COUNTY OF SAN BERNARDINO; COUNTY OF SAN JOAQUIN; COUNTY OF STANISLAUS; COUNTY OF TULARE,
Defendants.

No. 20-15897

D.C. No. 4:19-cv-07230-HSG

OPINION

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Argued and Submitted June 17, 2021
San Francisco, California

Filed August 5, 2021

Before: Sidney R. Thomas, Chief Judge, and
Daniel A. Bress and Patrick J. Bumatay, Circuit Judges.

Opinion by Chief Judge Thomas

SUMMARY*

Tax

The panel affirmed the district court's preliminary injunction in favor of BNSF Railway Company in BNSF's action alleging that several California counties are taxing railroad property at a higher rate than the rate applicable to commercial and industrial property in the same assessment jurisdiction, in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(3).

The panel held that the district court applied the correct preliminary injunction standard under 49 U.S.C. § 11501, which does not require courts to consider traditional equitable factors. Instead, binding circuit precedent establishes that a railroad is entitled to a preliminary injunction if its evidence demonstrates reasonable cause to believe that a violation of § 11501 has been, or is about to be committed.

The district court had observed that it is difficult to apply § 11501 to California, because California has no specific tax rate for commercial and industrial property. The panel held that the district court properly analyzed BNSF's tax rate

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

under *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 867 (9th Cir.), *cert denied*, 464 U.S. 846 (1983), which provides a framework for identifying the proper tax comparison rate—in this case, a county's average tax rate. The panel further held that the district court properly concluded that the Counties were overtaxing BNSF's property in violation of § 11501(b)(3), because BNSF's tax rate was higher than the average countywide tax rates for each county. Accordingly, the panel affirmed the district court.

The district court had rejected the Counties' contention that the relevant assessment jurisdiction is the State. The panel suggested that, as proceedings continue, the district court consider in the first instance whether the State or the county is the proper assessment jurisdiction.

COUNSEL

Margaret R. Prinzing (argued), Robin B. Johansen, and Omar El-Qoulaq, Olson Remcho LLP, Oakland, California, for Defendants-Appellants County of Alameda, County of Contra Costa, County of Fresno, County of Kern, County of Madera, County of Merced, County of Orange, County of Plumas, County of Riverside, County of San Bernardino, County of San Joaquin, County of Stanislaus, and County of Tulare.

Laura E. Blome (argued), Senior Deputy; Thomas E. Montgomery, County Counsel; Office of County Counsel, San Diego, California; for Defendant-Appellant County of San Diego.

Benjamin J. Horwich (argued), Munger Tolles & Olson LLP, San Francisco, California; Jessica Reich Baril, Munger Tolles & Olson LLP, Los Angeles, California; Misty Smith Kelley and John M. Phillips, Baker Donelson Bearman Caldwell & Berkowitz PC, Chattanooga, Tennessee; for Plaintiff-Appellee.

OPINION

THOMAS, Chief Judge:

This appeal requires us to consider whether California's taxation of railroad property complies with the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54–55 (1976) ("the 4-R Act"). BNSF Railway Company ("BNSF") owns property in various California Counties ("the Counties"). BNSF alleges that the Counties are taxing its property at a higher rate than the rate applicable to commercial and industrial property in the same assessment jurisdiction, in violation of the 4-R Act. 49 U.S.C. § 11501(b)(3).

The district court determined that the proper preliminary injunction standard under the 4-R Act asks whether BNSF had shown a "reasonable cause to believe" that the 4-R Act was being violated, and that the proper comparison class was the average countywide tax rate for each County. The district court issued a preliminary injunction, concluding BNSF had shown that the Counties were violating the 4-R Act because BNSF's tax rate was higher than the average countywide tax rates for each County.

The district court had jurisdiction under 49 U.S.C. § 11501(c). We have jurisdiction under 28 U.S.C. § 1292(a). We review for abuse of discretion a district court's decision regarding preliminary injunctive relief. *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). We review findings of fact for clear error and conclusions of law de novo. *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008). However, where a district court's ruling rests solely on a premise of law and the facts are either established or undisputed, review is de novo. *See Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 760 (9th Cir. 2004). We affirm.

I

A

Congress passed the 4-R Act out of concern for the financial stability of the nation's railway system. *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987) (quoting 4-R Act § 101(a)). Recognizing 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," *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (internal quotation marks and citation omitted), Congress instituted "a prohibition on discriminatory state taxation of railroad property," *Okla. Tax Comm'n*, 481 U.S. at 457.

The 4-R Act establishes that "[t]he following acts unreasonably burden and discriminate against interstate commerce, and a State [or locality] may not do any of them:"

> (1) Assess 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.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b).[1]

[1] This provision was originally contained in § 306 of the 4-R Act. 90 Stat. 31, 54–55. The language "was slightly altered" upon recodification in 1978, but such alteration "may not be construed as making a substantive change in the laws repealed." *Okla. Tax Comm'n*, 481 U.S. at 457 n.1 (internal quotation marks and citation omitted). Therefore, we "resolve any substantive conflicts between the original language of § 306 and the language in § [11501] in favor of the original language." *Burlington N. R.R. Co. v. Dep't of Revenue of State of Wash.*,

B

As the district court stated, California's system of property taxation "is, in a word, complicated." California employs an ad valorem (or value-based) property tax system. Cal. Const. art. XIII, § 1. Taxation follows a three-step process: (1) the value of taxable property is assessed, (2) the tax rate is computed, and (3) the tax is levied from the taxpayer. For most property, its value is assessed (and its rate is calculated) at the local level. *See* Cal. Rev. & Tax. Code § 404. But for a subset of property delineated in the California Constitution, including railroad property, the State assesses the value and calculates the applicable rate. Cal. Const. art. XIII, § 19.[2]

1

An understanding of California's system of taxation of locally assessed property is important for resolution of this case. Most property in California is locally assessed. County-level assessors determine the value of this property

934 F.2d 1064, 1066 n.1 (9th Cir. 1991). We reproduce the language of the original § 306 as relevant *infra*.

[2] California's Constitution establishes which property is state-assessed: "(1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity." Cal. Const. art. XIII, § 19.

for tax purposes. *See* Cal. Rev. & Tax. Code § 404.[3] This property is classified into one of two rolls: the secured roll or the unsecured roll. The secured roll contains "property the taxes on which are a lien on real property sufficient . . . to secure payment of the taxes." *Id.* § 109. In practice, this is most real property. The unsecured roll contains all other property. *Id.* § 109; 1 Sean Flavin, Taxing California Property §§ 12:3–12:4 (4th ed. 2020). There is no further subdivision based on use; for example, both the secured and unsecured roll contain both residential property and commercial and industrial property.

After determining the appropriate roll, Counties next assign locally assessed property to a particular tax rate area ("TRA") based on the property's location, and that TRA's tax rate is applied to the property. A TRA is a small geographical area serviced by the same combination of local government entities, including the county, city, special district, and school districts. Cal. Rev. & Tax. Code § 95(g). A county may have hundreds or thousands of TRAs—for example, San Diego County has over five thousand TRAs.[4]

The tax rate for property on the secured roll is taxed at a rate calculated under a formula found in § 93 of the California Revenue and Taxation Code ("the Code"), and it

[3] The assessment ratio of real property is limited by constitutional amendment in California. *See* Cal. Const. art. XIIIA, § 1 ("Proposition 13").

[4] San Diego County requests that we take judicial notice of several publicly available documents explaining the taxation process in that County and in California. These documents are matters of public record, and we grant the motion. Fed. R. Evid. 201(b)(1)–(2); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

is specific to a particular TRA. The § 93 formula contains two components: the first component is a general tax levy, calculated at 1%. Cal. Const. art. XIIIA, § 1(a); Cal. Rev. & Tax. Code § 93. The second component, referred to as the "debt service component," is the amount needed as a percentage of property values to produce enough revenue to make payments for the interest and principal on all voter-approved bonded indebtedness issued by any of the various local entities, Cal. Rev. & Tax. Code § 93; *see also* Cal. Gov. Code § 29100, such as a voter-approved bond that funds school construction in the elementary school district serving that TRA. For locally assessed property on the unsecured roll, the rate is the § 93 rate for the previous year for that TRA. Cal. Const. art. XIII, § 12; Cal. Rev. & Tax. Code § 2905. This formula ensures that each TRA will have enough revenue to make payments for the interest and principal on its bonded indebtedness. The rate is then applied to the assessed value of the property on the assessment rolls, *see* Cal. Rev. & Tax. Code § 2152, and collected. *Id.* § 2602. As a result, each County, with its hundreds or thousands of TRAs, likewise has hundreds or thousands of different tax rates applied to property in that County, and these rates apply to all property in that TRA, without regard to use, i.e., whether commercial and industrial or residential or otherwise.

2

Other property, including railroad property, is State-assessed. *See* Cal. Const. art. XIII, § 19. State-assessed property is also classified onto either the secured or unsecured roll. However, for this property, the *State* assesses its value for tax purposes, as opposed to the counties, Cal.

Const. art. XIII, § 19, and applies a different formula to calculate the tax rate. *See* Cal. Rev. & Tax. Code § 100.

The assessment process for some of this property, including BNSF's property, is different from standard local assessment. For this subset of State-assessed property, known as "unitary property," the value is calculated under the unit valuation method. *Id.* §§ 723, 723.1. Under this method, the State Board of Equalization ("the State Board") first calculates the value of a taxpayer's entire system, i.e., BNSF's railroad property nationwide. Then, the State Board allocates a portion of that value to California, and further allocates that value among the various counties in which the taxpayer's property is located. The unit valuation method is meant to account for the valuation of assets where the component parts are valuable as a whole, but less valuable in isolation. For example, in the railway context, "ten miles of [railroad] track would have a questionable value, other than as scrap, without the benefit of the rest of the system as a whole." *Am. Airlines, Inc. v. Cnty. of San Mateo*, 912 P.2d 1198, 1208 (Cal. 1996) (alterations and citation omitted).

The tax rate applied to State-assessed property is calculated under a formula different from the § 93 formula. Due to a lengthy legislative history, unitary property holders do not need to demonstrate the TRAs in which their property is located.[5] Instead, their countywide value is allocated to a

[5] Prior to 1986, the value of unitary property was not allocated to the counties—instead, taxpayers reported to individual local TRAs where their property was located. There was no separate tax rate for unitary property; the local taxing jurisdictions applied their own rates. Under this system, an individual assessee had to report in thousands of TRAs. A series of state legislation established today's system. *See* 1986 Cal. Stat. 5217, 5223–24 (establishing that the State Board will allocate unitary

countywide TRA with a single tax rate. *See* Cal. Rev. & Tax. Code § 100.11(a)(2)(B). For this reason, the tax rate applied cannot be informed by the debt service needs of the particular TRA where the property is located. *Compare id.* § 93. State-assessed property is therefore taxed under a different formula established in § 100 of the Code, the "unitary rate." *Id.* § 100.

Like § 93, § 100's first component is effectively a 1% general tax levy. *Id.* § 100(b)(1). Section 100's second component is also a debt service component, but it is calculated differently from § 93's. Section 100's debt service component is calculated as the previous year's unitary debt service rate, *see id.* § 100(b)(2)(A), multiplied by the percentage change between the two preceding fiscal years in the county's ad valorem debt service *levy* (not rate) for the secured roll. *Id.* § 100(b)(2)(B). The formula for the second component means that the unitary rate is based on the change in absolute dollars of the county's debt service rate, not changes in the percentage that taxpayers are paying. According to BNSF, it is this component that accounts for the divergence between the §100 and § 93 rates. Specifically, if the tax rate applied to the secured roll increases, but the property values also rise, the § 93 rate will not rise. But the

---

property value to a county's existing TRAs, irrespective of the property's actual location); 1987 Cal. Stat. 2959, 2959–61 (creating a single countywide TRA for unitary property so that each taxpayer receives only one tax bill per county); 1988 Cal. Stat. 2087, 2094–95 (tying the tax rates for unitary property to the unitary and operating non-unitary data rather than the total county-wide data, effectively implementing what is now § 100(b)(2)(A)). In 2006, the 1987 and 1988 laws were applied to railroads, 2006 Cal. Legis. Serv. ch. 791 (A.B. 2670) (West), via a bill "introduced on behalf of the California Railroad Industry," including BNSF.

§ 100 rate will increase because it is based on the increase in actual dollars of debt service tax paid. The difference in tax rates between the countywide average tax rates (labeled as the "Section 11501 Benchmark Rate") and BNSF's rate (the "Plaintiff Unitary Rate") for the 2019–2020 tax year are represented below:

County	2019–20 Plaintiff Unitary Rate	2019–20 Section 11501 Benchmark Rate
Alameda	2.5187%	1.241%
Contra Costa	1.6865%	1.148%
Fresno	1.370408%	1.181%
Kern	1.611299%	1.24%
Kings	1.326084%	1.087%
Madera	1.203169%	1.089%
Merced	1.4109014%	1.088%
Orange	1.28173%	1.064%
Plumas	1.11652%	1.089%
Riverside	1.76133%	1.164%
San Bernardino	1.3645%	1.144%
San Diego	1.62331%	1.142%
San Joaquin	1.6922%	1.145%
Stanislaus	1.38011%	1.103%
Tulare	1.4002%	1.113%

The countywide average rates are calculated by the State Board every year, as required by statute. Cal. Rev. & Tax. Code § 11403. This average is calculated by dividing (1) the sum of all ad valorem property tax levies for a given county

per year by (2) the sum of the assessed values of all property in that county for that year. *Id*.

C

Observing that BNSF's tax rate had deviated from the average countywide tax rates in each County, BNSF filed suit on November 1, 2019, alleging a violation of 49 U.S.C. § 11501(b)(3). BNSF sought a preliminary injunction preventing the Counties from collecting taxes at a rate higher than each County's average rate. The district court granted the preliminary injunction, noting that the law of this circuit does not require courts to consider traditional equitable factors in considering a § 11501 case, and instead requires issuance of a preliminary injunction upon a showing that "a violation of [§ 11501] has been, or is about to be committed." *See Burlington N. R.R. Co. v. Dep't of Revenue of State of Wash.* (*Burlington Northern v. Washington*), 934 F.2d 1064, 1074–75 (9th Cir. 1991).

On the merits, the district court observed that the trouble with 4-R Act analysis in California is that "California has no specific tax rate for commercial and industrial property" against which to compare a railroad's rate. Accordingly, the court followed the approach outlined in *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 867 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983), for identifying a proper comparison rate. The court first addressed *Trailer Train*'s recommended comparison rate—the rate applicable to whichever roll, secured or unsecured, contains the "majority of the commercial and industrial property" in the State. *Id.* at 867. Although the secured roll almost certainly contains the majority of commercial and industrial property, the "tax rate applicable" to the secured roll, *id.*, "cannot be

determined," because property on the secured roll is "spread among the hundreds or thousands of TRAs in each County." In other words, there is no single identifiable tax rate applicable to the secured roll. Therefore, the district court followed *Trailer Train*'s fallback approach and compared BNSF's tax rate to the *average* tax rate. *See Trailer Train*, 697 F.2d at 867. In doing so, it used Counties as the relevant assessment jurisdiction. Although this property too is spread across hundreds or thousands of TRAs, the *average* rate is readily available, since the State Board is required by statute to calculate it each year. *See* Cal. Rev. & Tax. Code § 11403.

The district court rejected the Counties' proposal to compare BNSF's rate only to the rates for other State-assessed taxpayers—who pay the same § 100 rate that BNSF pays. The Counties argued that the relevant "assessment jurisdiction" is the State, and as such the court should compare only to other State-assessed property. *See* 49 U.S.C. § 11501(b)(3). The district court held that, even if the State (as opposed to the County) were the appropriate assessment jurisdiction, the commercial and industrial property *in the State* is clearly not limited to the group of mostly utility company property that is State-assessed. *See* Cal. Const. art. XIII, § 19. Moreover, the court observed that to limit the comparison class to "a relatively narrow subset of other state-assessed utilities and other entities that pay the same unitary tax rate," would depart from Congress's intention to "link railroads' fate" to commercial and industrial taxpayers.

The district court also rejected the Counties' argument that BNSF needed to make an independent showing of discrimination in order to prevail under § 11501(b)(3). The court held that subsection (b)(3) "does not require proof of discrimination, because Congress has already declared in the

preface of Section 11501(b) that the imposition of such an ad valorem property tax rate disparity 'unreasonably burden[s] and discriminate[s] against interstate commerce.'"

The district court's amended preliminary injunction order requires BNSF to deposit the enjoined amount of taxes for the 2019–2020 tax year in an escrow account and deposit the enjoined amount for future tax years when those tax payments would be due. The preliminary injunction enjoins the collection of only the disputed portion of BNSF's taxes, not the collection of the undisputed taxes.

II

As a threshold matter, we must first determine whether the district court applied the correct standard in awarding a preliminary injunction to BNSF. We generally consider traditional equitable factors when evaluating requests for preliminary injunctions. *See BOKF, NA v. Estes*, 923 F.3d 558, 561–62 (9th Cir. 2019) (listing factors). However, in some circumstances, a statute will prescribe that a showing of a violation of the statute alone warrants the issuance of a preliminary injunction. *See Burlington Northern v. Washington*, 934 F.2d at 1074 (quoting *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 258 (10th Cir. 1981)); *cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313–14 (1982). In *Trailer Train*, we held that the 4-R Act falls within this limited category, 697 F.2d at 869, and we reaffirmed that reasoning more recently in *Burlington Northern v. Washington*, 934 F.2d at 1074 ("Although we need not reach this issue, we note that [this injunction standard] is supported by the existing case law."). As the district court correctly observed, these cases constitute binding circuit precedent establishing the proper injunction

standard for violations of the 4-R Act: the railroad "is entitled to a preliminary injunction if its evidence demonstrates reasonable cause to believe that [§ 11501] has been violated, or is about to be violated." *Id.* at 1075 (internal quotation marks omitted).

Romero-Barcelo does not qualify as intervening irreconcilable authority that would require deviation from our circuit precedent. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). First, and importantly, *Romero-Barcelo* was not intervening authority: it was decided on April 27, 1982, after *Trailer Train* was argued but more than seven months *before Trailer Train* was decided on January 25, 1983. *Compare Romero-Barcelo*, 456 U.S. at 305, *with Trailer Train*, 697 F.2d at 860. Thus, the *Trailer Train* panel had the benefit of consulting the reasoning in *Romero-Barcelo* before issuing its decision.[6]

Second, *Romero-Barcelo* is not irreconcilable with *Trailer Train*. The irreconcilability requirement is a "high standard." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019). "[I]f we can apply our precedent consistently with that of the higher authority, we must do so. . . . [I]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent." *Id.* (internal quotation marks and citations omitted). In *Romero-Barcelo*, the Supreme Court held that a certain provision of the Federal Water Pollution and Control Act did not withdraw courts' traditional equitable discretion. 456 U.S. at 320. The

[6] We also note that this court reaffirmed *Trailer Train*'s preliminary injunction standard in 1991 in *Burlington Northern v. Washington*, nearly a decade after *Romero-Barcelo* was decided. *Burlington Northern v. Washington*, 934 F.2d at 1074–75.

Supreme Court cautioned that courts should apply equitable principles "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Id.* at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). These instructions are not "irreconcilable" with our holding in *Trailer Train* that § 11501 "clearly falls within" the exception for statutes that "specifically provide[] for injunctive relief." 697 F.2d at 869. Indeed, *Trailer Train* followed these requirements, looking to the language of the original § 306, which specified that "the district courts of the United States shall have jurisdiction . . . to grant such mandatory or prohibitive injunctive relief . . . *as may be necessary to prevent*, restrain, or terminate any acts in violation of this section." 4-R Act of 1976, § 306(2) (emphasis added); *Trailer Train*, 697 F.2d at 869 & n.16. *Trailer Train*'s interpretation of this language is a holding that we "can apply . . . consistently," *Consumer Def.*, 926 F.3d at 1213, with the Supreme Court's instruction in *Romero-Barcelo* to look to the statute's direct command or necessary and inescapable inference. *See* 456 U.S. at 313. The district court applied the correct injunction standard to this case.

III

On the merits, the Counties' arguments fall into three categories. The first two involve the Counties' contention that the district court erred in selecting the countywide average tax rates as the baseline rate against which it compared BNSF's rate. First, the Counties argue that the district court only arrived at that rate by following the *Trailer Train* framework, which was error because *Trailer Train* involved a prior version of California's property taxation system, under which railroads were not taxed at the unitary

rate. Second, the Counties argue that the district court should have disregarded the *Trailer Train* framework and compared BNSF's property only to other property taxed at the unitary rate, *see* Cal. Rev. & Tax. Code § 100, since this is the only property in the same "assessment jurisdiction." 49 U.S.C. § 11501(b)(3); *see id.* § 11501(a)(2). Third, and separately, the Counties contend that BNSF was required to make a threshold showing that its tax rate was not only different, but also discriminatory. BNSF cannot do so, the Counties contend, because they are justified in taxing BNSF subject to the unitary rate since BNSF lobbied for the change in state law that subjected it to this rate. We address each argument in turn.

A

The 4-R Act prohibits States and localities from taxing railroad property "at a tax rate that exceeds the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(b)(3). As we noted in *Trailer Train*, and as is still true today, it is difficult to apply this statute to California, since California "has no specific tax rate for commercial and industrial property." *Trailer Train*, 697 F.2d at 867. Thus, the baseline rates to which we should compare a railroad's rate are not readily apparent.

We first addressed this issue in *Trailer Train* in 1983, the only time this court has applied subsection (b)(3) to California's system of taxation. At that time, the tax rate applied to private rail cars was essentially the weighted average of the prior year's secured and unsecured rates. *Id.* at 863. The Board determined that the recently established tax rate limitations in Proposition 13 applied to private

railcars, and it taxed Trailer Train's property at the lower rate required by Proposition 13 for the 1978–1979 tax year. *Id.* at 863–64. In 1980, when the California Supreme Court ruled that the Proposition 13 tax rate limitation did not apply to the unsecured roll, the Board interpreted the Court's decision to mean Proposition 13 must not apply to private railcars and determined that its rate reduction on railcars for the 1978–1979 tax year was improper. *Id.* The Board recalculated the tax at a higher rate. *Id.* Railway companies sued to enjoin collection of taxes at the higher rate as a violation of 49 U.S.C. § 11501(b)(3). *Id.*

To address the issue of the proper comparison rate, *Trailer Train* outlined two approaches. The first approach instructs a court to ascertain which roll, secured or unsecured, contains the majority of California's commercial and industrial property. *Id.* at 867. "The tax rate applicable to the roll that contained the majority of commercial and industrial property shall be deemed" the proper comparison rate. *Id.* As a second, fallback approach, the court instructed that, if that determination is "not possible, the average tax rate for all property shall be used as the basis for comparison." *Id.*[7]

The Counties do not suggest any persuasive reason for departing from this framework. To be sure, the choice between the secured roll, the unsecured roll, or the average of

[7] The district court was correct to move to *Trailer Train*'s second option when no party offered data reflecting the tax rate applicable to the secured roll or otherwise limited to only commercial and industrial property. We are not persuaded by the Counties' contention that BNSF should have provided such data. BNSF's expert represented below that BNSF did not believe those numbers were "published or readily ascertainable." If the Counties, who are in possession of the tax rate data, wish the district court to consider these rates, then they may produce them.

all tax rates had the potential for a more significant impact at the time of *Trailer Train*: at that time, the two rates were quite different, *see id.* at 864, whereas today they may not diverge as dramatically. However, the district court was correct that the central question of *Trailer Train*—how to identify the proper comparison rate to capture commercial and industrial property in California, *see id.* at 867—remains equally relevant in this case. This is the question that *Trailer Train* answered by pointing us to either the rate applicable to the secured or unsecured roll or the average rate applied to all property. The evolution in California's system of taxation does not provide a sufficient reason to deviate from these instructions.[8]

B

The Counties also urge deviation from *Trailer Train* because the district court should have compared BNSF's rate to other State-assessed taxpayers' rates rather than the countywide averages, since the only property in the same "assessment jurisdiction" as BNSF is other State-assessed unitary property. The Counties thus argue that they comply with the 4-R Act because they do not treat BNSF differently from other unitary property taxpayers. We disagree.

The 4-R Act forbids railroads from being taxed at a rate that exceeds the rate applicable to commercial and industrial property "in the same assessment jurisdiction." 49 U.S.C.

[8] San Diego County argues that the district court needed to compare BNSF's tax rate for its specific parcels to the tax rate for the corresponding TRA. We decline to reach this argument since it was not raised below. *See Detrich v. Ryan*, 740 F.3d 1237, 1248–49 (9th Cir. 2013) (en banc).

§ 11501(b)(3). The statute defines "assessment jurisdiction" as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation." *Id.* § 11501(a)(2). The Counties argue that the State is the appropriate assessment jurisdiction here, and that therefore, the district court should have compared BNSF's rate to the rate applied to other State-assessed entities: the § 100 rate. *See* Cal. Const. art. XIII, § 19; Cal. Rev. & Tax. Code § 100.

Yet even if the State were the appropriate assessment jurisdiction, the Counties' proposal cannot pass muster. If the State were the appropriate assessment jurisdiction, then the statute instructs that the proper comparison rate is that applicable to "commercial and industrial property in the same assessment jurisdiction"—the State of California. 49 U.S.C. § 11501(b)(3). Commercial and industrial property in California certainly is not limited to the small subset of State-assessed property. Furthermore, the definition of "assessment jurisdiction" is a "geographical area." *Id.* § 11501(a)(2). The statute does not require comparison only to other entities assessed by the same agency, just entities within the appropriate "geographical area."[9] Thus, if the State were the appropriate assessment jurisdiction, the proper comparison would be to *all* commercial and industrial property in the State, not just the limited group of State-assessed entities.

Furthermore, the Counties' proposal to compare BNSF's tax rate only to the rate applied to State-assessed property, a limited set of property mostly owned by utility companies that pay the same tax rate as BNSF, runs contrary to the

[9] For this reason we are also not persuaded by San Diego County's argument that the countywide TRA (as opposed to the County) is the proper assessment jurisdiction.

purpose of the 4-R Act. Congress's goal in passing this legislation was to ensure railroads were treated equally as taxpayers. *See CSX Transp., Inc. v. Ala. Dep't of Revenue* (*CSX I*), 562 U.S. 277, 280 (2011); *see also Okla. Tax Comm'n*, 481 U.S. at 457. To do so, the statute instructs comparison to "commercial and industrial property"—a deliberately broad term. 49 U.S.C. § 11501(b). Moreover, a comparison to entities paying *the same tax rate* would deprive this subsection of nearly all meaning. It was, in part, for this reason that we recently rejected a similar proposal to compare railroad property only to centrally assessed property under a different subsection of the 4-R Act. *See BNSF Ry. Co. v. Or. Dep't of Revenue*, 965 F.3d 681, 692 (9th Cir. 2020) (noting that such a comparison would "deprive subsection (b)(4) of all real-world effect"). Accordingly, we affirm the district court's decision to not compare BNSF's rate only to other State-assessed taxpayers' rates.[10]

C

Finally, the Counties contend that the statute requires BNSF to demonstrate not only that there is a difference in tax rates, but also that any difference is discriminatory. The

[10] The district court assumed that the county was the proper assessment jurisdiction rather than the State. We agree that, under either possible assessment jurisdiction, the Counties' proposal to compare BNSF only to other State-assessed taxpayers must fail. We also recognize that the effect of selecting either the county or the State is slight, since the countywide averages do not significantly diverge from the statewide averages. However, we note that it would be appropriate for the district court to examine this issue in the first instance as proceedings continue, especially considering our case law interpreting the phrase "the same assessment jurisdiction" in the subsection (b)(1) context. *See Arizona v. Atchison, Topeka, & Santa Fe Ry. Co.*, 656 F.2d 398, 405 (9th Cir. 1981).

Supreme Court has defined discrimination in the 4-R Act context to mean "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX I*, 562 U.S. at 286 (quoting Black's Law Dictionary 534 (9th ed. 2009)). The Counties contend that BNSF cannot show discrimination because the Counties are justified in taxing BNSF at the unitary rate, the rate at which BNSF itself lobbied to be taxed. *See Ala. Dep't of Revenue v. CSX Transp., Inc.* (*CSX II*), 575 U.S. 21, 31 (2015) ("[A tax] does not discriminate unless it treats railroads differently from other *similarly situated* taxpayers *without sufficient justification*."). The Counties also contend that, since discrimination requires that an individual entity be treated worse than similarly situated entities, the proper comparison group is other State-assessed, unitary property.

However, the Counties arguments are unsuccessful at the outset because no independent showing of discrimination is required for subsection (b)(3) claims. The Supreme Court has clearly stated that "[w]hat subsection (b)(4) requires, and subsections (b)(1)–(3) do not, is a showing of *discrimination*—of a failure to treat similarly situated persons alike." *CSX II*, 575 U.S. at 27 (emphasis in original); *see also Trailer Train*, 697 F.2d at 866–67 (explaining that to "discern whether California has imposed a discriminatory tax rate in violation of [subsection] (b)(3)," the court's task was "to compare the tax rate applied to the Companies' railroad cars with that generally applicable to commercial and industrial property").

The text of the statute is not to the contrary. The preface to § 11501(b) states: "The following acts unreasonably burden *and discriminate against* interstate commerce." 49 U.S.C. § 11501(b) (emphasis added). The language of the

original § 306, states that "any action described in this subsection is *declared to constitute* an unreasonable and unjust *discrimination against*, and an undue burden on, interstate commerce." 4-R Act § 306(1) (emphasis added). It is true that subsection (b)(4) includes the term "discrimination," whereas the term is absent from subsections (b)(1)–(3). However, this additional requirement was likely included because subsection (b)(4) is a catch-all provision. *CSX I*, 562 U.S. at 280–81. The inclusion of a discrimination requirement in this broader provision makes sense: discrimination may come in forms other than the three types listed in subsections (b)(1)–(3), but in that case an additional showing of discrimination, rather than simply difference, is required. *See CSX II*, 575 U.S. at 27. Accordingly, since BNSF was not required to show discrimination, we need not address the Counties' arguments that BNSF would be unable to make this showing.

IV

In sum, the district court applied the correct preliminary injunction standard, properly analyzed BNSF's tax rate under the *Trailer Train* framework, and concluded that the Counties were overtaxing BNSF's property in violation of § 11501(b)(3). Accordingly, we affirm the district court, and suggest that, as proceedings continue, the district court consider in the first instance whether the State or the county is the proper assessment jurisdiction.

AFFIRMED.