No. 18-

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Cross-Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE,
AND VERNON BARNETT, COMMISSIONER,
DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,
Cross-Respondents.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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November 9, 2018

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QUESTION PRESENTED

Whether, as the Eleventh Circuit held, Alabama's imposition of a motor fuels tax on the fuel used by interstate motor carriers sufficiently justifies Alabama's imposition of a facially discriminatory sales and use tax on railroad diesel fuel, notwithstanding decisions of this Court and at least one state supreme court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no parties to this proceeding other than the named parties, *i.e.*, the Alabama Department of Revenue, its Commissioner, and CSX Transportation, Inc.

CSX Corporation is the parent company of Cross-Petitioner CSX Transportation, Inc. No other publicly held corporation has a 10% or greater ownership interest in Cross-Petitioner.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The State's petition should be denied. The petition asks this Court to review the Eleventh Circuit's holding that Alabama's sales and use tax on railroad diesel fuel discriminates against railroads in violation of 49 U.S.C. § 11501(b)(4), by exempting interstate water carriers, a principal railroad competitor. The Eleventh Circuit's opinion regarding water carriers is not worthy of this Court's review. The water carrier ruling does not conflict with a decision of any other circuit or state supreme court and is not contrary to any decision of this Court. CSX will file an opposition to Alabama's petition in due course.

But if this Court were to grant the State's petition, the Court should likewise grant CSX's conditional cross-petition to review the motor carrier portion of the Eleventh Circuit's holding. The Eleventh Circuit held that Alabama does not discriminate against railroads in violation of 49 U.S.C. § 11501(b)(4) by imposing sales and use taxes on railroad diesel fuel while exempting motor carriers, another principal competitor of railroads. This motor carrier holding conflicts with a decision of the Iowa Supreme Court, and is also contrary to both this Court's recent decisions interpreting the 4-R Act and this Court's well-established precedent on the standards for examining a facially discriminatory tax that burdens interstate commerce.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 888 F.3d 1163 (11th Cir. 2018), *modified on partial denial of rehearing at* 891 F.3d 927, and repro-

duced at App. 1a-46a.[1] The district court's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 247 F. Supp. 3d 1240 (N.D. Ala. 2017), and reproduced at App. 47a-76a.

JURISDICTION

CSX filed this action against the Alabama Department of Revenue and its Commissioner under Section 306(2) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), codified at 49 U.S.C. § 11501, which grants district courts subject-matter jurisdiction to restrain and prohibit state taxes that discriminate against railroads. The district court entered final judgment in the State's favor. *See* App. 75-76a. CSX noticed a timely appeal, and the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. The Eleventh Circuit entered final judgment reversing the district court on June 8, 2018. *See* App. 45-46a.

This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The State's petition (Docket No. 18-447) was docketed on October 10, 2018, and this Conditional Cross-Petition is timely filed within 30 days of October 10, 2018, in accordance with this Court's Rule 12.5.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (reproduced in the Appendix to this Cross-Petition), presently codified at 49 U.S.C. § 11501. As currently codified, this provision states, in relevant part:

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[1] Unless otherwise noted, cites to the Appendix are to the Appendix filed by the Petitioner in Docket No. 18-447.

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

This Cross-Petition will sometimes reference Section 306 as well as the current codification at 49 U.S.C. § 11501. The codification slightly altered the language of Section 306, but without substantive change. *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 280 n.1 (2011).

STATEMENT OF THE CASE

A. INTRODUCTION.

For the reasons that will be stated in its opposition to Alabama's petition for certiorari, CSX believes the Court should not review this case. Alabama's petition seeks review of the water carrier portion of the Eleventh Circuit's opinion, namely, the holding that Alabama's sales and use tax on railroad diesel fuel discriminates against railroads in violation of 49 U.S.C. § 11501(b)(4), because interstate water carriers, a principal railroad competitor, are exempt from that tax. The water carrier holding does not warrant further review. It does not conflict with any decision of any federal circuit court, state supreme court, or this Court. The State's petition should therefore be denied. However, if this Court grants the State's petition, CSX respectfully requests that this Court grant its cross-petition for a writ of certiorari to review the Eleventh Circuit's ruling on motor carriers.

Diesel fuel purchased by interstate motor carriers, another principal railroad competitor, is also exempt from the sales and use tax Alabama imposes on railroad diesel fuel. The Eleventh Circuit held, however, that Alabama's sales and use tax exemption for motor carrier fuel does not violate 49 U.S.C. § 11501(b)(4), because Alabama, like all other states, imposes a highway motor fuel excise tax on the diesel fuel purchased by motor carriers. The Eleventh Circuit held that this highway motor fuel excise tax sufficiently justifies Alabama's facially discriminatory sales tax on railroad diesel fuel.

This motor carrier holding is contrary to the rulings of this Court in *CSX I*[2] and *CSX II*[3], as well as decades of settled jurisprudence addressing how a state can justify a facially discriminatory tax that burdens interstate commerce. The Eleventh Circuit's holding concerning motor carriers also conflicts with the decisions of this Court rejecting a strict formalism in deciding when taxes violate federal law, and decisions requiring consideration of how the tax proceeds are spent when judging discrimination.

The State's petition necessarily presupposes that the Eleventh Circuit correctly decided the motor carrier issue because the State claims that reversal of the Eleventh Circuit's water carrier ruling would resolve this case. But if this Court grants review concerning the water carrier issue, then granting this cross-petition would be essential to a complete resolution of the question whether Alabama can impose its sales and use tax on railroad diesel fuel, one of the railroads' largest operating expenses, while exempting the railroads' principal competitors, without violating Section 306 of the 4-R Act, an important Congressional anti-discrimination law.

B. STATEMENT OF FACTS.

1. The Parties.

Cross-Petitioner and Plaintiff below, CSX, is an interstate common carrier by rail operating in Alabama, as well as other states. *CSX II*, 135 S. Ct. at

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[2] *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277 (2011).

[3] *Alabama Dept. of Revenue v. CSX Transportation, Inc.*, 135 S. Ct. 1136 (2015).

1140; (Stip., ¶ 1).[4] The Defendants are the Alabama Department of Revenue, and its Commissioner. The Alabama Department of Revenue is the entity responsible for administering and collecting taxes within Alabama, including the state sales and use taxes. The Commissioner, named in his official capacity only, exercises general supervision over the administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes. (Stip., ¶¶ 2-3).

2. The Sales And Use Tax Imposed Under Chapter 23 Of The Alabama Revenue Code.

Alabama imposes sales taxes on the gross receipts from the sale of goods at retail. *CSX II*, 135 S. Ct. at 1140. Although it is collected from retailers, the Alabama sales tax is conclusively presumed to be a direct tax on the retail consumer, and is pre-collected from retailers for convenience only. Ala. Code § 40-23-26(c) (Stip., ¶¶ 4-5). Alabama imposes a use tax on the storage, use or consumption of tangible personal property in Alabama where a sales tax has not already been paid. Ala. Code § 40-23-60 *et seq*. Thus, the sales tax and use tax are considered "complementary" and not duplicative, and are often collectively referred to hereafter simply as the "sales" tax imposed on the "purchase" of fuel.

Railroads are subject to sales tax on their purchase of diesel fuel in Alabama. Fuel costs incurred in the transportation of property in interstate commerce constitute a major annual operating expense of rail carriers, motor carriers and water carriers. (Stip. ¶ 12). The tax is imposed by the State at the rate of

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[4] The parties filed Agreed Facts which appear at Doc. 137 of the district court's record.

4%, plus additional amounts imposed at varying rates by several Alabama counties and municipalities. *CSX II*, 135 S. Ct. at 1140; (Stip., ¶¶ 7-8, 16). In Birmingham and Montgomery, where CSX purchases over 95% of its Alabama fuel, the combined state and local sales tax rate is 10%, and statewide, CSX pays approximately $5 million per year in diesel fuel sales taxes. (Stip. ¶ 16; Trial Trans. (Doc. 139) p. 467).

Revenues from the Alabama sales tax are deposited in the general revenue fund as provided in Ala. Code §§ 40-23-35 and 40-23-85, and earmarked principally for education purposes. The tax revenues generated are not devoted to transportation uses, and thus railroads are in no way the direct beneficiaries of the sales taxes they pay to the state, counties, or municipalities.

The principal competitors of rail carriers in Alabama are on-highway motor carriers of property in interstate commerce ("motor carriers") and carriers of property in interstate commerce by ships, barges and other vessels ("water carriers"). *CSX II*, 135 S. Ct. at 1140; (Stip., ¶ 10). Motor carriers do not pay sales or use tax on their purchase or use of diesel fuel in Alabama. *CSX II*, 135 S Ct. at 1140; Ala. Code § 40-17-325; (Stip., ¶ 14). Water carriers likewise do not pay sales or use taxes on their purchase or use of diesel fuel in the Alabama used for interstate transportation. Ala. Code § 40-23-4(a)(10) (sales tax); Ala. Code § 40-23-62(3) (use tax); (Stip., ¶ 11).

3. The Separate Motor Fuel Excise Tax Imposed Under Chapter 17 Of The Alabama Revenue Code.

Interstate motor carriers do pay an Alabama Motor Fuels Excise tax totaling 19 cents a gallon on the diesel fuel they consume on the state highways. Ala.

Code § 40-17-325(a)(2). An Alabama constitutional amendment requires that all motor fuel tax revenues must be expended solely for the costs of building and maintaining highways, roads and bridges, Amend. 93, Ala. Const. V, § 111.06, and the proceeds from the motor carrier fuel excise tax are used exclusively for these purposes (Stip., ¶ 18.). The excise tax thus stands in stark contrast to the sales taxes collected from railroads, which provide no special benefit to them. The sales tax is imposed on the railroads' purchase of diesel fuel in Alabama, regardless of whether or where the fuel is eventually used (*i.e.*, whether it fuels a train that travels solely in Alabama or a train that traverses several other states.). In contrast, the motor carrier fuel excise tax is effectively levied on the consumption of diesel fuel in Alabama, as a highway user fee, regardless of where it was purchased, by operation of the interstate reconciliation process under the International Fuel Tax Agreement ("IFTA"). (Trial Tr. (Doc. 139) pp. 272-73, 340-45).

Numerous government reports, including those that motivated Congress to enact Section 306, recognize the direct benefit motor carriers receive from these types of motor fuel taxes that fund the infrastructure necessary to their business, and the fact that this gives the trucks a significant competitive advantage over railroads, who must pay for and build, and pay taxes on, their right of way infrastructure. This imbalance is widely recognized, and has a significant impact on the competitive position among modes of transportation, which was one of the fundamental drivers in enacting Section 306, *viz.*, to enhance the railroads' ability to compete with other carriers. *CSX II*, 135 S. Ct. at 1142. For example, the U.S. General Accountability Office recently found that:

> federal programs treat different freight modes differently. For example, trucks and barges use infrastructure that is owned and maintained by the government, while rail companies use infrastructure that they pay to own and maintain. The trucking and barge industries pay fees and taxes to use this government-funded infrastructure, but their payments generally do not cover the costs they impose on highways and waterways, thereby giving the trucking and barge industries a competitive price advantage over railroads.

Pls. Ex. 57 (2006 GAO Report) at p. 00067.[5] The seminal study on national transportation policy that ultimately led to the legislation that included Section 306, the "Doyle Report," likewise expressly recognized the different benefits bestowed by the highway fuel taxes that motor carriers pay to support highway infrastructure and the taxes railroads pay to support general state revenues, and the competitive harm this asymmetry does to rail carriers. S. Rep. No. 87-445 (1961) ("Doyle Report").[6]

The unique benefit motor carriers receive from the highways funded by the motor fuel taxes is evident in the American Trucking Associations' participation as amicus for Alabama in the previous appeals in this case, as well as the motor carrier industry's recent suit seeking to compel Georgia to dedicate diesel fuel sales taxes, in addition to motor fuel taxes, exclusively to road construction. *Georgia Motor Trucking As-*

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[5] The October 2006 GAO report Freight Railroads Industry Health, is available online at http://www.gao.gov/new.items/d0794.pdf.

[6] The Doyle Report is available online at https://babel.hathitrust.org/cgi/pt?id=mdp.39015023117982;view=1up;seq=9.

soc. v. Georgia Dept. of Rev., 801 S.E.2d 9 (Ga. 2017). As the government reports acknowledge, unlike motor carriers, railroads do not receive any direct benefit from the sales taxes they pay, beyond the benefits enjoyed by society in general.

At both trials below, CSX also presented the undisputed expert testimony of Richard R. Mudge, Ph.D., who was tendered without challenge as an expert transportation economist. In his written statement in the second trial (Pls. Ex. 5) and testimony at both trials, Dr. Mudge established the following:

1. The per-gallon excise taxes on motor fuels, in Alabama and throughout the United States, are dedicated benefit taxes in the nature of user fees that provide direct, tangible benefits to highway users, including the motor carrier industry.

2. These user fees historically have been, and continue to be, the principal source of funds to construct, improve, and maintain highways, thus directly benefitting the trucking industry.

3. In contrast, sales taxes on diesel fuel paid by the railroads in Alabama do not provide direct benefits to the railroads.

4. Imposing a sales tax on railroad diesel fuel but not motor carrier diesel fuel "provides a competitive advantage" to the trucking industry relative to the railroad industry. While the motor fuel excise taxes paid by motor carriers maintain a highway network essential to their industry, the railroads must expend more than $19 billion a year to build, maintain and operate their nationwide system of track and signal structure. CSX also pays more than $2 million annually in property taxes on its track structure in Alabama.

5. Although both motor carriers and railroads pay taxes in Alabama triggered by the purchase of diesel fuel, the motor excise tax and the sales tax are not comparable taxes. The motor carrier industry receives tangible, direct benefits in the form of a network of well-maintained roads and bridges for the taxes it pays, while the railroad industry must build, maintain and pay taxes on its rail network from its own resources, and receives no direct benefit from the sales taxes it pays. (Tr. (Doc. 65), pp. 34-53; Tr. (Doc. 139), pp. 327-392).

When Congress prohibited discriminatory taxes against railroads, it did so to protect railroads' ability to compete against their main competitors, motor carriers. Therefore failing to analyze the entire effect of the State's taxing regime cannot fulfill Congress's primary purpose. We turn now to that history.

C. THE 4-R ACT.

In the 1970s, many of the nation's railroads were bankrupt and the industry near collapse. After more than 15 years of investigation, Congress determined that state and local taxes were in part to blame, noting that discriminatory tax schemes had exacerbated the inherent competitive disadvantage railroads have because they must build, fund, and pay taxes on their own tracks and rights-of-way, whereas their competitors—the trucks and barges—operate on publicly-funded infrastructure.[7]

Congress responded with the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R

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[7] S. Rep. No. 87-445 (1961) ("the Doyle Report"), at 449-66, available online at https://babel.hathitrust.org/cgi/pt?id=mdp.39015023117982. *See also W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131 (1987); H.R. Rep. No. 94-725 (1975), at 78; S. Rep. No. 91-630 (1969), at 1.

Act"), legislation designed "to restore the financial stability of the railway system of the United States while fostering competition among all carriers by railroad and other modes of transportation." *CSX II*, 135 S. Ct. at 1142 (internal citations omitted). One method Congress chose to accomplish these goals, particularly the goal of furthering railroad financial stability, was to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of railroads. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 (1987).

Among the acts that Congress prohibited is the imposition of a tax that discriminates against a rail carrier. As this Court has held, a tax that facially discriminates against a railroad by imposing a tax on railroads that is not imposed on railroad competitors violates 49 U.S.C. § 11501(b)(4), unless the government can prove a sufficient justification for the discrimination. *CSX II*, 135 S. Ct .at 1143.

Declaring state tax discrimination against railroads to be "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce," Section 306 confers jurisdiction upon district courts of the United States, notwithstanding 28 U.S.C. § 1341 and without regard to the amount in controversy or citizenship of the parties, to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of [Section 306]."

D. THE HISTORY OF THIS LITIGATION.

1. *CSX I.*

CSX sued in 2008 to enjoin imposition of Alabama's discriminatory sales tax under 49 U.S.C.

§ 11501(b)(4). The district court initially dismissed CSX's suit prior to trial, and the Eleventh Circuit affirmed. Both courts relied on *Norfolk Southern Railway Company v. Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008), *overruled by CSX I*, which held that a railroad could not invoke Section 11501(b)(4) to challenge a generally-applicable property tax with discriminatory exemptions. 350 Fed. App'x 318 (2009).

This Court subsequently granted CSX's petition for a writ of certiorari, overruled the Eleventh Circuit's decision in *Norfolk Southern*, and held that CSX had stated a claim of discrimination under Section 11501(b)(4) because the purchase of diesel fuel by railroads was subject to sales tax, but the purchase of diesel fuel by railroad competitors was not. This Court held that "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.'" 562 U.S. at 288. Moreover, this Court imposed the following burden-shifting analysis for the lower courts:

> Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption to rail carriers.

Id. at n.8.

This Court thus reversed the Eleventh Circuit's earlier opinion, and remanded the case for further proceedings consistent with this Court's decision.

2. *CSX II*.

Upon remand from *CSX I*, the district court preliminarily enjoined the tax, and subsequently conducted

a trial on the merits. Following trial, the district court issued an order dismissing the complaint with prejudice. In regard to the motor carrier issue, the district court held that the imposition of the sales tax on the purchase of CSX's diesel fuel was not discriminatory because Alabama imposes a motor fuel excise tax at a tax rate imposed per gallon of diesel fuel that the district court concluded was mathematically "essentially the same" as the per-gallon rate of the Alabama sales tax, when the percentage sales tax is multiplied by the average price of railroad diesel fuel in the years preceding the lawsuit. *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 892 F. Supp. 2d 1300, 1313 (N.D. Ala. 2012).

On appeal, the Eleventh Circuit reversed this finding, holding that Section 11501(b)(4) does not allow the State to justify a facially discriminatory sales tax by relying on a different tax imposed on competitors. *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 720 F.3d 863 (11th Cir. 2013). The State successfully sought review in this Court, resulting in its decision in *CSX II*.

As to motor carriers, this Court rejected the Eleventh Circuit's wooden refusal to consider Alabama's tax-based justification (the motor fuel tax) for the facial discrimination against railroads, concluding:

> We think that an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory.

135 S. Ct. at 1143. In reaching this conclusion the Court relied on its dormant Commerce Clause precedent, particularly *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

The instructions on remand from this Court were "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." *Id.* at 1144.

3. *CSX III*.

After the second remand by this Court, the district court conducted another trial, and (reiterating without further analysis its previous finding) held that the motor fuel tax and the sales tax were "roughly equivalent" based solely on an arithmetic analysis. Specifically, the district court calculated a cents-per-gallon rate for the approximately 10% sales tax by multiplying it by the average price of fuel during the years preceding the lawsuit, and compared that rate to the 19 cent motor fuel excise tax. 247 F. Supp. 3d 1240 (N.D. Ala. 2017); App. 66a. The district court rejected the use of this Court's well-established Compensatory Tax Doctrine and refused to consider any dormant Commerce Clause cases as relevant in determining whether two disparate taxes are, in fact, "roughly equivalent." Instead, the district court relied solely on the mathematical "rate" comparison. In rejecting the Compensatory Tax Doctrine, the district court also refused to consider that the proceeds of the motor fuel tax paid by the motor carriers fund and support the highways, which are essential to motor carrier operations, whereas the proceeds of the sales tax paid by railroads is of only attenuated benefit to the railroads.

On appeal, the Eleventh Circuit affirmed that part of the district court's holding. 888 F.3d 1163 (11th Cir. 2018), *modified on partial denial of rehearing at* 891 F.3d 927, App. 1a-46a. Like the district court, the Eleventh Circuit did not go beyond a mathematical "tax rate" analysis and offered no articulable standard to determine when two taxes are "roughly

equivalent," notwithstanding this Court's citation to its dormant Commerce Clause analysis in *CSX II*.

REASONS THE COURT SHOULD GRANT THE CROSS-PETITION

CSX believes that the State's petition should be denied because its challenges to the Eleventh Circuit's holding on water carriers do not meet the standards of this Court's Rule 10. But if the Court disagrees and does grant Alabama's petition, it should grant CSX's conditional cross-petition as well and provide needed guidance on the standard for discrimination under 49 U.S.C. § 11501(b)(4).

The Eleventh Circuit's decision upholding Alabama's discriminatory sales tax on railroad diesel fuel conflicts with *CSX I* and *CSX II*, as well as with a similar 4-R Act decision issued by the Iowa Supreme Court. Furthermore, the Eleventh Circuit's decision in regard to motor carriers directly contradicts this Court's well-established precedent articulating the standards for justifying a facially discriminatory tax that burdens interstate commerce, including this Court's decisions recognizing the relevance of the use of tax proceeds in deciding whether a tax is impermissibly discriminatory.

A. THE ELEVENTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISIONS IN *CSX I* AND *CSX II* AND THIS COURT'S OPINIONS ON HOW TO EXAMINE A FACIALLY DISCRIMINATORY TAX.

In *CSX II*, this Court invoked the Compensatory Tax Doctrine applicable to "negative Commerce Clause cases" to hold, for the first time in a 4-R Act case, that a state's imposition of "an alternative, roughly equivalent tax" on a railroad competitor is

one possible justification that can potentially save a facially discriminatory tax like Alabama's from violating Section 11501(b)(4). 135 S. Ct. at 1143. This Court cited *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932), the foundational case establishing, and frequently used as shorthand for, what is now referred to as the Compensatory Tax Doctrine, which is the Court's well-developed test to determine whether an alternative tax can justify a facially discriminatory tax that burdens interstate commerce. *CSX II*, 135 S. Ct. at 1144. This Court's reference to a "roughly equivalent" alternative tax is most naturally understood as referring to the Compensatory Tax Doctrine. In fact, during the same term as *CSX II*, this Court acknowledged that taxes "are 'compensatory' if they are rough equivalents imposed upon substantially similar events." *Comptroller of Treas. of Maryland v. Wynne*, 135 S. Ct. 1787, 1804 n.8 (2015) (emphasis added). It also makes sense for this Court to have interpreted sufficient justification under the 4-R Act using Commerce Clause standards, as the 4-R Act explicitly declares that taxes which violate the Act "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). Indeed, this Court referred to its dormant Commerce Clause cases to interpret the 4-R Act in both *CSX I* and *CSX II*. *See* 562 U.S. at 286; 135 S. Ct. at 1143.

As this Court knows, the Compensatory Tax Doctrine employs a three-pronged analysis to determine if two different taxes are truly equivalent. Only one of the prongs considers the actual tax "rate," which was the sole indicia of "rough equivalency" used by the Eleventh Circuit. But the Compensatory Tax Doctrine analysis is far more rigorous, including inquiry into the purpose of the two taxes, and whether they are sufficiently similar in substance to serve as

mutually exclusive proxies for each other. *Fulton Corporation v. Faulkner*, 516 U.S. 325, 334-39 (1996). The motor fuels tax does not qualify as a roughly equivalent tax under the Compensatory Tax Doctrine analysis.

Under the dormant Commerce Clause analysis that this Court has now twice used to interpret the 4-R Act, discriminatory taxes are "virtually per se invalid" and any justification must "pass the strictest scrutiny." *Oregon Waste v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994). The Compensatory Tax Doctrine is the sole test this Court uses to determine whether a sufficient justification based on an alternative tax meets this strict standard. In fact, it is the only test the Court has ever applied to determine whether facial tax discrimination is cured by the existence of a comparable, "roughly equivalent" alternative tax. This Court in *CSX II* explicitly recognized the difficulty of undertaking this inquiry, and specifically referenced this Court's Compensatory Tax Doctrine cases, which take into consideration not only the "rates," but, consistent with this Court's adherence to substance rather than form when examining taxes, also requires analysis of whether the two taxes are the same in type and effect. In both *CSX I* and *II*, the Court recognized that questions of discrimination and "rough equivalency" are not easily resolved and require an exhaustive analysis consisting of "knotty questions about when dissimilar treatment is adequately justified," 562 U.S. at 297, and the potentially "Sisyphean" burden of determining when two different taxes are comparable and roughly equivalent, 135 S. Ct. at 1144. This Court held that despite the burdens, this type of exhaustive analysis is precisely what the 4-R Act requires. *Id*. The lower courts' arithmetic solution is hardly "Sisyphean" in nature

and it does not remotely justify the competitive harm done to the railroads by Alabama's facially discriminatory tax.

The Eleventh Circuit rejected the use of the Compensatory Tax Doctrine because this Court in *CSX II* did not specifically "tell us to do that." App. 21-22a. But this sophomoric rejection of this Court's guidance in *CSX II* ignores the Court's specific invocation of the dormant Commerce Clause cases, specifically its citation to *Gregg Dyeing*. And neither the district court nor the Eleventh Circuit explains why the simplistic "rate" analysis is sufficient when that analysis was already in the record when this Court in *CSX II* remanded the case for further analysis. A remand would not have been necessary if the arithmetic "rate equivalency" analysis already in the record fulfilled the State's sufficient justification obligation. Surely something more than a calculator (or even an abacus) is required to determine if two disparate taxes are in fact "roughly equivalent." If the Court decides to review the water carrier issue presented by Alabama, it should resolve both of the issues decided below and provide guidance on what constitutes justifiable discrimination against railroads.

B. THE ELEVENTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S RULINGS ON THE RELEVANCE OF THE USE OF TAX PROCEEDS.

The Eleventh Circuit also rejected any consideration of Alabama's use of the tax revenue in evaluating the State's sufficient justification defense. The highway fuel taxes that motor carriers pay (which railroad companies also pay when they use the state highways) are dedicated exclusively to fund road construction and maintenance. The undisputed expert testimony at trial and numerous government reports,

including those that motivated Congress to enact the 4-R Act, recognize the direct benefit trucks receive from motor fuel taxes, and the competitive advantage this gives trucks over railroads.[8] Thus, the same highway fuel taxes that the Eleventh Circuit found justify Alabama's discrimination against railroads were one of the competitive harms Congress cited for enacting the 4-R Act's protection against railroad tax discrimination in the first place.

The Eleventh Circuit's refusal to consider how the tax proceeds are used is also contrary to the Iowa Supreme Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Bair*, 338 N.W. 2d 338, 341 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984), and to this Court's decision in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

The Iowa Supreme Court in *Atchison* held in a 4-R Act case that, in comparing an excise tax on railroad diesel fuel with motor carrier highway taxes, the competitive advantage motor carriers receive from the fact their taxes fund their necessary infrastructure must be taken into account. Iowa had imposed an excise tax of 8¢ per gallon on railroad fuel, and a motor fuel tax of up to 15.5¢ per gallon on motor carriers. In rejecting the state's defense that the motor fuel tax nullified the railroads' claim under Section 11501(b)(4), the Iowa Supreme Court ruled:

> Superficially the trucks rather than the railroads appear to be at a competitive disadvantage as to fuel taxes. But a major adjustment must be made in order to compare railroad-fuel with

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[8] 2006 GAO Report Freight Railroads Industry Health 67, available online http://www.gao.gov/new.items/d0794.pdf; The Doyle Report, p. 459 (S. Rep. No. 87-445 (1961) available online at https://babel.hathitrust.org/cgi/pt?id=mdp.39015023117982.

> truck-fuel taxes: the costs of construction and maintenance of the roads of the two modes must be placed in the balance. Trucks operate on publicly constructed and maintained roads. The various taxes which the General Assembly requires the trucks to pay go into an earmarked fund for the construction, maintenance, supervision, and administration of the highways. Iowa Const. Amend. 18. Those taxes represent the Assembly's judgment as to the portion of the cost of the highways that the trucks should bear. But the railroads acquire, construct, maintain, and pay taxes on their own roads. We thus have the railroads providing their own roads with the eight-cent fuel tax in addition, and the trucks paying the legislative approximation of their share of the highways without the additional eight-cent tax. This gives the trucks a distinct competitive advantage.

338 N.W.2d at 346-47. The Eleventh Circuit simply ignored the reasoning of the Iowa Supreme Court.

In *West Lynn Creamery*, this Court rejected an argument strikingly similar to the argument raised here by Alabama. A Massachusetts "pricing order" imposed an assessment on all milk sold by wholesale dealers to Massachusetts retailers. The state defended these "premium payments" (which this Court treated as a "tax") against a Commerce Clause challenge by out-of-state producers by stressing that the required "premiums" were at the same rates for in-state and out-of-state producers. But this Court emphasized that the proceeds of the tax went into a fund distributed only to Massachusetts producers—clearly a discriminatory scheme, notwithstanding its superficial neutrality. Thus, this Court rejected the state's plea to ignore how the proceeds of an allegedly

"roughly equivalent tax" were spent, ruling instead that "we cannot divorce the [taxes] from the use to which the [taxes] are put." 512 U.S. at 201. This Court reaffirmed this principle in its most recent Term, in its *Wayfair* opinion, where the Court, citing *West Lynn Creamery*, noted that "the Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018).

The Eleventh Circuit, however, rejected consideration of the use of the tax proceeds, primarily on statutory grounds. The Eleventh Circuit found no "textual" support in the 4-R Act for addressing tax expenditures, surmising that, by its silence, Congress precluded analysis of such expenditures. App. 18-21a. But this myopic view ignores Congress's broad prohibition of "taxes that discriminate" against railroads. As this Court emphasized in *West Lynn Creamery*, in determining whether a tax "discriminates" against a protected party, a court "cannot divorce the [taxes] from the use to which the [taxes] are put." 512 U.S. at 201. The Eleventh Circuit merely mentions *West Lynn Creamery* in passing (App. 17a), but makes no attempt to distinguish it or explain why use of the tax proceeds is relevant to evaluating "discrimination" under the Commerce Clause but not to evaluating "discrimination" under an Act of Congress specifically protecting against discriminatory taxes imposed on railroads.

In rejecting consideration of the use of the motor fuel tax proceeds, the Eleventh Circuit described CSX's argument as an attempted "remodeling" of subsection (b)(4), requiring the court to add or subtract from the statutory language, a practice disapproved by the courts. App. 19-20a. But considering

the use of tax proceeds does not in any way require a "remodeling" of subsection (b)(4). Congress has spoken with remarkable clarity in its broad proscription of taxes that "discriminate" against railroads, and this Court in *CSX I* rejected resort to rules of statutory construction that would frustrate this Congressional intent. 562 U.S. at 294-95. In fact, this Court in *CSX I* specifically cited *West Lynn Creamery* to reject a restrictive view of "discriminate" which is "at odds with its natural meaning." 562 U.S. at 287.

Further, the Eleventh Circuit erroneously reasoned that reading subsection (b)(4) "in context" forbids a court from considering the use of the motor fuel tax proceeds when judging discrimination. The "context" relied upon by the Eleventh Circuit was apparently a comparison of subsection (b)(4) with subsections (b)(1)-(3). Such a purported "contextual" analysis ignores this Court's observation that subsection (b)(4) represents "very different terrain" from the other subsections in section 11501. *Id.* at 288 n.8. But more importantly, limiting the reach of subsection (b)(4) by reference to the "context" of the other subsections was specifically condemned in *CSX I*, where this Court noted that Congress drafted subsection (b)(4)'s proscriptions "more broadly" (*id.* at 296) and that subsection (b)(4) "speaks both clearly and broadly." *Id.* at 285. And the Eleventh Circuit's observation that Congress did not intend for subsection (b)(4) to proscribe discrimination "in any other way" (App. 20a) flies in the face of this Court's view in *CSX I*: "After all, the very purpose of a catch-all provision like subsection (b)(4) is to avoid the necessity of listing each matter (here, each kind of tax discrimination) falling within it." *Id.* at 292. At least in the context of comparing two allegedly "roughly equivalent" taxes, it is no answer to say that use of the pro-

ceeds is "irrelevant" because Congress did not mention them in the Act.

Another court of appeals has also erroneously refused to consider how the tax proceeds are used, stating without analysis or citation to authority that "how 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." *BNSF Railway Co. v. Tennessee Dept. of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015). Although the Sixth Circuit's decision was on review of a denial of a preliminary injunction (not a final judgment) and did not involve a comparison of two allegedly "roughly equivalent" taxes, the unsupported *BNSF* ruling has already been cited in another unpublished opinion by the Sixth Circuit, thus compounding the error. In *Illinois Central Railroad v. Tennessee*, which, unlike *BNSF*, did involve a comparable tax defense, the Sixth Circuit cited *BNSF*, without further analysis, as support for its refusal, in its rough equivalency analysis, to consider how the tax proceeds are used. 2018 WL 4183464 at * 4 (6th Cir. Aug. 31, 2018). It is likely that other lower courts will err on this important issue, making this Court's review and correction timely and appropriate.

CONCLUSION

CSX's Brief in Opposition will set forth the reasons why the State's petition should be denied. But in the event the State's petition is granted, CSX's conditional cross-petition for certiorari should also be granted in order for this Court to decide whether the Compensatory Tax Doctrine or some other articulable standard that embodies more than simple arithmetic calculations should be employed to comply with the roughly equivalent standard in *CSX II*.

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November 9, 2018

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