No. 18-866

IN THE
Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

TENNESSEE DEPARTMENT OF REVENUE, ET AL.,
Respondents.

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

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents that all parties were provided notice of *Amicus's* intention to file this brief and gave consent to the filing of this brief.

matter.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many state courts considering this issue, and because any decision will significantly impact taxpayers and state tax administration, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

Tennessee taxes the purchase of diesel used by trucks, spending the revenue in a special fund to operate and improve roads and bridges used by truckers. At the time of the events in this case, Tennessee imposed a 7 percent tax on the purchase of diesel used by railroads, spending the revenue for purposes other than operating or improving infrastructure used by railroads.

Citing the federal 4-R Act, which prohibits "another tax [other than property tax] that discriminates against a rail carrier providing transportation," 49 U.S.C. § 11501(b)(4), the railroads argue that the tax they pay provides them with no direct benefits while the tax the truckers pay is effectively a rebate because it pays for infrastructure operating and improvement costs that otherwise

would have to be paid out-of-pocket by the truckers (and for the railroads, is paid out-of-pocket).

The Sixth Circuit below and the Eleventh Circuit not only disagreed, they concluded that even looking at what happens to the revenue is irrelevant for evaluating whether a tax is discriminatory. This conclusion, aside from being at odds with this Court's methods of evaluating discriminatory taxation in the Dormant Commerce Clause context, is at odds with this Court's repeated 4-R Act reversals that occur because lower courts become fixated on the form of a tax statute rather than how the tax substantively functions. This Court should make clear that the 4-R Act inquiry means asking whether the tax results in discrimination, and courts evaluating a tax should not limit themselves to incomplete fragments. When everyone else in the world decides what they think about a tax, they look at the rate, the base, and the use of the revenue, and the courts below should too.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A LOWER COURT SPLIT ON WHETHER 4-R ACT CHALLENGES REQUIRE COURTS TO FULLY EVALUATE ALL COMPONENTS OF A TAX.

A. The Court Below Denied that Rate, Base, and Use of Revenue are Indivisible Components of Fully Evaluating a Tax.

A Tax Foundation analyst who was directed to evaluate a tax would be told "incomplete" by our editor if their evaluation did not look at the tax's (1) rate, (2) base, and (3) use of revenue. A taxpayer considering voting for or against a tax wants to know how high the rate is, what it taxes, and what the revenue will be used for. A 4 percent sales tax in one state where the tax applies to groceries (as in Hawaii) has different effects from a 4 percent sales tax in another state where the tax does not apply to groceries (as in Georgia). Similarly, two taxes with roughly equivalent rates that two people both pay, but one person gets rebated back to him, are not roughly equivalent.

4-R Act cases keep returning to this Court because lower courts keep not understanding that this Court does not want stilted, incomplete analysis of taxes challenged under § 11501(b)(4). In *CSX Transp., Inc. v. Ala. Dep't of Revenue* ("*CSX* I"), 562 U.S. 277 (2011), this Court reversed the Eleventh Circuit's refusal to consider tax base in evaluating discrimination, where Alabama had a tax on everyone but exempted truckers but not railroads. *See id.* at 287 ("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 the State takes the favored group's rate down to 0%. And that is all an exemption is."). In *Ala. Dep't of Revenue v. CSX Transp., Inc.* ("*CSX II*"), --- U.S. ----, 135 S. Ct. 1136 (2015), this Court reversed the Eleventh Circuit's refusal to consider whether a tax is discriminatory when similarly situated industries are exempted but pay a different, roughly equivalent tax. *See id.* at 1144 ("There is simply no discrimination when there are roughly comparable taxes. If the task of determining when that is so is 'Sisyphean,' as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes.") (internal citation omitted). And yet here we are again, with the Eleventh and Sixth Circuits trying to determine discrimination through piecemeal formalism rather than looking at how the taxes operate.

B. This Court Should Stop the Emergence of Two Different Methods of Evaluating Tax Discrimination, Including One that Would Require Many More Roundtrips to the Supreme Court.

In the dormant Commerce Clause context, this Court has eschewed formalism and piecemeal approaches and instead focuses on substance when evaluated tax discrimination. The most direct case on this topic is *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), where Massachusetts taxed in-state and out-of-state producers of milk sold in the state, then distributed the entire amount collected only to in-

state producers of milk. The Court found the system "clearly unconstitutional," *see id.* at 194, rejecting Massachusetts's argument that the tax was nondiscriminatory because it should be viewed piecemeal from the subsidy program:

> A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not "benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S., at 273-274, 108 S.Ct., at 1807-1808; see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S., at 272, 104 S.Ct., at 3055; *Guy v. Baltimore*, 100 U.S., at 443, 25 L.Ed. 743.
>
> More fundamentally, respondent errs in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts. By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone.[…] [W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which

> would otherwise lobby against the tax has been mollified by the subsidy.

Id. at 199-200. See also *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) ("It is true that tax exemptions, as an abstract matter, could be a variant of tax discrimination."); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) (striking down income tax provision taxing federal-provided retirement benefits while exempting state-provided retirement benefits); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (striking down tax on alcohol where exemptions granted to local producers resulted in discrimination); *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (striking down a tax exemption given only to taxpayers engaged in in-state activity).

Justices Scalia and Thomas, who concurred in the judgment in *West Lynn Creamery*, nevertheless agreed with its conclusion that a state taxing in-state and out-of-state taxpayers but then using the money to subsidize the in-state payers of the tax was unconstitutional under negative Commerce Clause doctrine. *See id.* at 211-12 (Scalia, J., concurring in the judgment) ("I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund. Perhaps, as some commentators contend, that line comports with an important economic reality: A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, nonprotectionist, purposes."). Justice Thomas, who expounded on an originalist

alternative to dormant Commerce Clause jurisprudence in his dissent in *Camps Newfound*, did not consider his analysis complete without evaluating whether the tax would be violative "[e]ven when coupled with the tax exemption (which is, in truth, no different than a subsidy paid out of the State's general revenues) . . . ." *Camps Newfound*, 520 U.S. at 640 (Thomas, J., dissenting). Although his framework and conclusion differed from that of other justices, he understood that one must look at the entire operation of the tax and not just fragmented portions, with the reference to "general revenues" perhaps keying off Justice Scalia's inquiry as to whether the subsidy money came from general taxes or the challenged tax.

The evaluation of discriminatory taxes in the Commerce Clause context is more detailed because the Court has been at it far longer than the 4-R Act has been around. States have tried to enact pretty much every permutation of discriminatory taxation, and the Supreme Court has been vigilant about stopping them all. A New York tax solely on out-of-state activity that left identical in-state activity untaxed. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). A Louisiana tax on all activity but where in-state activity receives significant credits. *See Maryland v. Louisiana*, 451 U.S. 725 (1981). A New York tax on out-of-state activity simultaneous with an exemption for in-state activity. *See Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984). A Hawaii tax on all activity but in-state activity is exempted. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). A Pennsylvania fee on all activity but with reduced taxes on in-state activity. *See Am. Trucking Ass'n v. Scheiner*, 483 U.S. 266

(1987). An Ohio tax credit for all activity but disallowed for out-of-state taxpayers. *See New Energy Co. v. Limbach*, 486 U.S. 269 (1988). A Maryland tax on all activity with a partial credit for out-of-state activity and a full credit given for in-state activity only. *See Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. ----, 135 S. Ct. 1787 (2015). The Court can recreate all these permutations in the 4-R Act context, a case at a time, as states get a second bite at the apple in taxing out-of-state activity or taxpayers while exempting similar in-state activity or taxpayers. Or this Court can cut it all off now, making clear that "discriminatory taxation" means the same thing in both contexts.

In *CSX II*, this Court understood that it would be silly to have one concept of "discriminatory taxation" for 4-R Act cases and another concept of "discriminatory taxation" for dormant Commerce Clause cases, by drawing on the dormant Commerce Clause case *Gregg Dyeing*:

> It 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. If that were true, both competitors could claim to be disfavored—discriminated against—relative to each other. Our negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479–480, 52 S.Ct. 631, 76 L.Ed. 1232 (1932).

CSX II, 135 S. Ct. at 1143. In this case, instead the

Sixth Circuit rejected applying any Commerce Clause analysis tools to its 4-R Act case beyond those this Court has already explicitly directed them to use. *See Illinois Cent. R.R. Co. v. Tennessee Dep't of Revenue*, No. 17-5553, 2018 WL 4183464, at *3 (6th Cir. Aug. 31, 2018) ("Indeed, had the Supreme Court wanted us to employ a Commerce Clause test under the 4-R Act, we would have expected them to say so. Rather than apply the compensatory tax doctrine, we agree with the Eleventh Circuit that taxes are roughly equivalent if they impose similar rates. "). As a result, if faced with a trucking-and-railroad fuel tax carbon copy of the Massachusetts milk tax-and-subsidy struck down in *West Lynn Creamery*, they might conclude that it is a discriminatory tax in violation of the Commerce Clause but is not a discriminatory tax for 4-R Act purposes. It would be Schrödinger's Fuel Tax: simultaneously discriminating against interstate carriers while not discriminating against interstate carriers.

This case is not precisely a carbon copy of the Massachusetts milk tax-and-subsidy struck down in *West Lynn Creamery*. That case involved one tax and a direct monetary transfer to the in-state competitor, while this case involves two taxes and spending targeted and intended to benefit the in-state competitor. Nevertheless the parallels are close enough to warrant judicial inquiry. The Sixth and Eleventh Circuits erred in declining to undertake that inquiry.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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