No.

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

TENNESSEE DEPARTMENT OF REVENUE AND REAGAN FARR, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 49 U.S.C. § 11501(b)(4), states may not impose taxes that discriminate against railroads by favoring their competitors, such as motor carriers.

In this case, Tennessee imposed a fuel tax on railroads but exempted motor carriers. The Sixth Circuit upheld the tax by pointing out that Tennessee also imposed what the court deemed a "roughly equivalent" fuel tax on motor carriers. The court held it "irrelevant" that Tennessee dedicates the revenue from the motor carrier tax to building and maintaining roads—the infrastructure that motor carriers use for their business—whereas the revenue from the railroad tax is *not* similarly dedicated to building and maintaining railroad tracks, and railroads are left to pay for their own infrastructure.

The question presented is whether Tennessee's tax on railroad fuel discriminates against railroads under 49 U.S.C. § 11501(b)(4).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioner Illinois Central Railroad Company is an indirect, wholly-owned subsidiary of Canadian National Railway Company, a publicly-traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Illinois Central Railroad Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a) is not yet reported, but is available at 2018 WL 4183464. The Sixth Circuit's order denying rehearing or rehearing en banc (App. 34a) is not reported. The order and opinion of the district court (App. 12a) is available at 2017 WL 1347269.

JURISDICTION

The Sixth Circuit entered its judgment on August 31, 2018, and denied petitioner's timely petition for rehearing or rehearing en banc on October 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, now codified at 49 U.S.C. § 11501, provides, in relevant part:

> (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:
>
> ….

> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board under this part.

The full text of 49 U.S.C. § 11501 is reproduced at the back of this brief, App. 36a.

INTRODUCTION

The Sixth and Eleventh Circuits have split with the Iowa Supreme Court on an important question of federal law: In determining whether a state tax discriminates against railroads in violation of 49 U.S.C. § 11501, is how the state allocates its tax revenue relevant?

Congress enacted the Railroad Revitalization and Regulatory Reform Act—the 4-R Act—in hopes of preserving the nation's interstate freight rail system. The Act forbids states from imposing any "tax that discriminates against a rail carrier," 49 U.S.C. § 11501(b)(4), by, for example, favoring motor carriers or other transportation businesses that compete with the railroads.

In cases where a state enacts a facially discriminatory tax, such as a sales tax that applies to the fuel used by railroads but exempts the fuel used by motor carriers, the state can rebut the prima facie case of discrimination by showing that motor carriers must pay a "roughly equivalent" tax. *See Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015) ("*CSX II*").

Comparing two taxes obviously requires comparing the relative tax rates. But it should also require comparing the way a state *allocates* the tax revenue. A state discriminates against railroads if it

taxes motor carriers and railroads at the same rate—but dedicates the revenue from the motor carrier tax to building and maintaining highways (the infrastructure used for the truckers' business), while directing the revenue from the railroad tax to a purpose that does not directly benefit the railroads that pay the tax. Tax schemes of this type give motor carriers a competitive advantage, in that their tax dollars are immediately plowed into projects that benefit their business, whereas the railroads are left to pay for their own infrastructure.

The first court to confront this issue was the Iowa Supreme Court in *Atchison, Topeka & Santa Fe Railway v. Bair*, 338 N.W.2d 338 (Iowa 1983). The court invalidated Iowa's railroad fuel tax as discriminatory under the 4-R Act because Iowa did not dedicate the revenues to rail infrastructure used by the active railroads that paid the tax, whereas it dedicated the revenues of its motor carrier fuel tax to building and maintaining highways and bridges.

Two federal circuit courts, however, have recently held the precise opposite—that the way a state tax scheme allocates revenue is *not* relevant to analyzing discrimination under the 4-R Act. In *BNSF Railway v. Tennessee Department of Revenue*, 800 F.3d 262 (6th Cir. 2015), and again in the decision below, the Sixth Circuit held that allocation is irrelevant. In the Sixth Circuit's view, the fact that a state dedicates the taxes paid by motor carriers to the very infrastructure the motor carriers use for their business—but fails to do the same for the taxes paid by the railroads—does not give rise to discrimination. The Eleventh Circuit agrees with the Sixth Circuit, deeming allocation irrelevant to analyzing discrimination under the 4-R

Act. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163 (11th Cir. 2018).

This Court, in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), held that the way a state allocates tax revenue *is* relevant to determining whether a tax is discriminatory under the Commerce Clause. The Court explained that, in assessing discrimination, one cannot "divorce" the tax "payments from the use to which the payments are put." *Id*. at 201. But the Court has never addressed whether the same rule applies in deciding whether a tax is discriminatory under the 4-R Act. Now that there is a deepening split in the lower courts over that very question, this case presents the ideal vehicle for resolving it.

This question is important and recurring. It is of immense importance to the nation's freight railroads, which purchase more than 3 billion gallons of diesel fuel annually, and are placed at a competitive disadvantage when the resulting tax revenue is not dedicated to their rail infrastructure, while the tax payments of their competitors are dedicated to building their competitors' infrastructure. This competitive disadvantage is the very outcome Congress sought to prevent when it enacted the 4-R Act. And the question presented is also of great importance to the states themselves, as illustrated by Alabama's recent request that the Court grant certiorari on this issue. *See* Response of Alabama to Conditional Cross-Petition, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, No. 18-612, at 1 (acknowledging that resolving this issue is "in the nation's best interest" given that it is unsettled and will recur with great frequency).

STATEMENT

Petitioner challenged Tennessee's imposition of a tax on the diesel fuel bought by railroads in Tennessee—a tax from which motor carriers (*i.e.*, trucks) are exempt. Tennessee did not dispute that the tax is a prima facie violation of the 4-R Act's antidiscrimination mandate, in that railroads had to pay it but motor carriers did not. Rather, Tennessee argued that the tax on railroads was not discriminatory because motor carriers paid a *different* tax on fuel. *See CSX II*, 135 S. Ct. 1136, 1143-44 (2015) (holding that a state can justify a tax levied against railroads but not their competitors by identifying a roughly equivalent tax levied against the competitors). But when petitioner pointed out that the two taxes were *not* rough equivalents because the motor carrier tax revenue was used for highway improvements, whereas the railroad tax revenue was used for purposes that did not directly benefit the railroads that paid the tax, the Sixth Circuit rejected the argument. It held that the way Tennessee allocated the tax revenue was irrelevant to the discrimination analysis. App. 9a.

A. The 4-R Act

In the 1970s, many of the nation's railroads were bankrupt and the industry was near collapse. Congress determined that state and local taxes were in part to blame. It found 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 motor carriers—the railroads' main competitors—operate on highways, which are publicly-funded infrastructure. *See W. Air Lines, Inc.*

v. Bd. of Equalization of S.D., 480 U.S. 123, 131 (1987); H.R. Rep. No. 94-725, at 78 (1975); S. Rep. No. 91-630, at 1 (1969); S. Rep. No. 87-445, at 449-66 (1961).

Congress responded with the 4-R Act. The legislation was 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). Congress emphasized that the railroads "'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines*, 480 U.S. at 131 (quoting S. Rep. No. 91-630, at 3). "Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, addresses this concern by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads." *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 336 (1994). The 4-R Act gives federal courts the power to grant injunctions to enjoin violations of Section 306. *See* 49 U.S.C. § 11501(c).

Section 306 identifies four types of taxes that "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first three categories are various types of property taxes. *Id*. § 11501(b)(1)-(3). The fourth category—the one at issue in this case—sweeps broadly to encompass "another tax that discriminates against a rail carrier." *Id*. § 11501(b)(4). This Court has stated that the phrase "another tax" means "any other tax," and has described subsection (b)(4) as a "catch-all" provision

that "encompass[es] any form of tax a State might impose." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 280, 284 n.6, 285 (2011).

B. Tennessee's Tax Scheme

The tax on railroad fuel. Tennessee imposes a tax on the purchase or use of tangible personal property in Tennessee. The tax is imposed at the rate of 7% of the purchase price. *See* Tenn. Code Ann. § 67-6-201 (sales tax); *id*. § 67-6-201-203 (use tax). During the years at issue—2006 through mid-2014—Tennessee imposed the 7% sales and use tax on railroads' diesel fuel.[1] During each of these years, petitioner paid the state between $1.3 million and $2.9 million in taxes for its purchase of diesel fuel in Tennessee. D. Ct. Dkt. #88-1. Most of the taxes petitioner paid were deposited into a short line rehabilitation program to aid county economic development—a program that does not directly benefit petitioner. App. 46a (stip. ¶ 38). The remainder of the taxes were deposited into Tennessee's general revenue and education funds, and used for a wide variety of government functions. *Id.* (stip. ¶ 39).[2]

The tax on motor carrier fuel. "The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of

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[1] Tennessee amended its sales tax effective July 1, 2014. *See* Tenn. Code Ann. § 67-3-202(c). The amended tax scheme was challenged in a separate lawsuit. *See BNSF Ry. v. Tenn. Dep't of Revenue*, 800 F.3d 262 (6th Cir. 2015).

[2] Specifically, with regard to the 7% sales tax on railroad diesel fuel, 5.5% goes to the Transportation Equity Trust Fund, the railroad portion of which funds the short line rehabilitation program. The remaining 1.5% is deposited in the general fund and/or used for educational purposes. *See* App. 46a (stip. ¶ 39).

Tennessee are on-highway motor carriers." App. 41a. Tennessee *exempts* motor carriers from paying the sales or use tax on their purchase or use of diesel fuel in Tennessee. *See* Tenn. Code Ann. § 67-6-329(a)(2). However, Tennessee, like all states, requires motor carriers to pay a highway fuel motor excise tax. During the years at issue, this tax was imposed at a rate of 17 cents per gallon of diesel fuel consumed on Tennessee roadways. *See* App. 42a (stip. ¶¶ 17-18). The revenues from Tennessee's highway tax are dedicated to the costs of building and maintaining state highways, roads, and bridges. *See* Tenn. Code Ann. § 4-3-1016(c); App. 43a (stip. ¶ 24).

C. The Decision Below

Petitioner Illinois Central sued Tennessee in the Middle District of Tennessee under the 4-R Act. Petitioner argued that Tennessee's application of its 7% sales-and-use tax to railroad diesel fuel was discriminatory in violation of 49 U.S.C. § 11501(b)(4), because motor carriers are exempted from paying the tax. Tennessee argued in response that the tax was not discriminatory because motor carriers paid the 17-cents-a-gallon motor fuel tax instead. The parties submitted a joint set of stipulated facts, App. 39a, and the district court conducted a bench trial.

In August 2013, the district court ruled in petitioner's favor. It held that Tennessee's sales tax as applied to railroad diesel fuel was facially discriminatory and placed railroads at a competitive disadvantage to motor carriers. *See Ill. Cent. R.R. v. Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892, 899-901 (M.D. Tenn 2013). The court found that Tennessee had failed to justify the discrimination, and

permanently enjoined the tax on railroad diesel fuel. *Id*. at 901.

While the case was on appeal, but before the Sixth Circuit ruled, this Court decided *CSX II*. The Court confirmed that a state violates 49 U.S.C. § 11501(b)(4) by imposing a fuel tax on railroads that is not imposed on competitors—unless the state can justify the discrimination. 135 S. Ct. at 1143. The Court explained that "an alternative, roughly equivalent tax is one possible justification" that can save a facially discriminatory tax. *Id*. (citing *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932)). The Sixth Circuit then remanded the case to the district court "for further proceedings in light of [*CSX II*]." CA6 Dkt. # 61-2.[3]

On remand, petitioner introduced expert testimony that per-gallon excise taxes on motor fuels are dedicated benefit taxes in the nature of user fees. D. Ct. Dkt. #89, at ¶ 1. These taxes provide direct, tangible benefits to the motor carrier industry, as they are the principal source of funds for constructing, improving and maintaining highways. *Id*. ¶¶ 1, 19. The railroad industry, in contrast, receives minimal direct benefit from the sales taxes it pays. *Id*. ¶ 19. Railroads must pay the construction and maintenance costs for their own infrastructure—including railroad tracks, bridges, and the many other elements of a rail network—themselves. *Id*. In addition, railroads must pay taxes on this infrastructure. App. 44a (stip. ¶¶ 27-28).

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[3] This citation refers to earlier appellate proceedings in this case: *Illinois Central Railroad v. Tennessee Department of Revenue*, No. 13-6348 (6th Cir.).

The district court entered judgment in Tennessee's favor. The court held that the sales tax (as applied to railroads) and the motor fuel tax (as applied to motor carriers) were "roughly equivalent." To reach this result, the court made a simple mathematical comparison of the relative tax rates from 1941 through 2014, concluding that because the tax rates over this 73-year span were comparable, there was no discrimination. The court rejected petitioner's argument that discrimination resulted from the different ways Tennessee allocated the revenue from the two taxes. App. 29a n.6.

The Sixth Circuit affirmed. Mirroring the district court's approach, the court of appeals focused exclusively on the relative tax rates. The court acknowledged that railroads paid approximately 30 percent more per gallon of diesel fuel than did motor carriers during the seven years preceding the lawsuit, but brushed aside the difference as inconsequential. App. 9a. The court concluded "that the taxes are roughly equivalent," and thus Tennessee did not discriminate by exempting motor carriers from the sales tax. *Id*.

The court rejected petitioner's argument that discrimination arose from the different ways Tennessee allocated the revenue from the two taxes. The court did not dispute that the revenue from the tax paid by motor carriers is dedicated to improving their business infrastructure, whereas the tax paid by railroads is not. But it declared this difference irrelevant. App. 9a. It held that, under settled Sixth Circuit law, "'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.'" *Id.* (quoting *BNSF Ry. v. Tenn. Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015)). The court "agree[d]" with the Eleventh Circuit's holding in the remanded *CSX II* case, where that court examined the text of the 4-R Act, and "found that the statute's plain language thwarts any call to examine how states allocate their tax revenue." App. 8a-10a (citing *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163, 1175-76 (11th Cir. 2018)). Thus, the court concluded, "[b]ecause the motor carriers instead paid another, comparable fuel tax, we conclude that Tennessee did not discriminate against rail carriers" by exempting motor carriers from the sales tax on diesel fuel. App. 2a.

The Sixth Circuit denied rehearing. App. 35a.

REASONS FOR GRANTING THE PETITION

The current state of affairs—in which two federal circuits are directly at odds with a state's highest court on a substantial and recurring question of federal tax law—is untenable. This Court's review is necessary to resolve the split, and to ensure that railroads are afforded the full measure of antidiscrimination protection that Congress enacted into law.

I. Review Is Warranted To Resolve The Split Over An Important Question Of Federal Tax Law.

The Iowa Supreme Court holds that a state's method of allocating tax revenue is highly relevant to assessing discrimination under 49 U.S.C. § 11501(b)(4). The Sixth and Eleventh Circuits, in contrast, deem it irrelevant as a matter of law.

A. The Iowa Supreme Court Holds That The Way A State Allocates Tax Revenue Is *Highly* Relevant To Analyzing Discrimination.

In *Atchison, Topeka & Santa Fe Railway v. Bair*, 338 N.W.2d 338 (Iowa 1983), the Iowa Supreme Court held that a fuel tax on railroads was discriminatory under the 4-R Act because, unlike the arguably comparable fuel tax paid by motor carriers, the railroad tax was not earmarked for railroad infrastructure used by the railroads that paid the tax. Iowa had imposed a tax on the amount of fuel the railroads used within the state. *Id*. at 341. The tax rate was initially three cents a gallon, and later raised to eight cents a gallon. *Id*. at 346. Just like Tennessee's tax at issue here, Iowa dedicated the revenues from its diesel fuel tax to a special fund used to rehabilitate debilitated railroad lines; it was *not* used for the benefit of the "viable railroads" that actually paid the tax. *Id*. at 347.

The Iowa Supreme Court compared the railroad fuel tax to the tax that motor carriers paid for their use of fuel. The court noted that motor carriers actually paid a higher tax rate—anywhere from ten to fifteen and a half cents per gallon more—than did the railroads. 338 N.W.2d at 346-47. However, the court explained, the tax scheme nonetheless discriminated against the railroads because "[t]he various taxes which [Iowa] requires the trucks to pay go into an earmarked fund for the construction, maintenance, supervision, and administration of the highways." *Id*. at 347. In contrast, "the railroads acquire, construct, maintain, and pay taxes on their own roads." *Id*. Because Iowa's different ways of allocating the revenues of the two taxes "give[ ] the trucks a distinct

competitive advantage," the court concluded, "the railroad tax in question discriminates against the railroads contrary to section 11503." *Id.*; *see also Burlington N. R.R. v. Triplett*, 682 F. Supp. 443, 446 (D. Minn. 1988) (following *Atchison* in enjoining fuel tax as discriminatory because "[w]hile the fuel tax paid by trucks is dedicated to the trucks' roadbeds, the railroads must pay the fuel tax in addition to paying for their tracks").[4]

B. The Sixth and Eleventh Circuits Hold That The Way A State Allocates Tax Revenue Is *Not* Relevant To Analyzing Discrimination.

In conflict with the Iowa Supreme Court's approach, the Sixth and Eleventh Circuits hold that the way a state allocates the tax revenue is irrelevant for purposes of the 4-R Act's antidiscrimination mandate.

In *BNSF Railway v. Tennessee Department of Revenue*, 800 F.3d 262 (6th Cir. 2015), the Sixth Circuit considered a challenge to Tennessee's diesel fuel tax scheme (an amended version of the tax scheme at issue in this case). The railroads argued that even though railroads and motor carriers paid the same tax rate, the tax scheme was nonetheless discriminatory because "the diesel tax funds the maintenance of Tennessee roads, and railroads do not use or benefit from Tennessee roads." *Id.* at 274. The Sixth Circuit rejected this argument, holding that "how Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the

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[4] At the time *Atchison* was decided, the 4-R Act's antidiscrimination provision was codified at 49 U.S.C. § 11503(b)(4). It has since been recodified, without substantive change, at 49 U.S.C. § 11501(b)(4).

Railroads have been discriminated against within the meaning of the 4-R Act." *Id*.

The Sixth Circuit reaffirmed *BNSF*'s holding in this case. Petitioner argued that "[t]he motor carriers' fuel taxes fund public highways," thus "benefiting trucks," whereas "the railroads' taxes go to state funds that allegedly afford little benefit to large railroads." App. 9a. The Sixth Circuit again rejected this argument. It declared that "this train has already left the station," citing its prior decision in *BNSF*, as well as the Eleventh Circuit's latest *CSX* decision, discussed below. *Id*. at 9a-10a. The Sixth Circuit stated that it would "decline the invitation to revisit *BNSF*" and again declared "irrelevant" the way "Tennessee uses the proceeds of its taxation of diesel fuel." *Id*. (internal quotation marks omitted).

The Eleventh Circuit joins with the Sixth Circuit in deeming a state's method of allocating tax revenue irrelevant under the 4-R Act. In *CSX Transportation, Inc. v. Alabama Department of Revenue*, 888 F.3d 1163 (11th Cir. 2018), the railroad contended that Alabama's fuel tax scheme discriminated against railroads vis-à-vis motor carriers, because the taxes that railroads paid were deposited in the state's general fund, whereas the taxes that motor carriers paid were "used exclusively to fund public highways, effectively subsidizing the infrastructure on which motor carriers travel." *Id*. at 1175 (internal quotation marks omitted). The Eleventh Circuit rejected the argument, reasoning that "[b]ecause none of the four paragraphs comprising [49 U.S.C.] § 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)."

Id. at 1176. Thus, "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*. (citing 49 U.S.C. § 11501(b)(4)).

II. Review Is Further Warranted Because The Decision Below Is Incorrect.

The Sixth Circuit's holding all but nullifies the 4-R Act's nondiscrimination mandate. In comparing two taxes, a state's allocation of the tax revenues is highly relevant to determining whether a tax is discriminatory. Two taxes imposing the identical tax rate could not be deemed rough equivalents if, for example, the revenues from one tax were kept by the government, while the revenues from the other tax were refunded to the taxpayer. In the former scenario, the taxpayer bears the full burden of the tax at the assessed rate, whereas in the latter scenario, the taxpayer bears no burden other than administrative costs and the time value of money. By myopically analyzing questions of tax discrimination as requiring nothing more than a mathematical comparison of tax rates, the Sixth Circuit's approach empowers states to give motor carriers an unfair competitive advantage over railroads. As long as the tax rates (in a court's view) are similar enough, states are free to discriminate against railroads by allocating tax revenues to benefit railroads' competitors.

In this case, Tennessee's use of the tax revenues gives rise to discrimination in that the tax paid by the motor carriers is used to subsidize their business, whereas the tax paid by the railroads is not. That is a textbook example of a discriminatory tax prohibited by the 4-R Act and directly contravenes the Act's purpose—to remedy the competitive disadvantage between railroads, which must build and maintain

their own infrastructure, and the trucking industry, which operates on publicly funded infrastructure. *See* S. Rep. No. 87-445, at 449-66 (1961). In fact, a Government Accountability Office report specifically recognized the unfairness arising from this asymmetry. *See* U.S. Gov't Accountability Office, GAO-07-94, Freight Railroads: Industry Health Has Improved, but Concerns About Competition and Capacity Should Be Addressed 62 (2006).

The Sixth Circuit's approach conflicts with how this Court has historically approached questions of tax discrimination. In *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), the Court held that a Massachusetts milk pricing order violated the Commerce Clause prohibition on discriminatory taxes by favoring in-state milk producers over out-of-state producers. In reaching that conclusion, the Court looked to how Massachusetts allocated the tax revenues as a critical part of the discrimination inquiry. The Court noted that "[a]lthough the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers." *Id*. at 194. The Court emphasized that where a state has enacted an "integrated regulation"—that is, a scheme that taxes, and then subsidizes with the tax proceeds—a court "cannot divorce the [taxes] from the use to which the [taxes] are put," but must examine the scheme as a whole. *Id*. at 201.

The same logic applies here. Although the Court in *CSX II* did not specify how a federal court should conduct a "rough equivalency" analysis for purposes of determining whether a tax is discriminatory vis-à-vis a purportedly comparable tax, it did not need to. That

is because the Court, in a long line of cases stretching back decades, had already developed a common-law test—the compensatory tax doctrine—for determining whether taxes are "roughly equivalent" in order to adjudicate claims of discrimination under the dormant Commerce Clause. *See Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932).

Under the compensatory tax doctrine, "a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 98, 102-03 (1994) (internal quotation marks omitted). To establish rough equivalence, the state must identify the state tax for which the challenged tax is attempting to compensate. *Id*. at 103. The state then must show that the challenged tax roughly approximates—but does not exceed—the comparator tax. *Id*. And finally, the state must show that "the events on which the [two] taxes are imposed [are] substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Id*. (alterations and internal quotation marks omitted); *see also Comptroller of Treas. of Md. v. Wynne*, 135 S. Ct. 1787, 1803 n.8 (2015) (Taxes "are 'compensatory' if they are rough equivalents imposed upon substantially similar events.").

In *CSX II*, the Court specifically invoked this line of caselaw in holding that 4-R Act discrimination claims should be evaluated under the "rough equivalence" standard. The Court stated that "[o]ur negative Commerce Clause cases"—*i.e.*, the cases discussed above—"endorse the proposition that an

additional tax on third parties may justify an otherwise discriminatory tax." 135 S. Ct. at 1143. And the Court specifically cited its ruling in *Gregg Dyeing*—a seminal comparative tax doctrine precedent—to make its point clear. *See id*. The Sixth Circuit erred by brushing aside this Court's well-settled test and fashioning its own "rough equivalence" standard that eschews the Court's holistic approach in favor of a simplistic comparison of tax rates.

III. The Question Presented Is Exceptionally Important And This Case Provides The Ideal Vehicle For Resolving It.

This case raises an exceptionally important and recurring question of federal tax law over which the lower courts have split. This Court has long emphasized the importance of a nationally uniform tax law. In *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948), the Court explained how different legal interpretations give rise to "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion." For those reasons, the split in the lower courts cannot be allowed to stand.

Resolution of the question presented is important to the railroads, which have been denied the statutory protections against discrimination that Congress guaranteed them in the 4-R Act. In states within the Sixth and Eleventh Circuits, railroads are now subject to discriminatory tax schemes that favor their primary competitors, the motor carriers, by funneling the motor carriers' tax payments to infrastructure projects that directly benefit the motor carriers' business. The railroads, in contrast, are left to pay for their own infrastructure. In this way, the tax scheme

puts railroads at a severe competitive disadvantage, in violation of 49 U.S.C. § 11501(b)(4). Resolution of the question presented is also important to the states, as Alabama recognized when it recently acknowledged that resolving this issue is "in the nation's best interest." *See* Response of Alabama to Conditional Cross-Petition, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, No. 18-612, at 1.

This case is a perfect vehicle for resolving the split in the lower courts over whether a state's way of allocating tax revenue is relevant to assessing discrimination under the 4-R Act. Petitioner has pressed the question presented at all stages of this case and it was fully briefed by the parties. The Sixth Circuit squarely addressed the issue, relying on settled circuit precedent and expressly "agree[ing]" with the Eleventh Circuit's approach. App. 8a. The Sixth Circuit entered a final judgment and there are no further proceedings to be had in the district court.

Moreover, the district court and the court of appeals decided this case on a jointly-stipulated set of relevant facts, and on cross-motions for summary judgment. *See* App. 30a, 39a. Consequently, the record is clean and there are no significant factual disputes that could cloud the legal issues. Because the factual record is not just fully developed but largely *undisputed*, the legal question is squarely presented for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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