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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11705

D.C. Docket No. 2:08-cv-00655-AKK

CSX TRANPORTATION, INC.,

Plaintiff-Appellant,

v.

ALABAMA DEPARTMENT OF REVENUE,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(April 25, 2018)

ON PETITION FOR REHEARING

Before ED CARNES, Chief Judge, BLACK, Circuit Judge, and MAY,* District Judge.

ED CARNES, Chief Judge:

We grant the State of Alabama's petition for rehearing in the nature of a request for clarification and extension of opinion and issue this opinion with modest revisions as a substitute for the one we issued initially. See CSX Transp., Inc. v. Ala. Dep't of Revenue, 886 F.3d 974 (11th Cir. 2018).

The Railroad Revitalization and Regulatory Reform Act prohibits states from imposing a tax "that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). The question before us is whether Alabama's tax scheme, which imposes either a sales or use tax on rail carriers when they buy or consume diesel fuel but exempts competing motor and water carriers from those taxes, violates the Act. Our answer is "no" as to motor carriers, "yes" as to water carriers.

I. BACKGROUND

A. Facts

CSX Transportation, Inc. is an interstate rail carrier that does business and pays taxes in a number of states including Alabama. In the shipment of freight interstate it and other rail carriers compete against trucking transport companies (motor carriers) and commercial ships, vessels, and barges (water carriers). Yet Alabama taxes each type of carrier differently on the purchase

* Honorable Leigh Martin May, United States District Judge for the Northern District of Georgia, sitting by designation.

or use of diesel fuel inside the state. Rail carriers pay a 4% sales and use tax on diesel fuel,[1] while motor carriers and water carriers are exempt from that tax, see Ala. Code §§ 40-17325(b) (motor carriers), 40-23-4(a)(10) (water carriers). Motor carriers do pay a Motor Fuels Excise Tax of $0.19 per gallon of diesel.[2] Id. § 40-17-325(a). But water carriers pay no tax of any kind to Alabama for diesel fuel they purchase or use in Alabama to transport freight interstate. Id. §§ 40-23-4(a)(10) (sales tax exemption), 40-23-62(12) (use tax exemption).

The State deposits revenue from the sales and use tax that rail carriers pay into the general fund and earmarks it for education purposes. Id. § 40-23-35(f). Of the $0.19 per gallon excise tax that motor carriers pay, $0.13 goes to the Alabama Department of Transportation for the construction and maintenance of roads and bridges and for the payment of highway bonds. Id. § 40-17-361(a). The remaining $0.06 per

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[1] The "sales and use tax" is actually two separate taxes on tangible personal property (including diesel fuel): a 4% sales tax on it if purchased in Alabama, and a 4% use tax on it if purchased outside Alabama but used inside the state. Ala. Code §§ 40-23-2(1) (sales tax), 40-2361(a) (use tax). The rate is the same regardless of which of the two taxes is applied and it is stylistically simpler to refer to the taxes as though they were one. For those reasons, we will use the term "the sales and use tax" to refer to either or both taxes (unless we are quoting part of a district court or Supreme Court opinion that refers to them separately).

[2] For the first half of this litigation, the Motor Fuels Excise Tax was codified at Alabama Code § 40-17-2. The State modified its motor fuels tax scheme in October 2012, and the excise tax is now codified at § 40-17-325(a)(2), (b). The modification did not alter the amount of the tax, only the time at which it is imposed, a change that does not affect the outcome of this case.

gallon goes to counties, towns, and cities for the construction and maintenance of roads and bridges. Id. § 40-17-361(b).

In 2008 CSX sued the Alabama Department of Revenue, seeking to enjoin the Department from collecting the sales and use tax on the railroad's purchase or consumption of diesel fuel in the state. It also sought a declaratory judgment that the imposition of that tax violates the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501, often called "the 4-R Act."

Congress enacted the 4-R Act to "restore the financial stability of the railway system of the United States" and to "foster competition among all carriers by railroad and other modes of transportation." 45 U.S.C. § 801(a), (b)(2). The 4R Act forbids states from discriminating against rail carriers in assessing property or imposing taxes. 49 U.S.C. § 11501(b). It specifies that states and their subdivisions may not:

> (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.

Id. The first three paragraphs address property taxes, not sales and use taxes, and are not at issue here. The fourth paragraph is a catchall that applies to taxes generally and provides the basis for CSX's claim about the sales and use tax imposed on it but not on the other types of carriers.

B. Procedural History

Over the past decade, this case has made two trips to the Supreme Court, stopping along the way three times at the district court and five times here. Because it is all pretty much relevant, we will set out that procedural history in some detail.

In doing so, we will begin with a discussion of the first district court order, which dismissed CSX's complaint, and from there we will recount our decision on appeal and the Supreme Court's first decision. We will then discuss the district court's second opinion, our second decision on appeal, and the Supreme Court's second decision. Finally, we will discuss the third leg of the journey to date,

starting with our second remand order and ending with the district court judgment from which CSX now appeals.

1. First Round of Proceedings

In round one of this case, the district court dismissed CSX's complaint and we affirmed. CSX Transp., Inc. v. Ala. Dep't of Revenue, 350 F. App'x 318 (11th Cir. 2009), rev'd, 562 U.S. 277, 131 S. Ct. 1101 (2011), vacated, 639 F.3d 1040 (11th Cir. 2011). In doing so, we relied on one of our earlier decisions involving a nearly identical challenge to Alabama's tax scheme. See Norfolk S. Ry. v. Ala. Dep't of Revenue, 550 F.3d 1306 (11th Cir. 2008), abrogated by 562 U.S. 277, 131 S. Ct. 1101. Based on Norfolk we held that discrimination in the granting of tax exemptions does not amount to tax discrimination for purposes of the 4-R Act. See 350 F. App'x at 319.

The Supreme Court reversed our decision and held that denying rail carriers exemptions provided to other carriers can be a form of discrimination under the 4R Act. CSX Transp., Inc. v. Ala. Dep't of Revenue ("CSX I"), 562 U.S. 277, 280, 131 S. Ct. 1101, 1105 (2011). The Court explained that a tax discriminates when it treats "groups [that] are similarly situated" differently without "justification for the difference in treatment." Id. at 287, 131 S. Ct. at 1109. As a result, "a state excise tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier.'" Id. at 288, 131 S. Ct. at 1109. The Court did not decide whether the different tax treatment violated the 4-R Act, but it did decide that the outcome "depends on whether the State offers a sufficient justification for

declining to provide the exemption at issue to rail carriers." Id. at n.8, 131 S. Ct. at 1109 n.8.

2. Second Round of Proceedings

On remand, after holding a bench trial the district court ruled that Alabama's sales and use tax scheme does not discriminate against CSX. CSX Transp., Inc. v. Ala. Dep't of Revenue, 892 F. Supp. 2d 1300 (N.D. Ala. 2012), rev'd and remanded, 720 F.3d 863 (11th Cir. 2013), rev'd and remanded, 575 U.S. __, 135 S. Ct. 1136 (2015), vacated and remanded, 797 F.3d 1293 (11th Cir. 2015). The district court concluded that the motor carrier exemption to the sales and use tax is justified because motor carriers pay a "substantially similar" amount under the excise tax that applies to them. Id. at 1313. As to water carriers, which pay neither tax when they purchase or use diesel fuel to haul freight interstate, the district court concluded that international commerce clause concerns do provide a rational basis for exempting them and also that CSX had failed to show that it had suffered a discriminatory effect. Id. at 1316–17.

We reversed. CSX Transp., Inc. v. Ala. Dep't of Revenue, 720 F.3d 863, 865 (11th Cir. 2013), rev'd and remanded, 575 U.S.__. 135 S. Ct. 1136 (2015), vacated and remanded, 797 F.3d 1293 (11th Cir. 2015). We first decided whether to apply the "functional approach" or the "competitive approach" to identify a comparison class of taxpayers for 4-R Act claims. Id. at 867–69. The functional approach compares rail carriers to all other "commercial and industrial" taxpayers, thereby importing into § 11501(b)(4) the "commercial and industrial" limitation from the three preceding paragraphs. Id.

at 867 (citing Kansas City S. Ry. v. Koeller, 653 F.3d 496, 508 (7th Cir. 2011)). The competitive approach, by contrast, compares rail carriers only to their competitors. Id. at 867–68.

We chose the competitive approach, reasoning that the functional approach disadvantages rail carriers by applying too broad a comparison class and that the competitive approach better accords with the 4-R Act's purpose. Id. at 869. Applying the competitive approach, we held that motor carriers and water carriers are competitors of, and as a result proper comparators to, rail carriers. Id. at 867. Because those two competitors are exempt from the sales and use tax, we reasoned that CSX had established a "prima facie case of discrimination," shifting the burden to the State to justify its facially discriminatory tax. Id. at 869.

We rejected the argument that the motor carrier exemption to the sales and use tax would be justified if motor carriers paid excise taxes in amounts substantially similar to the sales and use tax that the rail carriers paid. Id. We held, instead, that a court should look "only at the sales and use tax with respect to fuel to see if discrimination has occurred." Id. (quotation marks omitted). We reasoned that focusing solely on the specific tax that is allegedly discriminatory would avoid the "Sisyphean burden of evaluating the fairness of the State's overall tax structure in order to determine whether a single tax exemption causes a state's sales tax to be discriminatory." Id. at 871. Because the State failed to justify the motor carrier exemption, and because "no one can seriously dispute that the water carriers, who pay not a cent of tax on diesel fuel, are the

beneficiaries of a discriminatory tax regime," we reversed and remanded with instructions to enter declaratory and injunctive relief for CSX. Id.

The Supreme Court granted certiorari on two questions: "whether the Eleventh Circuit properly regarded CSX's competitors as an appropriate comparison class for its subsection (b)(4) claim," and "whether, when resolving a claim of unlawful tax discrimination, a court should consider aspects of a State's tax scheme apart from the challenged provision." Ala. Dep't of Revenue v. CSX Transp., Inc. ("CSX II"), 575 U.S. __, 135 S. Ct. 1136, 1140 (2015).

On the first question, the Court agreed with us that, "in light of [CSX's] complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination." Id. at 1143. The Court rejected Alabama's argument that the proper comparison class is all commercial and industrial taxpayers, deciding that the "commercial and industrial" limitation from 49 U.S.C. § 11501(b)(1)–(3) does not carry over to (b)(4). Id. at 1142–43. Given the 4-R Act's purpose of "restor[ing] the financial stability of the railway system" while "foster[ing] competition among all carriers by railroad and other modes of transportation," the Court held that competitors "can be another 'similarly situated' comparison class." Id. at 1142 (quoting 45 U.S.C. § 801(a), (b)(2)).

On the second question, about whether a state's other taxes should be considered in the analysis, the Court held that "an alternative, roughly equivalent

tax is one possible justification that renders a tax disparity nondiscriminatory." Id. at 1143. The Court reasoned that "[i]t does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay another comparable tax from which the rail carrier is exempt." Id. As a result, the Court held that this Court should have let the State "justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax" (which the rail carriers do not pay). Id.

The Court remanded for us to consider "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales [and use] tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." Id. at 1144. It did not specify a standard for determining whether those taxes are "roughly equivalent." See Id. As to water carriers, which pay no state tax when they purchase or use diesel fuel to transport freight interstate, the Court noted that "[t]he State . . . offer[ed] other justifications for the water carrier exemption — for example, that such an exemption is compelled by federal law," and directed us to consider those "alternative rationales" on remand. Id.

3. Third Round of Proceedings

We vacated the district court's judgment and remanded for proceedings "consistent with the Supreme Court's opinion." CSX Transp., Inc. v. Ala. Dep't of Revenue, 797 F.3d 1293, 1294 (11th Cir. 2015). On remand, the district court again ruled that Alabama's tax scheme does not violate the 4-R Act.

CSX Transp., Inc. v. Ala. Dep't of Revenue, 247 F. Supp. 3d 1240, 1242–43 (N.D. Ala. 2017).

The district court concluded that the motor carrier exemption does not violate the 4-R Act for two reasons. First, the court found that CSX's trains can operate on either clear diesel or dyed diesel, and that if CSX opted to purchase clear diesel, it would be subject to the excise tax, just like motor carriers, instead of the sales and use tax.[3] Id. at 1245. For that reason, the court ruled that any alleged discrimination is "self-imposed," and as a result, "the State has established that its tax schemes for dyed diesel and clear diesel do not discriminate against rail carriers." Id. at 1247. Alternatively, the court ruled that the motor carrier exemption is justified because the excise tax that motor carriers pay is "roughly equivalent" to the sales and use tax. Id.

The court also determined that there were two reasons why the water carrier exemption does not violate the 4-R Act. First, it concluded that the exemption "does not violate the 4-R Act" because "CSX has suffered no competitive injury" from that exemption. Id. at 1255. Second, it found that

[3] Under federal law, tax-exempt fuel must be "indelibly dyed." 26 U.S.C. § 4082(a)(2). Federal law prohibits using dyed diesel for travel on highways. Id. § 4041(a)(1)(A). Trains can run on clear diesel, but CSX and its peer rail carriers buy dyed diesel to avoid paying federal and state motor fuels taxes at the pump. If as the State suggests CSX were to switch between clear and dyed diesel depending on tax implications, CSX says it would incur operational disruptions and costs, including "a $9 million per year increase in up-front fuel costs due to the time lag necessary to secure federal highway tax refunds, and the costs to put in a specialized system to track fuel usage to secure those refunds." Appellant's Br. at 15.

because "imposition of a state sales [and use] tax on interstate water carriers would expose the State to liability under the negative Commerce Clause," their exemption "is compelled by federal law." Id. at 1252 (citing CSX II, 135 S. Ct. at 1144). This is CSX's appeal.

II. STANDARD OF REVIEW

We review de novo the district court's interpretation of the Supreme Court's rulings and the scope of the mandate. Cox. Enters., Inc. v. News-Journal Corp., 794 F.3d 1259, 1271–72 (11th Cir. 2015). We also review de novo questions of statutory interpretation. Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 237 (11th Cir. 1995). The district court's factual findings we review only for clear error. United States v. Magluta, 418 F.3d 1166, 1182 (11th Cir. 2005).

III. STANDING

The State contends that CSX lacks standing. It raises that issue for the first time in this appeal, but because standing goes to Article III jurisdiction a party can contest it "at any point in the litigation." Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011). To have standing, CSX "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. __, 136 S. Ct. 1540, 1547 (2016).

CSX meets those three requirements. Without a favorable decision it will suffer an injury in fact because it will continue to be liable for roughly $5 million per year in sales and use tax on diesel fuel. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599, 127 S. Ct. 2553, 2653 (2007) ("[B]eing forced to pay . . . a tax causes a real and immediate economic injury to the individual taxpayer."). CSX's claimed injury is fairly traceable to the Department, which the parties stipulate is responsible for "administer[ing] and collect[ing] taxes within Alabama, including the administration of sales and use taxes." And that injury would be redressed by a declaratory judgment that the sales and use tax violates the 4-R Act and an injunction prohibiting the Department from collecting that tax on CSX's purchase and consumption of diesel.

The State does not, of course, contest that CSX has paid, and unless it prevails here will continue to be liable for paying, the sales and use tax. It argues instead that CSX has not suffered an injury in fact because it failed to prove "that Alabama's exemption for water carriers actually injures CSX." But CSX's challenge seeks to prevent application of the sales and use tax on it, not an end to the exemption of the water carriers from the tax. CSX I, 562 U.S. at 286, 131 S. Ct. at 1108 ("What the complaint protests is Alabama's imposition of taxes on the fuel CSX uses; what the complaint requests is that Alabama cease to collect those taxes from CSX. . . . The exemptions, no doubt, play a central role in CSX's argument . . . . But the essential subject of the complaint remains the taxes Alabama levies on CSX.") (citations omitted). The only injury CSX must prove for standing purposes is liability for the sales and use

tax that it claims is discriminatory in violation of the 4-R Act. CSX has standing.

IV. THE MOTOR CARRIER EXEMPTION

The Supreme Court remanded this case for us to consider "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales [and use] tax as applied to diesel fuel, and therefore justifies the motor carrier sales [and use] tax exemption." CSX II, 135 S. Ct. at 1144. We in turn remanded it to the district court for proceedings "consistent with the Supreme Court's opinion." CSX Transp., 797 F.3d at 1294. The district court in turn decided that the motor carrier exemption does not violate the 4-R Act for two reasons: (1) CSX's trains can operate on either clear or dyed diesel, so any alleged discrimination is "self-imposed," and (2) the excise tax is "roughly equivalent" to the sales and use tax. CSX Transp., 247 F. Supp. 3d at 1247, 1255. We address each ruling in turn.

A. The District Court's Clear Fuel Ruling

The district court found that CSX's trains can operate on clear diesel and that if CSX chose to do so, it could avoid the sales and use tax and instead pay the excise tax, just like motor carriers, which would be perfectly nondiscriminatory. Id. For that reason, the court ruled that any alleged discrimination is "self-imposed," and "the State has established that its tax schemes for dyed diesel and clear diesel do not discriminate against rail carriers." Id. at 1247. That ruling violates the mandate rule.

"The mandate rule is a specific application of the 'law of the case' doctrine which provides that subsequent courts are bound by any findings of fact or conclusions of law made by the court of appeals in a prior appeal of the same case." Friedman v. Mkt. St. Mortg. Corp., 520 F.3d 1289, 1294 (11th Cir. 2008) (quotation marks omitted). That rule "has its greatest force when a case is on remand to the district court." Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 881 F.3d 835, 843 (11th Cir. 2018). A district court "must implement both the letter and the spirit of the mandate taking into account the appellate court's opinion and the circumstances it embraces." Cox Enters., 794 F.3d at 1271 (quotation marks and alterations omitted). Although a district court is "free to address, as a matter of first impression, those issues not disposed of on appeal," it is "bound to follow the appellate court's holdings, both expressed and implied." Id. (quotation marks omitted). The scope of the mandate is informed by the scope of the issues considered in the earlier appeal. Id.

The scope of the mandate that came out of our last decision was narrow. As to motor carriers, the Supreme Court had instructed us to consider only "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales [and use] tax as applied to diesel fuel, and therefore justifies the motor carrier sales [and use] tax exemption." CSX II, 135 S. Ct. at 1144. The district court noted that instruction and acknowledged that the clear fuel argument is not a "justification," but ruled that it could be a basis for defeating CSX's claim anyway. 247 F. Supp. 3d at 1244 ("[T]he State introduced evidence not only to show sufficient justification, but also to prove: that any 'discrimination' is self-

imposed through rail carriers' practice of purchasing dyed, rather than clear, fuel . . . .") (emphasis added).

That ruling went beyond the scope of the mandate, which was limited to whether the excise tax and the sales and use tax are roughly equivalent. CSX II, 135 S. Ct. at 1144. But because we agree with the district court's alternative ruling that the excise tax is roughly equivalent to the sales and use tax and, as a result, it justifies the motor carrier exemption, CSX Transp., 247 F. Supp. 3d at 1247–48, any error in the district court's clear fuel ruling is harmless.

B. The District Court's "Roughly Equivalent" Ruling

The district court decided that the motor carrier exemption is justified because the sales and use tax is "roughly equivalent" to the excise tax. Id. The Supreme Court did not specify how to decide whether those two taxes are roughly equivalent. See CSX II, 135 S. Ct. at 1144. So we have to decide the proper test for determining whether those taxes are roughly equivalent before we can evaluate if the district court was correct in deciding that they are.

The district court interpreted "roughly equivalent" to carry its ordinary meaning and limited its inquiry to whether the "fuel-excise tax approximates the sales [and use] tax." CSX Transp., 247 F. Supp. 3d at 1247. Applying that standard, the court found that over a recent nine-year period, the average rates rail carriers and motor carriers paid on diesel fuel differed "by some quantity between less-than-half-of-one cent and 3.5 cents" per

gallon.[4] Id. at 1250–51. That led the court to conclude that "the fuel-excise tax motor carriers pay is 'roughly equivalent' to the sales [and use] tax CSX pays." Id. at 1251. In reaching that conclusion the court declined to consider how the State spends revenues from those different taxes. Id. at 1251 n.16.

CSX doesn't question the district court's math. Instead, it questions the test that the district court applied. CSX argues that the proper test is the compensatory tax doctrine — a three-part dormant Commerce Clause test that would require us to compare not only the rate that rail carriers and motor carriers pay under the sales and use tax and the excise tax, but also how the State allocates revenue from those taxes. Appellant's Br. at 38–39 (citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201, 114 S. Ct. 2205, 2215 (1994) (examining revenue expenditures to determine whether a facially discriminatory tax violates the dormant Commerce Clause)).

The crux of CSX's argument is that the excise tax is not roughly equivalent to the sales and use tax because the excise tax "is used exclusively to fund public highways," effectively subsidizing the infrastructure on which motor carriers travel, while "the railroad sales [and use] tax is deposited

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[4] The difference fluctuates because the excise tax that motor carriers pay is assessed as a flat rate per gallon of fuel consumed regardless of the price of the fuel, while the sales and use tax that rail carriers pay is assessed ad valorem and depends on the price of fuel. Compare Ala. Code § 40-17-325(a)(2) (excise tax), with Ala. Code §§ 40-23-2(1) (sales tax), 40-23-61(a) (use tax).

in the State's general fund, earmarked primarily for education." Compare Ala. Code § 40-17-361(a), (b), with id. § 40-23-35(f). Because excise tax revenues directly benefit motor carriers while sales and use tax revenues do not directly benefit rail carriers, CSX asserts that the excise tax "cannot possibly be 'roughly equivalent'" to the sales and use tax.

CSX does not pretend that the 4-R Act's text supports its contention that a state's revenue expenditures control a claim under that statute. It argues instead that the Supreme Court in its decision implicitly guided us toward the compensatory tax doctrine and examining revenue expenditures in two ways. The first was by using the phrase "roughly equivalent," some variation of which appears in all compensatory tax doctrine cases, and the second was by citing the "foundational" compensatory tax doctrine case of Gregg Dyeing Co. v. Query, 286 U.S. 472, 52 S. Ct. 631 (1932).

1. The 4-R Act Is Concerned with the Imposition of Taxes, Not with the Expenditure of Revenue from Taxes

"We begin, as in any case of statutory interpretation, with the language of the statute." CSX I, 562 U.S. at 283, 131 S. Ct. at 1107. And the plain language of § 11501(b)(4) stops in its tracks CSX's argument that we must consider how the State allocates revenue raised by the taxes in question.

Section 11501(b)(4) provides that no state shall "[i]mpose another tax that discriminates against a

rail carrier." The syntax of the sentence makes clear that the source of discrimination must be the state's imposition of a tax. The relative pronoun "that" introduces the subordinate clause "that discriminates against a rail carrier." The subordinate clause modifies the antecedent "tax" and describes the kinds of taxes states may not impose. All of which is a fancy way of saying that § 11501(b)(4) doesn't prohibit all anti-railroad discrimination, but only that which occurs in the state's imposition of a tax. Which is, after all, what the provision says.

In spite of that, CSX would have us read that provision to require revenue from the sales and use tax paid by rail carriers to benefit them as much as revenue from the excise tax paid by motor carriers benefits those carriers. That reading of § 11501(b)(4) does not fit the meaning of "impose." Impose, Black's Law Dictionary (10th ed. 2014) ("To levy or exact (a tax or duty)."). States cannot "levy or exact" a revenue expenditure. CSX's proposed reading of §11501(b)(4) also equates "tax" with revenue, even though "tax" by definition distinguishes the "charge . . . imposed by the government" from the "revenue" it seeks to yield. Tax, Black's Law Dictionary (10th ed. 2014). Stripped to the rails, CSX's argument depends on calling revenues taxes. And "an argument that depends on calling a duck a donkey is not much of an argument." Gilbert v. United States, 640 F.3d 1293, 1320 (11th Cir. 2011).

CSX's interpretative remodeling of § 11501(b)(4)'s restriction on states would require us to rewrite the "[i]mpose another tax that discriminates against a rail carrier" language in

one of two ways. The first way would be to add words to the provision so that no state could:

> Impose another tax or appropriate revenue in a way that discriminates against a rail carrier.

Or subtract some language and add other language so that no state could:

> ~~Impose another tax~~ that discriminate[ ] against a rail carrier in any other way.

"But we are not allowed to add or subtract words from a statute." Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1224 (11th Cir. 2009); accord T-Mobile South, LLC v. City of Milton, 728 F.3d 1274, 1284 (11th Cir. 2013) ("Although we, like most judges, have enough ego to believe that we could improve a good many statutes if given the chance, statutory construction does not give us that chance if we are true to the judicial function."); Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278, 1286 (11th Cir. 2011) ("[W]e are not licensed to practice statutory remodeling."). If Congress had intended for § 11501(b)(4) to cover a state's revenue expenditures, it easily could have written it to say so. It didn't. And we assume that "Congress does not generally 'hide elephants in mouseholes.'" Rambaran v. Sec'y, Dep't of Corr., 821 F.3d 1325, 1333 (11th Cir. 2016) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468, 121 S. Ct. 903, 909–10 (2001)).

Reading § 11501(b)(4) in context adds another layer of conviction to our conclusion. See Wachovia Bank, N.A. v. United States, 455 F.3d 1261, 1267 (11th Cir. 2007) (explaining that in statutory

interpretation, "context is king"); accord Dolan v. U.S. Postal Serv., 546 U.S. 481, 486, 126 S. Ct. 1252, 1257 (2006) (The proper "[i]nterpretation of a word or phrase depends upon reading the whole statutory text . . . ."). The three paragraphs preceding the more general § 11501(b)(4) prohibit discrimination against rail carriers in the assessment of, or rates applicable to, property for purposes of taxation. 49 U.S.C. § 11501(b)(1)– (3).[5] They say nothing about revenue allocation or spending that discriminates against rail carriers. Because none of the four paragraphs comprising § 11501(b) mention revenue, it is evident that Congress did not intend (assuming it had any collective intent) for us to consider revenue expenditures in deciding whether a tax discriminates for purposes of subsection (b)(4).

For all of those reasons, we hold that how the State allocates its tax revenues is irrelevant to whether it "[i]mposes [a] tax that discriminates against a rail carrier." Id. § 11501(b)(4).

2. The Supreme Court Did Not Tell Us to Apply the Compensatory Tax Doctrine

Undeterred by the plain text or by context, CSX contends that in deciding whether there is discrimination in violation of § 11501(b)(4) we must give weight to discriminatory revenue expenditures

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[5] In the order in which they appear, those paragraphs forbid states or their subdivisons from assessing rail transportation property at a higher ratio to true market value than other commercial and industrial property, id. § 11501(b)(1); from levying property taxes based on such an assessment, id. § 11501(b)(2); and from levying ad valorem taxes on rail transportation property at a higher rate than for commercial and industrial property generally, id. § 11501(b)(3).

because the Supreme Court in CSX II told us to apply the compensatory tax doctrine. But the Court didn't tell us to do that. In fact, its opinion does not once use "compensatory" or any other derivative of the word "compensate." The Court has told us that it usually (almost always, we hope) says what it means and means what it says: "[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same." Mathis v. United States, 579 U.S. __, 136 S. Ct. 2243, 2254 (2016). Another good rule of thumb is that when the Supreme Court means to require something on remand, the Court will say that it is required. The Court did not say that we were to use the compensatory tax doctrine to determine if a tax scheme violates § 11501(b)(4).

Not to be derailed by the Supreme Court's failure to mention the compensatory tax doctrine, CSX argues that we still must apply that doctrine because the Court did use the term "rough equivalent," some variation of which appears in all compensatory tax doctrine cases.[6] CSX's argument is a fine example of a terminal logical fallacy known to logicians as an "illicit conversion" and to LSAT

[6] Some of CSX's cited decisions feature a variation of "rough equivalent" or "rough approximate." See, e.g., S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 169, 119 S. Ct. 1180, 1186 (1999) (compensatory tax burden must "roughly approximate" the allegedly discriminatory tax burden) (alterations omitted); Fulton Corp. v. Faulkner, 516 U.S. 325, 332–33, 116 S. Ct. 848, 854 (1996) (The compensatory tax "must be shown roughly to approximate — but not exceed the amount of the tax on intrastate commerce."); Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 103, 114 S. Ct. 1345, 1352 (1994) (noting that a compensatory tax is the "rough equivalent" of a "substantially similar" discriminatory tax).

students as a "mistaken reversal." See, e.g., Patrick J. Hurley and Lori Watson, A Concise Introduction to Logic 230–31 (13th ed. 2016); Steve Schwartz, Conditional Reasoning: Contrapositive, Mistaken Reversal, Mistaken Negation, LSAT Blog, April 10, 2009, http://lsatblog.blogspot.com/2009/04/conditional-reasoning-contrapositive.html. That all compensatory tax doctrine decisions feature the words "rough equivalent" does not mean that all decisions featuring those words are compensatory tax doctrine cases. Just as the fact that all birds are animals does not mean that all animals are birds.

As it happens, the Supreme Court has used the phrase "rough equivalent" in all sorts of contexts. It has used the term when talking about taxes in the due process and Commerce Clause contexts (to which the compensatory tax doctrine does not apply). See Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280, 98 S. Ct. 2340, 2348 (1978) ("In this case appellant's actual income tax obligation was the rough equivalent of a 1% tax on the entire gross receipts from its Iowa sales.") (emphasis added). It has used the phrase when talking about extortion. See Ocasio v. United States, 578 U.S. __, 136 S. Ct. 1423, 1428 (2016) ("[T]he type of extortion for which petitioner was convicted — obtaining property from another with his consent and under color of official right — is the rough equivalent of what we would now describe as 'taking a bribe.'") (emphasis added). It has even used the phrase when talking about usufructs of all things. See Boggs v. Boggs, 520 U.S. 833, 836, 117 S. Ct. 1754, 1758 (1997) ("A lifetime usufruct is the rough equivalent of a common-law life estate.") (emphasis added). The term "rough equivalent" is not a magical incantation that

spellbinds us to apply the compensatory tax doctrine. It is, instead, a term whose meaning must be determined in context. See Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 159 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

CSX's next argument for applying the compensatory tax doctrine is that the Supreme Court signaled that we should do so by citing Gregg Dyeing, which CSX characterizes as the "foundational building block of the compensatory tax analysis." According to CSX, Gregg Dyeing is cited "as shorthand for the Compensatory Tax Doctrine" by many courts, and it points to the Alabama Supreme Court's opinion in White v. Reynolds Metals Co., 558 So. 2d 373 (Ala. 1989), as an example.

That is not a good example for CSX because in White the Alabama Supreme Court did not use Gregg Dyeing as "shorthand for the Compensatory Tax Doctrine," but simply cited it along with two other decisions for the proposition that the "United States Supreme Court has upheld taxing statutes that appeared to discriminate against interstate commerce by holding that the state's tax scheme compensated for the tax by a substantially equivalent tax on intrastate commerce." Id. at 387. And even if the Alabama Supreme Court had used Gregg Dyeing as code for the compensatory tax doctrine, that would not mean the United States Supreme Court used it that way in this case. We

apply to the Supreme Court's opinions some of the same interpretative principles that it applies to congressional enactments, including the one about elephants and mouseholes. Whitman, 531 U.S. at 468, 121 S. Ct. at 909–10. We don't read the citation to Gregg Dyeing in the CSX II opinion as code but as simply a reference to the general principle that courts should consider other taxes a state imposes when assessing a facially discriminatory tax for 4-R Act purposes. See CSX II, 135 S. Ct. at 1143–44.

Third, CSX argues that failure to apply the compensatory tax doctrine would "lead[ ] to absurd results." We may deviate from the plain meaning of a statute only if "the result produced by the plain meaning" is "truly absurd." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1188 (11th Cir. 1997). According to CSX, because the dormant Commerce Clause "aris[es] from a negative implication imposed by case law" instead of "an express statutory prohibition" like the 4-R Act, we should scrutinize taxes that might violate the 4-R Act more rigorously than taxes that might violate the dormant Commerce Clause. Absurdity ensues, CSX asserts, if it is "easier to justify a facially discriminatory tax that violates a federal statute than it is to justify a facially discriminatory tax that violates the dormant Commerce Clause." What?

The posited result does not strike us as "truly absurd" — or even absurd without an adverb, for that matter. Id. Although the dormant Commerce Clause has been criticized,[7] the Supreme Court has

[7] See, e.g., Comptroller of the Treasury of Md. v. Wynne, 575 U.S. __, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) ("[T]he negative Commerce Clause is a judicial fraud . . . .");

held that it is grounded in the Constitution. See Fulton Corp., 516 U.S. at 330, 116 S. Ct. at 853 ("The constitutional provision of power '[t]o regulate Commerce' . . . has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority."). The economic protectionism that doctrine seeks to curb is a problem that "plagued relations among the Colonies and later among the States under the Articles of Confederation." Dep't of Revenue v. Davis, 553 U.S. 328, 338, 128 S. Ct. 1801, 1808 (2008). What seems truly absurd to us is the premise of CSX's assertion, which is that a constitutional doctrine is inherently less important than a statutory provision.

3. The Excise Tax Is Roughly Equivalent to the Sales and Use Tax

Having established that how a state allocates tax revenue is immaterial to whether two taxes are roughly equivalent under § 11501(b)(4), and that the Supreme Court did not direct us to apply the compensatory tax doctrine, we turn to the district court's ruling that the sales and use tax and the excise tax are roughly equivalent.

As an initial matter, the parties contest whether we should compare the rates that rail carriers and motor carriers pay in state taxes, or the combined rate they pay under state plus local taxes. We need not answer that question because the sales and use tax and the excise tax are roughly equivalent

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United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349, 127 S. Ct. 1786, 1799 (2007) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice.").

regardless of whether we consider local taxes. Considering only state taxes, over a recent nine-year period, rail carriers paid $0.0985 per gallon for dyed diesel while motor carriers paid $0.19 per gallon for clear diesel. CSX Transp., 247 F. Supp. 3d at 1250. Accounting for both state and local taxes, rail carriers paid $0.2348 per gallon while motor carriers paid between $0.20 and $0.23 per gallon. Id. During that same period, rail carriers and motor carriers each had a higher state plus local tax burden than the other one did an equal number of times (fifty-seven). Id. at 1246.

We agree with the district court that "roughly equivalent" bears its ordinary meaning and that two taxes are roughly equivalent if the rates they impose approximate one another. See id. at 1248. It does not mean "perfectly equivalent." Because the average rates that rail carriers and motor carriers paid differed only "by some quantity between less-than-half-of-one cent and 3.5 cents" per gallon, favoring one as many times as the other, id. at 1250–51, the district court correctly concluded that the excise tax is roughly equivalent to the sales and use tax. As a result, the excise tax "justifies the motor carrier sales-tax exemption." CSX II, 135 S. Ct. at 1144.

V. THE WATER CARRIER EXEMPTION

We now move from the roads to the waters. The Supreme Court recognized that, unlike the motor carrier exemption, the State could offer no rough equivalency justification for the water carrier exemption because water carriers pay no state taxes at all when they buy or consume diesel to haul freight interstate. Ala. Code §§ 40-23-4(a)(10) (sales

tax exemption), 40-23-62(12) (use tax exemption). The State did, however, offer "other justifications for the water carrier exemption — for example, that such an exemption is compelled by federal law" — and the Court remanded for consideration of those "alternative rationales." CSX II, 135 S. Ct. at 1144.

The district court ruled that the water carrier exemption for interstate shipments does not violate the 4-R Act for two independent reasons. First, the court found that there was no violation because "CSX has suffered no competitive injury from the State's exemption of water carriers from the sales [and use] tax." CSX Transp., 247 F. Supp. 3d at 1255. Second, the court found that because "imposition of a state sales [and use] tax on interstate water carriers would expose the State to liability under the negative Commerce Clause," the exemption for water carriers "is compelled by federal law." Id. at 1252 (citing CSX II, 135 S. Ct. at 1144). We will take those two up in that order.

A. The District Court's Competitive Injury Ruling

There are two problems with the district court's ruling that the water carrier exemption does not violate the 4-R Act because CSX has not shown that the exemption causes it competitive injury. The first problem is that the parties stipulated that water carriers are among "[t]he principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama." Although a district court may set aside an erroneous stipulation where justice requires, see, e.g., Morrison v. Genuine Parts Co., 828 F.2d 708, 709 (11th Cir. 1987), the district court did not suggest that it

thought justice required doing so. Instead, its rationale was that the "stipulation does not equate to a concession that the competition between CSX and water carriers is substantial." CSX Transp., 247 F. Supp. 3d at 1245. We are hard pressed to square a finding that competition between CSX and water carriers is insubstantial with a stipulation that they are "principal competitors," especially where the stipulation distinguishes "[a]ir carriers," which "also are engaged in the transportation of property in interstate commerce in the State of Alabama, but only marginally compete with rail carriers."

And we are supremely reluctant to allow a district court to relitigate a stipulated fact that the Supreme Court relied on for one of its holdings, which is that rail carriers and water carriers are a similarly situated comparison class. CSX II, 135 S. Ct. at 1143 ("[I]n light of [CSX's] complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate . . . .") (emphasis added).

The second problem with the district court's ruling is that it is contrary to the Supreme Court decisions in CSX I and CSX II. While neither of those decisions explicitly held that competitive injury was not required, the two of them combined decided that discriminatory taxation had been shown and that the remaining question to be answered on remand was whether there was sufficient justification for it. CSX I, 562 U.S. at 288 & n.8, 131 S. Ct. at 1109 & n.8 ("[A] state excise tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4)[,]" but the State may "offer[ ] a sufficient justification for declining to

provide the exemption at issue to rail carriers."); CSX II, 135 S. Ct. at 1143–44 (holding that rail carriers and water carriers are similarly situated competitors and remanding for us to determine "whether Alabama's alternative rationales justify its exemption"). Competitive injury may play an important role in antitrust law but under the 4-R Act the lack of it is not a justification for discriminatory taxes.

Instead of putting the burden on the State to justify the difference in taxation, the district court put the burden on CSX to prove "discriminatory effect" or "competitive injury." CSX Transp., 247 F. Supp. 3d at 1255. While the district court was "free to address, as a matter of first impression, those issues not disposed of on appeal," Cox Enters., 794 F.3d at 1271, it was not free to add another element for CSX to prove in order to establish a violation of the Act.[8]

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[8] The State contends that even if proof of injury is unnecessary to establish a violation of the 4-R Act, it is necessary for injunctive relief. That argument goes against the decisions of five of our sister circuits that have held the "irreparable injury" requirement does not apply to 4-R Act claims because the Act authorizes injunctive relief without it where the statutory conditions are satisfied. 49 U.S.C. § 11501(c). See Consol. Rail v. Town of Hyde Park, 47 F.3d 473, 479 (2d Cir. 1995); CSX Transp., Inc. v. Tenn. State Bd. of Equalization, 964 F.2d 548, 551 (6th Cir. 1992); Burlington N. R.R. v. Bair, 957 F.2d 599, 601–02 (8th Cir. 1992); Burlington N. R.R. v. Dep't of Revenue, 934 F.2d 1064, 1074–75 (9th Cir. 1991); Atchison, T. & S.F. Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981). Although we have not addressed this issue in the 4-R Act context, we follow the principle that when "an injunction is authorized by statute and the statutory conditions are satisfied the usual prerequisite of irreparable injury need not be established." Gresham v.

B. The District Court's "Compelled by Federal Law" Ruling

In remanding the case the Supreme Court recognized that if the water carrier exemption were "compelled by federal law," that might be sufficient justification. CSX II, 135 S. Ct. at 1144. The district court concluded that "imposition of a state sales [and use] tax on interstate water carriers would expose the State to liability under the negative Commerce Clause," and for that reason, "the exemption for water carriers 'is compelled by federal law.'" CSX Transp., 247 F. Supp. 3d at 1252 (citing CSX II, 135 S. Ct. at 1144).

As an initial matter, we disagree with the district court that the water carrier exemption is "compelled by federal law" merely because the "imposition of a state sales [and use] tax on water carriers would expose the State to liability" under the Commerce Clause. Id. (emphases added). For 4-R Act justification purposes exposure to a risk is not compulsion; compulsion requires legal obligation.

1. The Negative Commerce Clause

The Supreme Court applies a four-prong test to determine whether a state tax violates the Commerce Clause. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079 (1977). A state tax survives Commerce Clause scrutiny if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to

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Windrush Partners, 730 F.2d 1417, 1423 (11th Cir. 1984) (citations and alteration omitted).

services provided by the State." Id. All four requirements must be met. The district court's ruling that the Commerce Clause compels the water carrier exemption was based on the fourth requirement alone, CSX Transp., 247 F. Supp. 3d at 1251–52, and the State does not contend that any of the first three were not met. As a result, we consider only the "fairly related" or fourth requirement.[9]

The district court ruled that if imposed on water carriers the sales and use tax would not be fairly related to services that the State provides them because Alabama "provides virtually no services to interstate water carriers." Id. at 1252. It found that Alabama "spends no tax dollars on river maintenance projects" or "commercial water traffic regulation or enforcement." Id. It is, instead, the federal government that "funds all river dredging and lock and dam maintenance" and "spends monies licensing, policing, and maintaining commercial water traffic." Id. Because "water carriers impose

[9] We have not previously applied the Complete Auto test because the Eleventh Amendment and the Tax Injunction Act ordinarily prevent lower federal courts from deciding constitutional challenges to state taxes. See Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 962 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."); 28 U.S.C. § 1341 ("The district courts shall not enjoin . . . collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). But neither the Eleventh Amendment nor the Tax Injunction Act forbids us from deciding whether imposing the sales and use tax on water carriers would violate the Commerce Clause. The Supreme Court's remand instructions require us to decide that hypothetical case within this case to determine whether the water carrier exemption is "compelled by federal law." CSX II, 135 S. Ct. at 1144.

virtually no financial burden on the State" and "may never contact state land," the district court concluded that water carriers could challenge the sales and use tax as not "fairly related to services provided [them] by the State." Id. at 1251–52. Because imposition of the sales and use tax "would expose the State to liability under the negative Commerce Clause," the district court ruled the water carrier exemption is "compelled by federal law" under the CSX II decision. Id. at 1252.

That ruling doesn't hold water. The Supreme Court rejected similar reasoning in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–21, 101 S. Ct. 2946, 2955 (1981). That decision involved a Montana severance tax of up to 30% imposed on coal extracted in the state for use outside it. Id. at 612–13, 101 S. Ct. 2951. The coal producers argued that the "amount collected under the Montana tax is not fairly related to the additional costs the State incurs because of coal mining."[10] Id. at 620, 101 S. Ct. at 2955. The Court was not persuaded, explaining that the fourth prong of the Complete Auto test does not require "that the amount of general revenue taxes collected from a particular activity . . . be reasonably related to the value of services provided to the activity." Id. at 622, 101 S. Ct. at 2956. "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." Id.

[10] The coal producers asserted that the "legitimate local impact costs [of coal mining] . . . might amount to approximately 2 [cents] per ton, compared to present average revenues from the severance tax alone of over $2.00 per ton." Id. at 620 n.10, 101 S. Ct. at 2955 n.10.

(internal citations omitted); see also Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 199, 115 S. Ct. 1331, 1345 (1995) ("The fair relation prong of Complete Auto requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity.").

Instead, the fourth prong requires only that "the measure of a tax [be] reasonably related to the taxpayer's activities or presence in the State," in which case "the taxpayer will realize, in proper proportion to the taxes it pays, the only benefit to which the taxpayer is constitutionally entitled: that derived from his enjoyment of the privileges of living in an organized society." Commonwealth Edison, 453 U.S. at 628–29, 101 S. Ct. at 2959 (quotation marks and alterations omitted). Those privileges are the "services" to which a tax must be "fairly related" for Commerce Clause purposes, and they include "police and fire protection," public roads and mass transit, and other "advantages of a civilized society." Id. at 624, 101 S. Ct. at 2957. Applying that analysis, the Court had "little difficulty" upholding the Montana tax. Id. at 626, 101 S. Ct. at 2958 ("Because [the tax] is measured as a percentage of the value of the coal taken, the Montana tax is in proper proportion to appellants' activity within the State and, therefore, to their consequent enjoyment of the opportunities and protections which the State has afforded in connection with those activities.") (quotation marks omitted).

Under the Commonwealth Edison standard, a tax on water carriers would be "fairly related" to the services provided by the State. It makes no difference that the federal government, instead of the State, foots the bill for barge-related services like river maintenance projects and commercial water traffic. The standard is unconcerned with "the services provided to the taxpayer on account of the activity being taxed." Jefferson Lines, 514 U.S. at 199, 115 S. Ct. at 1345. Instead, the services to which a tax must be "fairly related" are the "privileges of living in an organized society." Commonwealth Edison, 453 U.S. at 629, 101 S. Ct. at 2959.

Water carriers purchasing or using diesel fuel in Alabama benefit from those privileges. That is doubtless true for the two categories of water carriers that, according to the record, regularly make landfall in Alabama. For example, water carriers engaged in "head-to-head competition" with CSX take product from feed mills "located between Decatur[, Alabama] and Guntersville[, Alabama] directly on the river system." Water carriers engaged in "river-to-truck competition" transport product from out of state to Albertville, Alabama and Ivalee, Alabama, where they "transfer [the product] and then truck it into their facilities." Those water carriers benefit from the State's provision of emergency services, access to the judicial system, roads, and other "advantages of civilized society," no matter how often they use those services. See Jefferson Lines, 514 U.S. at 200, 115 S. Ct. at 1346 ("The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's

maintenance of a civilized society, are justifications enough for the imposition of a tax.").

Even for water carriers that "may never contact state land," CSX Transp., 247 F. Supp. 3d at 1252, the fact that they could call upon the State to render aid in case of an emergency or use the state courts to vindicate their rights means that they derive some benefit, however attenuated, from the State's services. An attenuated benefit is all the fourth requirement of the Complete Auto test requires, which makes it unsurprising that the Supreme Court has never invalidated a state tax under that requirement. See, e.g., Jefferson Lines, 514 U.S. at 200, 115 S. Ct. at 1346. Justice Blackmun may have been right when he said that Commonwealth Edison had gone so far as to "emasculate" the fairly related requirement of the Complete Auto test, 453 U.S. at 645, 101 S. Ct. at 2967–68 (Blackmun, J., dissenting), but whether it is an emasculator or not, Commonwealth Edison is the law and we follow it.

The question then is whether the "measure of the tax [is] reasonably related to the extent of [water carriers'] contact" with the state. Commonwealth Edison, 453 U.S. at 626, 101 S. Ct. at 2958. Because the severance tax in Commonwealth Edison was "measured as a percentage of the value of the coal taken," the Supreme Court held that it was "in proper proportion to appellants' activities within the State." Id. Likewise, if applied to water carriers hauling freight interstate Alabama's sales and use tax, which is proportionate to the amount of diesel fuel bought or used in the state, would also be "in proper proportion to [the water carrier's] activities within the state." Id.; see Ala. Code §§ 40-23-2(1), 40-

2361(a). As a result, imposing the sales and use tax on water carriers would not offend the Commerce Clause and exempting those carriers from the tax cannot be justified on the basis that it would.[11] See CSX Transp., 247 F. Supp. 3d at 1252.

2. The Maritime Transportation Security Act

The State points to another federal law as compelling the water carrier exemption, arguing that taxing them could expose it to suit under the Maritime Transportation Security Act, 33 U.S.C. § 5(b). That statute provides:

> No taxes . . . shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under

[11] The State and district court cite an Illinois appellate court decision that applied the fourth requirement of Complete Auto more strictly. See CSX Transp., 247 F. Supp. 3d at 1252 n.18 (citing Am. River Transp. Co. v. Bower, 813 N.E.2d 1090, 1094 (Ill. App. Ct. 2004) (finding "no fair relation between the use tax and the benefits that [the tugboat company] received from the state for the use by its line haul tugboats of the navigable waterways of the United States")). We are not bound by one decision of one state appellate court about whether one tax imposed on one type of boat violates the Commerce Clause. See Lewis v. Casey, 518 U.S. 343, 379 n.7, 116 S. Ct. 2174, 2194 n.7. And for reasons we have discussed, we agree with Judge Bowman's dissenting observation in Bower, 813 N.E.2d at 1094–95, that the majority in that case took too strict a view of the fourth requirement.

> the right to freedom of navigation on those waters[.]

33 U.S.C. § 5(b). Taxing water carriers would expose it to suit for violating § 5(b), the State asserts, because the sales and use tax would be a "tax . . . collected from any vessel or other water craft, or from its passengers or crew by [a] non-Federal interest." Id. But, as we have already explained, exposure to a lawsuit alone is not compulsion under CSX II.

And any such a lawsuit would not, in our view, succeed. The State bases its fears primarily on Kittatinny Canoes, Inc. v. Westfall Township, No. 183 CV 2013, 2013 WL 8563483 (Pa. Com. Pl. May 6, 2013), and Moscheo v. Polk County, No. E2008-01969-COA-R3-CV, 2009 WL 2868754 (Tenn. Ct. App. Sept. 2, 2009). Both decisions struck down under § 5(b) state taxes on recreational activities on waterways. Kittatinny, 2013 WL 8563483, at *9; Moscheo, 2009 WL 2868754, at *1. The district court found those decisions "not helpful" because they involved the taxation of passengers of vessels on navigable waters. CSX Transp., 247 F. Supp. 3d at 1253. In rejecting this proffered justification for exempting the water carriers from the sales and use tax, the district court ruled that § 5(b) does not apply to taxes imposed on things other than "the vessel, its passengers, or crew." Id. We agree.

If as the State suggests § 5(b) of the Maritime Transportation Security Act invalidates the sales and use tax — which applies to diesel fuel because it is "tangible personal property," see Ala. Code § 40-23-2(1) — it would forbid states from taxing the purchase of any tangible property for use on or by a

"vessel . . . its passengers[,] or crew," 33 U.S.C. § 5(b). Under that view states could not collect sales or use taxes when a boat purchases porcelain pitchers for a dinner cruise or mattresses for the berths or any other property for any other reason. Water carriers would become floating tax free zones.

Properly construed, the Act forbids taxes imposed on the vessel itself, or on its crew members themselves, or on the passengers themselves — not taxes imposed on property purchased for use on or by a vessel, or by its crew, or by its passengers. See, e.g., Commercial Barge Line Co. v. Dir. of Revenue, 431 S.W.3d 479, 484 (Mo. 2014) (holding that there was no violation of the Act where the state "assess[ed] sales and use tax on the goods and supplies delivered to the Taxpayers' towboats while they [were] in Missouri"); Reel Hooker Sportfishing, Inc. v. Dep't of Taxation, 236 P.3d 1230, 1232 (Haw. Ct. App. 2010) ("33 U.S.C. § 5(b) does not preempt the assessment of [Hawaii's general excise tax] because [it] is a tax assessed on gross business receipts for the privilege of doing business in Hawai'i, and is not a tax on their vessels or passengers.").

If exempting water carriers from the sales and use tax that rail carriers pay is to be justified, it must be on some basis other than the Commerce Clause or the Maritime Transportation Security Act. The State has some more possibilities.

C. Other Justifications

The State advances two more arguments to justify the water carrier exemption: (1) "States can seek to avoid double taxation"; and (2) "States can charge a higher tax on a party that imposes higher

costs on the State than its comparison class does." Neither argument persuades us.

1. Double Taxation

The State argues that the water carrier exemption is justified because water carriers pay $0.29 per gallon in federal tax in exchange for barge-related services. 26 U.S.C. § 4042(b). Because water carriers benefit from "federal, not state, services," the State asserts that it is justified in "allowing water carriers to be taxed solely by the federal government" to avoid "double taxation."

The State cites only one decision in support of its avoiding double taxation argument. See Lawrence v. State Tax Comm'n, 286 U.S. 276, 279, 52 S. Ct. 556, 556 (1932). The Lawrence decision upheld a Mississippi income tax that exempted out-of-state income of corporations but not of individuals. The Court held that "a rational basis for the distinction made[ ] is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both." Id. at 284, 52 S. Ct. at 558–59 (emphasis added). Notably, the State omitted the part of the quotation to which we have added emphasis. With that important language out of mind, the State suggests that Lawrence stands for the proposition that a state's interest in "avoiding double taxation" includes not taxing income or activities that the federal government taxes. But the decision cannot stand for that proposition because the case did not involve it.

Lawrence involved a state's effort to avoid imposing two taxes on the same corporate income — once as the income comes into the corporation and again as that same income goes out as dividends. Id. at 284, 52 S. Ct. at 558–59. It did not involve, as this case does, a state tax and a federal tax that are of different types and serve different purposes. See 26 U.S.C. § 4042(b); Ala. Code § 40-23-2(1). For that reason, imposing the sales and use tax on water carriers would not qualify as "double taxation" under Lawrence or any of the three dictionary definitions of that term.[12]

And even if imposing a state tax and a federal tax that are measured in different ways and used for different purposes did qualify as "double taxation," the State offers no evidence that it has "adopted generally a policy of avoiding double taxation," which is necessary for two taxes to fall under Lawrence. See 286 U.S. at 284, 52 S. Ct. at 558. Indications are that it does not have a policy of not taxing what the federal government taxes. For example, the State imposes an excise tax on diesel fuel that motor carriers purchase even though the federal government does too. See Ala. Code § 40-17-325(a)(2); 26 U.S.C. § 4081. The State cannot treat a federal and a state tax as one tax if by land, two if by sea. And, of course, the federal income tax has not dissuaded the State from taxing income. See Ala. Code § 40-18-2(a). For these reasons, the State's

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[12] See Double taxation, Black's Law Dictionary (10th ed. 2014) ("1. The imposition of two taxes on the same property during the same period and for the same taxing purpose. 2. The imposition of two taxes on one corporate profit . . . 3. Int'l law. The imposition of comparable taxes in two or more states on the same taxpayer for the same subject matter or identical goods.").

reliance on Lawrence is misplaced and the federal excise tax on diesel fuel does not justify the exemption of water carriers from the State's sales and use tax on diesel fuel used for the interstate shipment of freight.

2. Disparate Burdens

The State also argues that the water carrier exemption is justified because water carriers "impose virtually no financial burden on the State" while rail carriers impose significant costs. The disparity in burdens, the State asserts, justifies the disparity in taxation.

The State relies on Oregon Waste, 511 U.S. 93, 114 S. Ct. 1345. That is a dormant Commerce Clause decision invalidating a regulatory scheme that imposed a "purportedly cost-based surcharge" of $0.85 per ton on the disposal of waste generated in-state and a $2.25 per ton surcharge on the disposal of waste from out of state. Id. at 95–96, 114 S. Ct. at 1348. Oregon did not argue that out-of-state waste imposed higher costs, nor did it contend it had considered any cost disparity when it fixed the surcharge rates. Id. at 101 & n.5, 114 S. Ct. at 1351 & n.5. In a footnote, the Supreme Court theorized that if out-of-state waste imposed higher costs on the State, the scheme would pass muster because the surcharge disparity would not be based impermissibly on the waste's origin but would instead be calibrated to cost. Id.

The Oregon Waste decision does not control here. The Court's footnote musing about what might have been if something were different is doubtless dicta. See Edwards v. Prime, Inc., 602 F.3d 1276, 1298

(11th Cir. 2010). And in any event, Oregon Waste is oceans apart from this case. Because that case involved a dormant Commerce Clause challenge, the issue was whether a state law impermissibly discriminates against out-of-staters. See, e.g., Maine v. Taylor, 477 U.S. 131, 137–38, 106 S. Ct. 2440, 2446–47 (1986). Its holding does not apply to a tax that does not discriminate against out-of-state economic interests.

Even if we could draw on dormant Commerce Clause decisions in deciding this 4-R Act case, the Oregon Waste dicta does not shed light on the sales and use tax at issue here. In that dicta the Court noted that evidence about disparate costs might salvage a facially discriminatory "cost-based surcharge." 511 U.S. at 95, 101 n.5, 114 S. Ct. at 1348, 1351 n.5. But a sales and use tax is not "cost-based" — it is not calibrated to account for varying burdens. See CSX Transp., 247 F. Supp. 3d at 1254. Instead, it is a flat-rate, 4% general tax imposed without reference to burdens generated by the activity and borne by the State. There is no evidence that the State accounted for disparate burdens when it set a tax rate of 4% for rail carriers and 0% for water carriers. As a result, the Oregon Waste Court's conjecture that a cost disparity might justify a proportionally disparate "cost-based surcharge" does not mean that one might justify exempting water carriers from a flat-rate tax of general applicability.

Because the sales and use tax does not account for the relative burdens imposed by taxpayers, and because dicta from the dormant Commerce Clause decision in Oregon Waste does not control the result

in this 4-R Act case, the State's "disparate burdens" argument does not justify the water carrier exemption. Having concluded that the water carrier exemption is not "compelled by federal law" and that neither of the State's "alternative rationales" justifies the water carrier exemption, see CSX II, 135 S. Ct. at 1144, we hold that Alabama's sales and use tax violates the 4-R Act.

VI. CONCLUSION

As to motor carriers, we agree with the district court that the excise tax is roughly equivalent to the sales and use tax because the average rates that rail carriers and motor carriers have paid differed "by some quantity between less-than-half-of-one cent and 3.5 cents" per gallon. CSX Transp., 247 F. Supp. 3d at 1250– 51. As a result, the excise tax justifies the motor carrier exemption from the sales and use tax. See CSX II, 135 S. Ct. at 1144.

As to water carriers, their exemption is not "compelled by federal law." CSX Transp., 247 F. Supp. 3d at 1252. Although imposing the sales and use tax on water carriers transporting freight interstate might "expose" the State to a lawsuit under federal law, compulsion requires more than exposure. The water carrier exemption is "compelled by federal law" only if imposition of the sales and use tax would violate federal law. In our view, it would not. And we are unpersuaded by the State's "alternative rationales" for the water carrier exemption. See CSX II, 135 S. Ct. at 1144.

CSX is entitled to relief from the State's discrimination that violates the 4-R Act. The relief the district court fashions should leave the State some discretion in remedying the tax discrimination. For example, the State could repeal the water carrier exemption, in which case water carriers and rail carriers would both pay the sales and use tax when they buy or use diesel fuel for interstate hauls. Or the State could retain the water carrier exemption and exempt rail carriers when they buy or use diesel fuel for interstate hauls. Either way, the State would not be imposing a tax "that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4).[13]

As long as the State retains the sales and use tax exemption for diesel fuel used by water carriers "engaged in foreign or international commerce or in interstate commerce," Ala. Code §§ 40-23-4(a)(10), 40-23-62(3), the 4-R Act forbids it from imposing the sales and use tax on diesel fuel used by rail carriers "engaged in foreign or international commerce or in interstate commerce." Our opinion should be read with that imperative in mind.

We **REVERSE** the judgment of the district court, hold that the State's sales and use tax on the purchase or use of diesel fuel for interstate shipment

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[13] The State's rehearing petition noted that the day after it was filed would be "this litigation's Tenth Anniversary" and predicted that "[n]o one will celebrate" it. Perhaps there was celebration by those attorneys who were paid by the hour. We have not been, so our celebration is limited to the fact that we have done our duty of deciding an appeal involving this dispute (once again). We have done so with the hope that this litigation is one step closer to the end of the line. It's time to put this one in the shed.

of freight violates the 4-R Act, and **REMAND** to the district court with instructions to enter declaratory and injunctive relief in favor of CSX consistent with this opinion.[14]

[14] Given our revisions, the mandate in this appeal will not be issued for 21 days after the issuance of this opinion, which will allow either party to file a new petition for rehearing, to the panel or for en banc review, if it wishes to do so. Cf. Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1248 (11th Cir. 2017).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 2:08-cv-655-AKK
ALABAMA DEPARTMENT OF REVENUE, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

Abdul K. Kallon, UNITED STATES DISTRICT JUDGE

CSX Transportation, Inc. filed this action against the Alabama Department of Revenue and Julie P. Magee, in her official capacity as Commissioner of the Department (collectively, "the State" or "Alabama"), seeking relief under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 (the "4-R Act"). Doc. 1. The 4-R Act, enacted in part to "foster competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801(b)(2), prohibits states and localities from engaging in discriminatory taxation of railroads. *See* 49 U.S.C. §

11501(b). CSX contends that Alabama's taxing scheme is discriminatory because the State exempts motor carriers and water carriers from the diesel fuel sales tax it requires railroads to pay. Accordingly, CSX seeks to enjoin the State from collecting sales tax on CSX's diesel fuel purchases pursuant to § 11501(b)(4).

After considering the evidence presented at trial and the parties' post-trial briefs, for the reasons provided herein, the court concludes that the State has not violated the 4-R Act and that this action is due to be dismissed with prejudice.

I. RELEVANT PROCEDURAL HISTORY

The court initially dismissed CSX's complaint based on the Eleventh Circuit's determination, in a similar case, that "the Alabama tax statute . . ., with its exemptions for motor and water carriers, does not offend the 4-R Act so long as the tax is generally applicable and does not target railroads within Alabama." *See* doc. 22 (citing *Norfolk S. Ry. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1316 (11th Cir. 2008)). The Eleventh Circuit, "bound by the panel's decision in *Norfolk Southern*," affirmed, 350 F. App'x 318 (2009). The Supreme Court reversed, stating that "CSX may challenge Alabama's sales and use taxes as 'tax[es] that discriminat[e] against . . . rail carrier[s]' under § 11501(b)(4),"[1] and remanded for

[1] As the Court explained,

> To charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter. That discrimination continues (indeed, it increases) if

further proceedings. 562 U.S. 277, 296 (2011) ("*CSX I*") (alterations and ellipsis in original).

Consistent with the remand from the Eleventh Circuit for this court to conduct further proceedings in light of *CSX I*, 639 F.3d 1040, 1041 (11th Cir. 2011), this court conducted a bench trial in April 2012. After the trial, this court held that: (1) Alabama's motor carrier exemption was not discriminatory, because motor carriers pay a fuel-excise tax at a rate that is "essentially the same" as the sales tax rate, doc. 71 at 23; and (2) CSX failed to demonstrate a discriminatory impact from the State's disparate tax treatment of rail carriers vis-à-vis water carriers, *id.* at 30. CSX appealed, and the Eleventh Circuit reversed, holding that Alabama could not justify the disparate sales tax treatment by arguing that another tax, such as the motor fuel-excise tax, "level[s] the playing field." 720 F.3d 863, 871 (11th Cir. 2013).[2]

On the State's petition, the Supreme Court again agreed to hear the case. 134 S. Ct. 2900 (2014). The Court reversed in part,[3] stating, "[t]here is simply no

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> the State takes the favored group's rate down to 0%. And that is all an exemption is.

CSX I, 562 U.S. at 287.

[2] The Eleventh Circuit did not examine the State's other justifications for the water carrier exemption, but instead stated that "water carriers, who pay not a cent of tax on diesel fuel, are the beneficiaries of a discriminatory tax regime." 720 F.3d at 871.

[3] The Court held that "[t]he Eleventh Circuit properly concluded that, in light of CSX Transportation's complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate,

discrimination when there are roughly comparable taxes." ___U.S.___, 135 S. Ct. 1136, 1144 (2015) ("*CSX II*"). The Court opined that "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory," and remanded the action for consideration of "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption," and whether the State's "other justifications for the water carrier exemption," which the "Eleventh Circuit failed to examine," were sufficient. *Id.*

The Eleventh Circuit remanded the action to this court for further proceedings consistent with *CSX II*. 797 F.3d 1293, 1294 (11th Cir. 2015). This court conducted a second bench trial, and, with the benefit of the parties' post-trial briefs, *see* docs. 154; 155; 156, this matter is ripe again for adjudication.

II. SCOPE OF THE REMAND

Before proceeding to the analysis, this court must address the scope of the remand, because the law of the case doctrine bars this court from considering issues the appellate courts have already decided, even if only by necessary implication. *See Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994). However, this court "is free to address, as a matter of first impression, those issues not disposed of on appeal." *Cox Enters., Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1271 (11th Cir. 2015).

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and differential treatment vis-à-vis that class would constitute discrimination." *CSX II*, 135 S. Ct. at 1143.

Relevant here, the Supreme Court directed the Eleventh Circuit to consider "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption," and to determine the sufficiency of the State's "alternative rationales [to] justify its [water carrier] exemption." *CSX II*, 135 S. Ct. at 1144. At trial, the State presented evidence which, it claims, "prove[s] every theory to deny CSX relief that was mentioned in the Supreme Court's majority opinion in *CSXT II*, in Justice Thomas and Ginsburg's dissenting opinion, and/or by a Justice during oral argument." Doc. 155 at 7 (emphasis omitted). In other words, the State introduced evidence not only to show sufficient justification, but also to prove: that any "discrimination" is self-imposed through rail carriers' practice of purchasing dyed, rather than clear, fuel; that rail carriers and water carriers are not "similarly situated"; and that CSX has sustained no competitive injury through the State's exemption of water carriers from the sales tax.

CSX contends that these issues are outside the scope of remand. CSX's Br. at 7.[4] Specifically, as to the clear fuel issue, CSX points out that Justice Thomas discussed "self-imposed discrimination" in his dissent, *see CSX II*, 135 S. Ct. at 1145 (Thomas, J., dissenting) ("The only relevant good exempted from the tax is diesel on which the motor fuel tax has been paid, . . . and no provision of law prevents rail

[4] Page citations to the parties' post-trial briefs refer to the original (as opposed to the electronically-stamped) pagination in order to provide consistency between the State's brief, doc. 155, and CSX's brief, which CSX did not file electronically.

carriers from buying such diesel."); *id.* at 1149 ("As far as I can tell, the rail carriers use dyed diesel fuel that is exempt from the motor fuel tax — and therefore subject to the sales and use taxes — as a matter of choice rather than necessity."). According to CSX, the majority's silence on this issue amounts to "an unmistakable rejection of the dissent's clear fuel argument that this Court cannot review further." CSX's Br. at 14. This court declines to find that the majority decided this issue through silence.[5]

Turning next to the second issue regarding water carriers, although the State agrees that the Court impliedly decided that rail carriers and water carriers are similarly situated through its declaration (based on CSX's "complaint and the parties' stipulation") that "differential treatment" vis-à-vis rail carriers and a "comparison class of competitors consisting of motor carriers and water carriers" would "constitute discrimination," *CSX II*, 135 S. Ct. at 1143; *see* State's Reply Br. at 3, the State nonetheless asserts that this court may decide whether rail carriers and water carriers are actually similarly situated. According to the State, the July 2016 trial "produce[d] substantially different evidence" as to this issue, which triggers an

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[5] *See Gonzalez v. Arizona*, 624 F.3d 1162, 1200 (9th Cir. 2010) ("[I]t is peculiar indeed to impute a *holding* to the majority on an issue it never addressed, because it chose not to follow the contrary reasoning of the dissent. A dissent has no precedential value, and the majority is surely not obligated to address every argument made there. It is obviously dangerous to infer that the majority ruled on a matter as to which it never expressed an opinion. By that peculiar reasoning, a majority can be held to have decided an issue . . . when it never said a word on the subject.") (emphasis in original, citation omitted).

exception to the law of the case doctrine. State's Br. at 25–26 (quoting *Mega Life & Health Ins. Co. v. Pienozek*, 585 F.3d 1399, 1405–06 (11th Cir. 2009)).

The "substantially different evidence" exception "is inapplicable where[,] by the prior appeal[,] the issue is not left open for decision." *See This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1285 (11th Cir. 2006) (quoting *Nat'l Airlines, Inc. v. Int'l Assoc. of Machinists & Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970)). Here, however, in response to the State's argument that "resolution" was not appropriate, Eleventh Circuit case no. 1214611, State's Br. at 16, and the State's request that the Eleventh Circuit remand the action for this court "to hold hearings and make findings about interstate water carriers," *id.*, the Circuit remanded. Based on this procedural history, the court finds that the Circuit left the "similarly situated" issue open for decision.

The final issue of contention regarding the scope of the remand centers on the *de minimis* competition/lack of competitive injury issue. The Supreme Court did not decide this issue. Instead, it remanded this action for examination of the State's "other justifications for the water carrier exemption." *CSX II*, 135 S.Ct. at 1144. Although CSX correctly points out that the State stipulated that trucks and water carriers are CSX's "principal competitors," doc. 137 at 3, this stipulation does not equate to a concession that the competition between CSX and water carriers is substantial. *See* State's Reply Br. at 11. Therefore, because this court is "free to address, as a matter of first impression, those issues not disposed of on appeal," *Cox*, 794 F.3d at 1271, and to

avoid another remand in the event the Circuit sides with the State on the scope of the current remand, the court will make findings and enter legal conclusions on this issue based on the evidence.

III. FINDINGS OF FACT[6]

The Alabama Department of Revenue administers and collects taxes within the State, including sales and use taxes. Doc. 137 at 1. The State levies a generally-applicable sales tax on the gross proceeds from "the business of selling at retail any tangible personal property whatsoever" at "an amount equal to four percent . . . ." Ala. Code §§ 40-23-2(1), 40-23-61(a) (1975).[7] Rail carriers pay this sales tax when they purchase dyed diesel. However, when rail carriers purchase clear diesel, like motor carriers, they instead pay a 19¢ per gallon fuel-excise tax and are exempted from the sales tax. Trans. 36–38.[8]

From a mechanical standpoint, CSX trains can operate on dyed or clear diesel. Trans. 17, 22, 540. CSX's fuel suppliers sell both types, and the trucks that deliver CSX's fuel are equipped to transport either type. Trans. 552. Nonetheless, the use of dyed diesel in railroad locomotives is a "decades"-long

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[6] The State's motion *in limine*, doc. 125, is **GRANTED** as to state tax expenditures and taxes on items other than diesel fuel, and **DENIED** as to local taxes on the sale or use of diesel fuel.

[7] Additionally, counties and municipalities may impose sales and use taxes that correspond to, and parallel the State's. Doc. 137 at 2–3; Ala. Code §§ 11-3-11.2, 11-51-200 through 11-51-204, 40-12-4 (1975).

[8] Citations to the transcript refer to docs. 138–141.

industry practice, recognizing a traditional distinction between clear diesel (used for highways) and dyed diesel (used for off-highway purposes). Trans. 532. CSX would encounter various administrative difficulties if it attempted to transition back-and-forth between the two types — based on the fluctuating price of fuel — in an effort to optimize its tax burden. Trans. 526–36.

Motor carriers and water carriers are CSX's principal competitors in the transportation of property in interstate commerce in Alabama.[9] Doc. 137 at 3. Motor carriers use clear diesel. *Id.* As a result, the State effectively exempts motor carriers from sales and use taxes on their fuel. *Id.* Instead, motor carriers pay the 19¢ per gallon fuel-excise tax. *Id.* at 5. On average, clear diesel users (*i.e.*, motor carriers and CSX for its vehicles) and dyed diesel users (*i.e.*, rail carriers) paid the following per gallon taxes from January 2007 through February 2016:

	State	**State + Local**
Undyed diesel fuel-excise tax	19¢	23¢[10]
Dyed diesel sales tax	9.85¢	23.48¢

[9] "Motor carriers" refers to on-highway motor carriers of property in interstate commerce. Doc. 137 at 3. "Water carriers" refers to carriers of property in interstate commerce by ships, barges, and other vessels. *Id.*

[10] *See infra* note 15.

State's Exs. 1–2. Moreover, in the 114 months between January 2007 and February 2016, the two taxes exceeded each other at an equal rate, *i.e.*, 57 times each. State's Ex. 2.

Water carriers are exempted from both types of taxes for their diesel fuel. Doc. 137 at 3. Instead, water carriers pay a 29.1¢ per gallon federal tax on fuel used in a vessel in commercial waterway transportation, with 29.0¢ of that amount earmarked for the Inland Waterways Trust Fund. 26 U.S.C. § 4042(b).

In contrast to rail carriers and motor carriers, water carriers impose virtually no financial burden on the State. The federal government funds and performs all river dredging and lock and dam maintenance projects. *See* State's Ex. 44 at 73– 75; Trans. 63, 96–97, 130–34, 149, 348, 363, 371. Half of the cost of construction and rehabilitation projects on Alabama's inland waterways is paid out of the Inland Waterways Trust Fund, while funds from the United States Treasury cover the remaining half. 26 U.S.C. § 9506(c); State's Ex. 44 at 85–89. The State also bears no burden stemming from accidents involving water carriers. Specifically, from 2004 to 2013, no interstate water carrier collided with an Alabama citizen; however, there were 703 "train-involved" automobile accidents in Alabama, resulting in 92 deaths and 316 casualties. State's Ex. 5 at 26. The Alabama Department of Transportation ("ALDOT"), the Alabama Department of Environmental Management ("ADEM"), and the Alabama Law Enforcement Agency ("ALEA") expended state funds responding to and investigating these incidents involving rail carriers. Trans. 69–70. The State does

not budget funds for commercial water traffic regulation or enforcement. Trans. 124, 149.

Lastly, although the parties stipulated that water carriers are one of CSX's two principal competitors in Alabama, the evidence showed a lack of substantial competition between water carriers and CSX. For example, in 2014, CSX's top five commodities shipped into or from Alabama were coal (36.7%), minerals (12.1%), agriculture (9.1%), forest (8.9%), and intermodal (8.5%). CSX's Ex. 50 at 5. In the largest category for CSX's business in Alabama, water carriers offer no competition. Specifically, CSX makes two interstate coal shipments in Alabama: the first from Central Appalachia to Birmingham, Alabama, and the second from Oak Grove, Alabama to Chicago, Illinois. CSX's Exs. 39, 44; Trans. 645–47, 674–67, 683–849. Water carriers do not haul coal from Central Appalachia to Birmingham, Trans. 694, and CSX only competes with motor carriers to haul coal along that route, Trans. 663, 665. Water carriers also provide no competition for the transportation of coal to Chicago — CSX competes with Norfolk Southern Railway to haul coal along this route. Trans. 687. The only competition provided by water carriers is in the agricultural products sector, where CSX competes with water carriers to ship between 50,000 and 100,000 carloads of agricultural products per year from Indiana, Ohio, and Illinois to locations in North Alabama. Trans. 597–602, 614–22.

IV. CONCLUSIONS OF LAW

Based on the findings of fact and the relevant law, the court examines the State's clear fuel argument and the State's proffered justifications for

any purported disparate tax treatment of rail carriers vis-à-vis motor carriers and water carriers, and makes the following conclusions of law.

A. The Alleged Discrimination is Self-Imposed Based on CSX's Decision to Purchase Dyed Diesel Rather than Clear Diesel for its Trains

It is undisputed that CSX's locomotives can operate on clear diesel. Moreover, if CSX purchases this fuel, Alabama will subject CSX to the same fuel-excise tax as motor carriers. *See* Trans. 17, 22, 36–38, 540. Consequently, the State asserts that any purported discrimination in its taxing scheme is self-imposed. CSX contends that the State's contention is unrealistic because of CSX's established practice of purchasing dyed fuel and the administrative burdens CSX would encounter in attempting to calibrate its usage of dyed and clear diesel to minimize its tax obligations in Alabama. To support its contention, CSX cites *Kraft Gen'l Foods, Inc. v. Iowa Dep't of Revenue*, 505 U.S. 71 (1992), for the proposition that "a state cannot force a taxpayer to conduct his business differently, particularly where the taxpayer's practices 'are supported by legitimate business reasons.'" *See* CSX's Br. at 17. However, because the holding in *Kraft* is narrower than CSX asserts and addresses taxation of foreign commerce,[11]

[11] *See* 505 U.S. at 78 ("Whether or not the suggested methods of tax avoidance would be practical as a business matter, and whether or not they might generate adverse tax consequences in other jurisdictions, we do not think that a State can force a taxpayer to conduct its foreign business through a domestic subsidiary in order to avoid discriminatory *taxation of foreign commerce*.") (emphasis added).

the court declines to construe *Kraft* to support a position that it forecloses the State from asserting that CSX can eliminate the purported discriminatory tax if it changed the fuel type it uses for its locomotives. Accordingly, based on the evidence at trial, because CSX can use clear fuel in its trains, and the State does not mandate that CSX use dyed diesel, this court finds that the State has established that its tax schemes for dyed diesel and clear diesel do not discriminate against rail carriers.

To the extent that this ruling exceeds the scope of the remand, for the reasons explained in section B below, the court finds also that motor carriers' payment of the fuel-excise tax is roughly equivalent to the sales tax on dyed diesel, and that the fuel-excise tax sufficiently justifies any disparate sales tax treatment by the State.

B. The State Provides Sufficient Justification for Exempting Motor Carriers from the Sales Tax

1. The Proper Standard for Comparing the Sales Tax and Fuel-Excise Tax

The court must ascertain as an initial matter what "rough equivalent" means. *See CSX II*, 135 S. Ct. at 1144 (directing the court on remand to examine "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption"). To no surprise, the parties propose different interpretations, with the State contending that "rough equivalent" bears its plain meaning — *i.e.*, that the State only has to show that the fuel-excise tax approximates the sales

tax, *see* State's Br. at 7–9, and CSX countering that the Court's use of the phrase "rough equivalence" is a directive to apply the "compensatory tax doctrine," CSX's Br. at 21. The court disagrees with CSX.

The Court has summarized the "compensatory tax doctrine" as follows:

> Since [*Henneford v.*] *Silas Mason*[, 300 U.S. 577 (1937)], our cases have distilled three conditions necessary for a valid compensatory tax. First, "a State must, as a threshold matter, 'identify . . . the [intrastate tax] burden for which the State is attempting to compensate.'" *Oregon Waste* [*Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93,] 103 [(1994)] (quoting *Maryland v. Louisiana*, 451 U.S. 725, 758 (1981)). Second, "the tax on interstate commerce must be shown roughly to approximate — but not exceed — the amount of the tax on intrastate commerce." *Oregon Waste*, 511 U.S. at 103. "Finally, the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'proxies' for each other." *Ibid.* (quoting *Armco, Inc. v. Hardesty*, [467 U.S. 638, 643 (1984)]).

Fulton Corp. v. Faulkner, 516 U.S. 325, 332 (1996). Although *CSX II* contains no citations to *Faulkner*, *Silas Mason*, *Oregon Waste Systems*, *Maryland*, or *Hardesty*, and the Supreme Court did not include the words "compensatory" or "complementary" in its opinion, CSX insists that the Court prescribed

application of the three-part test by citing *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479–80 (1932). *See* CSX's Br. at 21.

Turning briefly to *Gregg Dyeing*, the case involved a bleachery operator in South Carolina who purchased its gasoline from out-of-state dealers. *Gregg Dyeing*, 286 U.S. at 475. South Carolina exacted a sales tax on the bleachery's purchases, while exempting other taxpayers' out-of-state gasoline purchases. *Id.* at 473. The bleachery sued under the Commerce and Equal Protection Clauses. *Id.* The Court, noting that other taxpayers that purchased or produced gasoline within South Carolina paid the tax at the same rate in relation to gasoline consumption, found no constitutional violation:

> The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. . . . But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional "within its four corners," that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the

> Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute.

Id. at 479–80.[12]

In *CSX II*, the Supreme Court cited *Gregg Dyeing* only once, after this sentence: "Our negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." *CSX II*, 135 S. Ct. at 1143. The Court's negative Commerce Clause jurisprudence (including *Faulkner*, *Silas Mason*, *Oregon Waste Systems*, *Maryland*, and *Hardesty*) addresses scenarios in which a state unjustifiably attempts to "discriminate against or burden the *interstate flow* of articles of commerce," by means of "differential treatment of *in-state* and *out-of-state* economic interests that benefits the former and

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[12] *CSX II* echoed this discussion eighty-two years later:

> CSX claims that because the statutory prohibition forbids "impos[ing] another tax that discriminates against a rail carrier," 49 U.S.C. § 11501(b)(4) — "tax" in the singular — the appropriate inquiry is whether the challenged *tax* discriminates, not whether the tax code as a whole does so. It is undoubtedly correct that the "tax" (singular) must discriminate — but it does not discriminate unless it treats railroads differently from other similarly situated taxpayers without sufficient justification. A comparable tax levied on a competitor may justify not extending the competitor's exemption from a general tax to a railroad. It is easy to display the error of CSX's single-tax-provision approach. Under that model, the following tax would violate the 4-R Act: "(1) All railroads shall pay a 4% sales tax. (2) All other individuals shall also pay a 4% sales tax."

135 S. Ct. at 1143–44 (alteration and emphasis in original).

burdens the latter." *Oregon Waste*, 511 U.S. at 98–99 (emphasis added). This court does not believe this doctrine is implicated here, where the Alabama tax scheme at issue draws no distinction between in-state and out-of-state interests in its exemption of motor carriers from the sales tax rail carriers pay for their dyed fuel. Therefore, in light of the Court's failure to explicitly call for application of the compensatory tax doctrine, and because negative Commerce Clause jurisprudence would not provide a useful framework for comparing rail carriers and motor carriers, this court believes the citation to *Gregg Dyeing* stands for the basic, generalized proposition that courts should screen an allegedly discriminatory tax in context with other aspects of a state's tax code.[13]

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[13] As best as this court can discern, the Supreme Court has only applied the three-part compensatory tax doctrine in negative Commerce Clause cases. *See, e.g.*, *S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160 (1999); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *Or. Waste Sys. v. Dep't of Envt'l Quality*, 511 U.S. 93 (1994); *Associated Indus. v. Lohman*, 511 U.S. 641 (1994); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Maryland v. Louisiana*, 451 U.S. 725, 758 (1981). CSX does not direct this court to cases outside this context in which a court has used the three-part test.

CSX mentions that, in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1803 n.8 (2015), a case the Supreme Court heard during the same term as *CSX II*, the Court described "compensatory" taxes as "rough equivalents imposed upon substantially similar events." CSX's Br. at 24. Thus, according to CSX's logic, because the reference to "substantially similar events" is a component of the three-part test, "roughly equivalent" is a call to apply the three-part test. However, *Wynne* is a negative Commerce Clause case, and

For these reasons, the court will proceed according to the plain language of the remand order, and analyze whether the fuel-excise tax paid by motor carriers is "roughly equivalent" to the sales tax paid by rail carriers for dyed diesel.

2. Application of the "Rough Equivalence" Standard

In a minor departure from this court's 2012 opinion, *see* doc. 71 at 24, the court is persuaded by the State's argument that the relevant comparison is State taxes, rather than State and local taxes. As the State puts it, "the only 'act' Congress precluded Defendants from doing in section (b)(4) was to 'impose another tax that discriminates,'" State's Br. at 5, and "*allowing* a local government to levy a tax is not the same as *imposing* the tax," State's Br. at 5 (emphasis in original). Because no local governmental entities are defendants in this

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CSX omits the quoted language's context: "independent taxes on intrastate and interstate commerce are 'compensatory' if they are rough equivalents imposed upon substantially similar events." 135 S. Ct. at 1803 n.8.

CSX also contends that the Alabama Supreme Court has cited *Gregg Dyeing* as "shorthand" for the compensatory tax doctrine. CSX's Br. at 24. As an initial matter, the Alabama Supreme Court's interpretation of federal common law is not binding on this court. Also, the referenced language states that "[t]he United States Supreme Court has upheld taxing *statutes that appeared to discriminate against interstate commerce* by holding that the state's tax scheme compensated for the tax by a substantially equivalent tax on *intrastate* commerce." *White v. Reynolds Metal Co.*, 558 So. 2d 373, 387 (Ala. 1989) (citing *Gregg Dyeing*, 286 U.S. 472) (emphasis added). Again, the tax scheme at issue here does not distinguish based on a taxpayer's in-state or out-of-state character.

particular lawsuit, and the State has merely allowed such entities, in their discretion, to levy additional taxes, the court concludes that State tax statistics provide the relevant comparison for purposes of this case. *See* State's Reply Br. at 16 ("[T]he State Defendants do not 'impose' the local sales taxes; local officials do. These local officials are independent actors who must be (and have been) sued as independent defendants under the 4-R Act.").[14] Narrowing the inquiry accordingly, during a recent nine-year period, motor carriers paid 19¢ per gallon for undyed diesel to the State, while rail carriers only paid 9.85¢ per gallon for dyed diesel. State's Exs. 1–2. With rail carriers paying, on average, less than half the amount of tax motor carriers pay, the evidence does not support a finding that the State's failure to exempt rail carriers from the sales tax for dyed diesel results in discrimination against the rail carriers.

Alternatively, even if the court again considered both State and local taxes, the taxes are still roughly equivalent. During this same period, motor carriers and rail carriers each had a higher tax burden than the other an equal number of times. State's Ex. 2. As to the actual amount, motor carriers paid 20–23¢[15]

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[14] *But see* CSX's Br. at 31 n.24 ("The authority for cities and counties to impose a local sales tax emanates solely from the state statutes.") (citation omitted); *id.* ("[A]n injunction in this case will bind Alabama localities as 'parties acting in concert or participating with' the named defendants. Fed. R. Civ. P. 65(d)(2).").

[15] CSX cites the 2012 testimony of Steve DuBose (which it did not offer in the 2016 trial), doc. 65 at 64, for the proposition that the State's

per gallon and rail carriers paid 23.48¢ for each gallon of fuel purchased in the state. State's Exs. 1–2. With these averages differing by some quantity between less-than-half-of-one cent and 3.5 cents, the court concludes that the fuel-excise tax motor carriers pay is "roughly equivalent" to the sales tax CSX pays. Accordingly, under the framework the Supreme Court articulated, *see CSX II*, 135 S. Ct. at 1144 (remanding for consideration of "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carriers sales-tax exemption"), the State has shown sufficient justification for the disparate sales tax treatment of rail carriers vis-à-vis motor carriers.[16]

> Exhibit 2 is . . . flawed because it inflates the "average state and local motor fuel" rate by assuming an average rate of 23¢ per gallon (i.e., 19¢ state rate plus 4¢ local rates). CSX's analysis, presented by Vickie Friedman, is far more thorough, taking into account variations in local motor fuel taxes, including the fact that Birmingham (where CSX purchases almost all its fuel) imposes no motor fuel tax at all. Although the motor fuel rate may be 4¢ in Mobile, the majority of local motor fuel taxes (if any) are 1 or 2 cents a gallon.

CSX's Br. 23 n.25. To clarify, DuBose testified that local fuel taxes "range from 1 cent to 6 cents," and that most taxes are "1 or 2 cents a gallon." Doc. 65 at 64. Critically, however, as the State points out, Friedman testified on cross-examination that "there's no way that trucks buy 88 percent of their diesel fuel in [Birmingham]," Trans. 498–500, and that trucks actually purchase their fuel "interspersed all over the State[,] just when they need to fill up," Trans. 501–02. Finally, when accounting for this fact, Friedman testified that the tax rates rail and truck carriers paid were "very similar." Trans. 504.

[16] To support its contention of discrimination, CSX presented evidence at trial regarding how the State spends its sales tax

C. The State Provides Sufficient Justification for Exempting Water Carriers from the Sales Tax

The State also contends that its exemption of water carriers is justified, because: subjecting water carriers to the sales tax would expose the State to liability under various federal laws; water carriers impose virtually no financial burden on the State; and CSX has suffered no competitive injury. The court agrees in part, as explained below.

1. Federal Law

The State contends that the Commerce Clause and federal laws prohibit it from taxing water carriers for the fuel they purchase in Alabama.

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revenue (*i.e.*, public education) as opposed to how it spends the fuel-excise tax revenue (*i.e.*, on highway maintenance). *See, e.g.*, Trans. 28, 107–08, 346; CSX's Ex. 5 ¶¶ 2, 30. Basically, CSX maintains that motor carriers receive a benefit from the taxes they pay and that rail carriers do not. However, CSX's admissions that it benefits from the highway projects and from the funding of Alabama public education belie this contention. *See, e.g.*, State's Exs. 15; 16 at 3–5 (CSX employs more than 1,200 Alabamians and actively recruits students from public universities such as Auburn and Alabama); 19 at 7–10, 14 (CSX benefits from State projects at railroad crossings that ultimately reduce CSX's legal and financial liability for accidents). Moreover, the 4-R Act provides no limitation or instruction for a state's spending of its tax revenues, and the court refuses to read into subsection (b)(4) any directive regarding a state's spending of revenue from "another tax" that it collects from rail carriers, assuming the tax is collected through non-discriminatory means. *See BNSF Ry. Co. v. Tenn. Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015) ("[H]ow Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4-R Act.").

a. The Commerce Clause

In *Complete Auto Transit, Inc. v. Brady*, the Supreme Court stated that its decisions have "sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." 430 U.S. 274, 279 (1977). The Court elaborated on the *Complete Auto* test in *Commonwealth Edison Co. v. Montana*, stating: "Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it." 453 U.S. 609, 623 (1981) (citing *Nat'l Bellas Hess, Inc. v. Ill. Revenue Dep't*, 386 U.S. 753 (1967)). *See also Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 311 (1994) (*Complete Auto* "sufficient nexus" requirement met when taxpayers did business in the state).

Based on this test — in particular the relation to services provided by the state, the State asserts that if it repealed the interstate water carrier exemption, these carriers could claim a violation of *Complete Auto* "because (a) interstate water carriers travel on federal waters and may never contact state land and (b) the federal government, not the State, spends monies licensing, policing,

and maintaining commercial water traffic."[17] State's Br. at 22. Indeed, at trial, the State presented evidence that it provides virtually no services to interstate water carriers. *See, e.g.*, State's Ex. 44 at 73–75; Trans. 96, 131–34, 363, 371 (federal government funds all river dredging and lock and dam maintenance); Trans. 63, 97, 130, 149, 348 (State spends no tax dollars on river maintenance projects); Trans. 124, 149 (State does not fund commercial water traffic regulation or enforcement); State's Exs. 23, 44 at 75; Trans. 122, 363, 371–72 (ALEA's jurisdiction limited to

[17] The State also argues that taxing water carriers would run afoul of the prong that requires a substantial nexus with the State. According to the State, in 2013, 44.2% of Alabama's waterborne shipments were foreign goods either originating or terminating in Alabama, meaning that "nearly half of all shipments carried by Alabama water carriers are subject to international law and thus raise . . . commerce clause issues that never arise in CSX's rail business." State's Br. at 27. The State therefore contends that imposition of the sales tax could result in "multiple international taxation" or undermine the nation's ability to "speak with one voice" when regulating commerce with foreign governments. *Id.* at 28 (citing *Japan Line, Ltd. v. County of Los Angeles*, which stated that "[w]hen a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in Complete Auto, come into play," 441 U.S. 434, 446 (1979), and that "a state tax on the instrumentality of foreign commerce may impair federal uniformity in an area where federal uniformity is essential," *id.* at 448). The court does not have to reach this secondary issue because CSX says that it "does not assert any claims . . . based on the exemption of foreign water carriers, and they are not in the stipulated comparison class as approved by the Supreme Court in *CSX II*." CSX's Br. at 41.

recreational water traffic).[18] In light of the evidence presented at trial, the court finds that the State has established that, under *Complete Auto*, imposition of a state sales tax on interstate water carriers would expose the State to liability under the negative Commerce Clause. As such, the State has established that the exemption for water carriers "is compelled by federal law." *CSX II*, 135 S. Ct. at 1144.

b. The Maritime Transportation Security Act of 2002

The State asserts also that subjecting water carriers to the sales tax could violate the Maritime Transportation Security Act of 2002 ("MTSA"). State's Br. at 23. The MTSA amended section 5 of Title 33 of the United States Code, originally enacted in 1884, which prohibits the levying of tolls or operating charges upon any water craft "passing through any lock, canal, or canalized river" owned by the United States. 33 U.S.C. § 5(a). The MTSA amendment, codified as a new subsection (b), provides, in pertinent part:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any

[18] The State cites also *American River Transp. Co. v. Bower*, 351 Ill. App. 3d 208, 212 (2004), which affirmed summary judgment in favor of a tugboat company on a negative Commerce Clause claim when there was "no fair relation between the use tax and the benefits that [the tugboat company] received from the state for the use by its line haul tugboats of the navigable waterways of the United States." State's Reply Br. at 28.

> navigable waters subject to the authority of the United States, or under the right to freedom of navigation of those waters . . . .

33 U.S.C. § 5(b).

The State contends that interstate water carriers "could argue that the plain language of § 5(b) preempts Alabama's sales tax as applied to their purchase or use of fuel because Alabama's sales tax on diesel fuel is a 'tax . . . collected from any vessel or other water craft . . . by [a] non-Federal interest,'" and no exception applies.[19] State's Br. at 23. To support its contention, the State cites *Moscheo v. Polk County*, No. E2008-01969-COA-R3-CV, 2009 WL 2868754 (Tenn. Ct. App. Sept. 2, 2009), and *Kittitanny Canoes, Inc. v. Westfall Township*, No. 183 CV 2013, 2013 WL 8563483 (Pa. County Ct. May 6, 2013), both of which relied on the MTSA to strike down taxes for recreational activities on waterways.

These cases are not helpful, because, as CSX points out, they address taxes on *passengers* of vessels on navigable waters. *See* CSX's Br. at 36 (noting that the text of § 5(b) is limited to taxes "from any vessel or other water craft, or from its passengers or crew"). In contrast, and relevant here, other courts have found that the MTSA's "prohibition does not apply to taxes imposed on things other than the vessel, its passengers, or crew, such as taxes on the fuel used, or the privilege of doing business or using goods or services in the state." *Id.* (citing *Commercial Barge Line Co. v. Director of Revenue*, 431 S.W.3d 479, 484 (Mo. 2014) (no violation of

[19] The exceptions are provided in 33 U.S.C. § 5(b)(1)–(3) but are not at issue here.

MTSA where state was "assessing sales and use tax on the goods and supplies delivered to the Taxpayers' towboats while they [were] in Missouri" and not "taxing the barges, towboats, or their crews"), and *Reel Hooker Sportfishing, Inc. v. Department of Taxation*, 236 P.3d 1230, 1232 (Haw. Ct. App. 2010) ("33 U.S.C. § 5(b) does not preempt the assessment of [the Hawaii general excise tax] on the charter fishing revenue of these Hawaii businesses because [the general excise tax] is a tax assessed on gross business receipts for the privilege of doing business in Hawaii, and is not a tax on their vessels or passengers")). The court agrees with this plain reading of the MTSA, and finds that it does not preempt the imposition of a sales tax on the diesel fuel used by water carriers.

c. The 1819 Congressional Act admitting Alabama to the Union

The State cites next the congressional act admitting Alabama to the Union. Under that act, "all navigable waters within [Alabama] shall for ever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state," Res. of Mar. 2, 1819, 15th Cong. (1819), 3 Stat. 489, 492. According to the State, this act prohibits it from assessing a sales tax on diesel fuel purchased by water carriers.

CSX directs the court to *Battle v. Corporation of Mobile*, in which the Alabama Supreme Court addressed whether the city of Mobile's "power to lay taxes on both real and personal estate within the city, making no distinction as to any persons," violated the congressional act "declar[ing] that [the

State's] rivers shall forever remain public highways, without the imposition of any duty, tax, or impost by the State." 9 Ala. 234, 236 (1846). The Court held that "th[e] tax, not being a specific one, applicable alone to steamboats, but a general one, extending to all personal estate," was "free from constitutional objection." *Id.* at 238. Because the Alabama Supreme Court, tracking the language of the congressional act, held that a generally applicable tax did not violate the act, and because the State presents no authority supporting a contrary conclusion, this court agrees with CSX that this act does not appear to prohibit the State from subjecting water carriers to the generally applicable sales tax on diesel fuel.

2. The State's argument that trains and water carriers are not "similarly situated"

The State also contends that it can justify the exemption of water carriers from the sales tax in light of the extensive evidence that "[t]rains burden the State fisc more than foreign/interstate water carriers do." State's Br. at 17. The State's sole articulated basis for presenting evidence of relative burdens is as follows:

> In *Oregon Waste Systems, Inc. v. Oregon Dep't of Environmental Quality* — one of CSX's seminal cases in the "compensatory tax" defense — the Supreme Court noted another, distinct justification for imposing a greater tax on the plaintiff than the comparison class: the plaintiff "imposes higher costs" on the State than the comparison class does. 511

> U.S. 93, 101.[20] That justification applies here.

State's Br. at 17 (footnote in original). As discussed at length in Part IV.B.1, *supra*, reliance upon negative Commerce Clauses like *Oregon Waste* is misplaced, because the court is not presented with alleged discrimination based on an entity's in-state or out-of-state character. Perhaps more importantly, the State presented no evidence to establish that it took into account the varying burdens imposed by rail carriers and water carriers when setting rail carriers' sales tax rate at 4% like most other taxpayers. As CSX puts it, the relative burdens are irrelevant, because "Alabama sales tax is not calibrated to account for varying burdens." CSX's Br. at 39 (citing doc. 137 at 2). The court agrees.

3. The State's Argument that CSX Has Suffered No Competitive Injury

Finally, the State asks this court to find that Alabama's sales tax exemption for interstate water carriers does not negatively impact CSX's competition with interstate water carriers. The State correctly notes that CSX's director of agriculture and food marketing (the only area in which the record shows competition between CSX and water carriers) could not testify that the competing water carriers purchase dyed fuel in Alabama and, therefore, avail

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[20] The Court fleshed out the "higher costs" justification thusly: "[I]f out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste, for then there would be reason, apart from its origin, why solid waste coming from outside the [State] should be treated differently." 511 U.S. at 101 n.5 (internal quotes omitted).

themselves of the sales tax exemption at issue. State's Br. at 34. Thus, according to the State, "correcting" the disparate tax treatment would not change anything, and CSX has failed to prove any competitive injury. As the State points out, the Supreme Court has held, albeit in a negative Commerce Clause case,[21] that when "different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed," elimination of the "tax or regulatory differential would not serve the . . . fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State . . . . " *GMC v. Tracy*, 519 U.S. 278, 297–99 (1997). Because CSX presented no evidence that enjoining the State from taxing its purchase of dyed diesel would affect the level of competition between CSX and water carriers, the court finds that there is no discriminatory effect.

V. CONCLUSION

Because the court finds that: (1) the State does not force rail carriers to use dyed diesel (and thus, any "discrimination" results from CSX's business practices rather than State law) or alternatively, the sales tax and fuel-excise tax are roughly equivalent; (2) a failure to exempt water carriers from the sales tax could violate the Commerce Clause; and (3) CSX has

[21] Although the court found in Part IV.B.1, *supra*, that negative Commerce Clause cases did not shed light on whether the fuel-excise tax and sales tax are "roughly equivalent," where, as here, the State does not treat motor carriers and rail carriers differently based on in-state or out-of-state status, this logic does not apply to a discussion of whether enjoining the sales tax would increase CSX's profits.

suffered no competitive injury from the State's exemption of water carriers from the sales tax, the court concludes that Alabama's tax scheme does not violate the 4–R Act. The court will enter an order contemporaneously herewith dismissing CSX's claims with prejudice.

DONE the 29th day of March, 2017.

ABDUL K. KALLON
UNITED STATES
DISTRICT JUDGE

LIST OF RELATED CASES

FEDERAL COURT

Against the State of Alabama

1. *Norfolk Southern Railway Company v. Alabama Department of Revenue; Vernon Barnett, Alabama Commissioner of Revenue; City of Irondale, Alabama; James Stewart, Treasurer of the City of Irondale; Colbert County, Alabama; and Tommy Oswalt, Colbert County Revenue Commissioner*; US District Court for the Northern District of Alabama; 2:13-cv-01305-KOB
2. *BNSF Railway Company v. Alabama Department of Revenue and Vernon Barnett, Alabama Commissioner of Revenue*; US District Court for the Northern District of Alabama; 2:11-cv-01047-MHH
3. *Alabama Southern Railroad, LLC; Alabama Warrior Railway, LLC; Autauga Northern Railroad, LLC; and Birmingham Terminal Railway, LLC v. Alabama Department of Revenue and Vernon Barnett, Alabama Commissioner of Revenue*; US District Court for the Northern District of Alabama, 2:14-cv-00283-SLB

STATE COURT (REFUND CASES)

Against the State of Alabama

Plaintiff: CSX Transportation

1. *CSX Transportation, Inc. v. State of Alabama Department of Revenue and Cynthia Underwood*

as Assistant Commissioner, State of Alabama Department of Revenue; In the Circuit Court of Montgomery County, Alabama; CV-2010-900645

2. *CSX Transportation, Inc. v. State of Alabama Department of Revenue and Julie P. Magee as Commissioner, State of Alabama Department of Revenue*; In the Circuit Court of Montgomery County, Alabama; CV-2012-901655

3. *CSX Transportation, Inc. v. State of Alabama Department of Revenue and Julie P. Magee as Commissioner, State of Alabama Department of Revenue*; In the Circuit Court of Montgomery County, Alabama; CV-2013-902094

Plaintiff: Eastern Alabama Railway, LLC

1. *Eastern Alabama Railway, LLC v. State of Alabama Department of Revenue*, Circuit Court of Montgomery County, Alabama CV-2016-900128

Plaintiff: Norfolk Southern Railway Co.

1. *Norfolk Southern Railway Co v. Alabama Dept. of Revenue*; In the Circuit Court of Montgomery County, Alabama; CV-2015-901131

Against the State of Georgia

1. *CSX Transportation, Inc. v. Georgia State Dept. of Revenue,* In the Georgia Tax Tribunal, Docket No TAX-S&U-162264

2. *CSX Transportation, Inc. v. Georgia State Dept. of Revenue,* In the Georgia Tax Tribunal, Docket No TAX-S&U-1645680

3. *CSX Transportation, Inc. v. Georgia State Dept. of Revenue,* In the Georgia Tax Tribunal, Docket No TAX-S&U-1733834

Against Local Governments

Plaintiff: CSX Transportation

1. *CSX Transportation, Inc. v. City of Mobile and Barbara Malkove as Director of Finance for the City of Mobile, Alabama*; In the Circuit Court of Mobile County, Alabama; CV-2010-901129
2. *CSX Transportation, Inc. v. City of Birmingham, Alabama and Henry Young, III as Deputy Director of Finance*; In the Circuit Court of Jefferson County, Alabama; CV-2010-901772
3. *CSX Transportation, Inc. v. Shelby County, Alabama, Shelby County, Alabama Commission, and Alex Dudchock as County Manager of Shelby County, Alabama*; In the Circuit Court of Shelby County, Alabama; CV-2010-900461
4. *CSX Transportation, Inc. v. Jefferson County, Alabama, Jefferson County Commission, and Travis A. Hulsey, as Director of the Jefferson County Revenue Department*; In the Circuit Court of Jefferson County, Alabama; CV-2010-001490
5. *CSX Transportation, Inc. v. Montgomery County, Alabama, Montgomery County Commission, and Sherrill Davis as Director of Finance for Montgomery County*; In the Circuit Court of Montgomery County, Alabama; CV-2010-900648
6. *CSX Transportation, Inc. v. The City of Montgomery, Alabama and Charles G. Wilson as Revenue Administrator for the City of*

Montgomery, Alabama; In the Circuit Court of Montgomery County, Alabama; CV-2010-900652

7. *CSX Transportation, Inc. v. City of Mobile and Barbara Malkove as Director of Finance for the City of Mobile, Alabama*; In the Circuit Court of Mobile County, Alabama; CV-2012-902742

8. *CSX Transportation, Inc. v. Mobile County, Alabama, Mobile County, Alabama Commission, and Kim Hastie as License Commissioner of Mobile County, Alabama*; In the Circuit Court of Mobile County, Alabama; CV-2012-902743

9. *CSX Transportation, Inc. v. Montgomery County, Alabama, Montgomery County Commission, and Sherrill Davis as Director of Finance for Montgomery County*; In the Circuit Court of Montgomery County, Alabama; CV-2012-901656

10. *CSX Transportation, Inc. v. The City of Montgomery, Alabama and Charles G. Wilson as Revenue Administrator for the City of Montgomery, Alabama*; In the Circuit Court of Montgomery County, Alabama; CV-2012-901657

11. *CSX Transportation, Inc. v. Shelby County, Alabama, Shelby County, Alabama Commission, and Alex Dudchock as County Manager of Shelby County, Alabama*; In the Circuit Court of Shelby County, Alabama; CV-2012-901102

12. *CSX Transportation, Inc. v. City of Birmingham, Alabama and Henry Young, III as Deputy Director of Finance*; In the Circuit Court of Jefferson County, Alabama; CV-2012-904061

13. *CSX Transportation, Inc. v. Montgomery County, Alabama, Montgomery County Commission, and Sherrill Davis as Director of Finance for Montgomery County*; In the Circuit Court of Montgomery County, Alabama; CV-2013-902089

14. *CSX Transportation, Inc. v. The City of Montgomery, Alabama and Charles G. Wilson as Revenue Administrator for the City of Montgomery, Alabama*; In the Circuit Court of Montgomery County, Alabama; CV-2013-902091

15. *CSX Transportation, Inc. v. City of Birmingham, Alabama and Henry Young, III as Deputy Director of Finance*; In the Circuit Court of Jefferson County, Alabama; CV-2013-904854

16. *CSX Transportation, Inc. v. Shelby County, Alabama, Shelby County, Alabama Commission, and Alex Dudchock as County Manager of Shelby County, Alabama*; In the Circuit Court of Shelby County, Alabama; CV-2013-901410

17. *CSX Transportation, Inc. v. City of Mobile and Barbara Malkove as Director of Finance for the City of Mobile, Alabama*; In the Circuit Court of Mobile County, Alabama; CV-2013-903268

18. *CSX Transportation, Inc. v. Mobile County, Alabama, Mobile County, Alabama Commission, and Kim Hastie as License Commissioner of Mobile County, Alabama*; In the Circuit Court of Mobile County, Alabama; CV-2013-903269

<u>Plaintiff: BNSF Railway Company</u>

1. *BNSF Railway Company and W.C. Rice Oil Co., Inc. v. City of Birmingham, Alabama and Henry*

Young, III as Deputy Director of Finance; In the Circuit Court of Jefferson County, Alabama; CV-2010-903064

2. *BNSF Railway Company and W.C. Rice Oil Co., Inc. v. Jefferson County, Alabama, Jefferson County Commission, and Travis A. Hulsey, as Director of the Jefferson County Revenue Department*; In the Circuit Court of Jefferson County, Alabama; CV-2010-903065

3. *BNSF Railway Company and W.C. Rice Oil Co., Inc. v. City of Birmingham, Alabama and Henry Young, III as Deputy Director of Finance*; In the Circuit Court of Jefferson County, Alabama; CV-2013-901031

4. *BNSF Railway Company and ConocoPhillips Company v. Walker County, Alabama, Walker County Commission, and Susan Russell, CRO, CRE, Walker County Sales Tax Office, and fictitious parties A-H*; In the Circuit Court of Walker County, Alabama; CV-2014-900378

5. *BNSF Railway Company and W.C. Rice Oil Co., Inc. v. City of Birmingham, Alabama and Bettye Griggs as Deputy Director of Finance*; In the Circuit Court of Jefferson County, Alabama; CV-2014-903876