No. 18-866

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,
Respondent.

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

BRIEF OF THE TENNESSEE RAILROAD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Walter Hellerstein
Counsel of Record
University of Georgia
School of Law
303 Rusk Hall
Athens, Georgia 30602
(706) 542-5175
wallyh@uga.edu

Eric S. Tresh
Maria M. Todorova
Eversheds Sutherland (US) LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000
EricTresh@eversheds-sutherland.com
MariaTodorova@eversheds-sutherland.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

The Tennessee Railroad Association ("TNRRA") respectfully submits this brief as *Amicus Curiae* in support of Petitioner Illinois Central Railroad Company, urging this Court to grant Petitioner's petition for certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit.[1] That court improperly held that Tennessee's sales tax imposed on diesel fuel purchased by railroads was "roughly equivalent" to the motor fuel tax imposed on diesel fuel purchased by motor carriers and therefore did not discriminate against railroads in violation of the 4-R Act, even though almost 100 percent of the revenues from the motor fuel tax were dedicated to uses specifically benefiting motor carriers while sales tax revenues were used for general governmental purposes or other purposes not specifically benefiting major railroads. Amicus Curiae has authority to file this brief pursuant to Rule 37.3.[2]

TNRRA is a non-profit trade association whose members include Class I railroads with a significant presence in the State of Tennessee. TNRRA's members operate 2,500 miles of track and employ more than 3,618 employees. TNRRA encourages railroad safety and advocates for its members in matters of common interest, such as the issues involved in this litigation. This case raises concerns

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[1] *Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation of submission of the brief.

[2] All parties were timely notified and have consented to the filing of this brief.

about the validity and effectiveness of federal laws enacted by Congress to protect interstate commerce from discriminatory and unduly burdensome taxation. TNRRA has a significant interest in the outcome of this case in order to ensure that the 4-R Act is rigorously enforced and that its members are not subject to discriminatory state taxation.

INTRODUCTION

This case raises an important issue bearing on the ultimate question of whether Tennessee's sales tax on diesel fuel discriminates against railroads under the 4-R Act. The issue, as framed by this Court in a similar case, is "whether [Tennessee's] fuel-excise tax is the rough equivalent of [Tennessee's] sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1144 (2015) (*CSX II*).

SUMMARY OF ARGUMENT

The fundamental question is what "rough equivalence" means for purposes of this inquiry. The Court of Appeals for the Sixth Circuit held that "rough equivalence" means "dollar equivalence," and since Tennessee's sales tax on the railroads' purchase of diesel fuel was roughly the same in dollar terms as Tennessee's motor fuel tax on the motor carriers' purchase of diesel fuel, the taxes satisfied the "rough equivalence" requirement. In so holding the court embraced the view that how the state "'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.'" Pet. App. 29a (quoting *BNSF Ry. Co. v.*

Tennessee Dep't of Revenue, 800 F.3d 262, 274 (6th Cir. 2015)). As the ensuing discussion demonstrates, the Sixth Circuit's disposition of the "rough equivalence" issue ignores this Court's guidance as to the proper approach to the "rough equivalence" inquiry in its opinion in *CSX II*; it flies in the face of the purposes of the 4-R Act; and it defies common sense. Indeed, absent review the Sixth Circuit's approach would ignore the cardinal rule of interpretation of tax statutes, namely, that substance rather than form is the touchstone of analysis.

ARGUMENT

I. IN CSX II, THIS COURT PROVIDED CONTROLLING GUIDANCE ON THE MEANING AND APPLICATION OF THE "ROUGH EQUIVALENCE" STANDARD IN THE ANALYSIS OF "DISCRIMINATION" UNDER THE 4-R ACT.

In *CSX II*, a case whose facts closely resemble those of the instant case, this Court provided guidance on how the courts should undertake the "rough equivalence" inquiry. First, the Court explicitly recognized the difficulty of the task confronting courts in undertaking this inquiry. Thus, the Court declared that it was "inclined to agree" with the suggestion "that federal courts are ill qualified to explore the vagaries of state tax law" (*CSX II*, 135 S. Ct. at 1144) in undertaking the "rough equivalent" inquiry, but it determined that there was no escape from this burden because "Congress assigned this task to the courts by drafting an antidiscrimination command in such sweeping terms." *Id.* Accordingly, the Court continued, if the task of determining "when there are roughly comparable taxes . . . is 'Sisyphean,'

as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes." *Id.* (internal citation omitted).

Nevertheless – and what is dispositive for the purposes of this petition – in instructing courts how to discharge the task of determining whether two taxes are "roughly comparable," this Court pointed specifically to its "negative Commerce Clause cases" that "endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." *Id.* at 1143. Moreover, in so doing, the Court made explicit reference to *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932), as illustrating its view that "an alternative, roughly equivalent tax . . . renders a tax disparity non-discriminatory." *CSX II*, 135 S. Ct. at 1143. This is understandable, as *Gregg Dyeing* is one of a long line of cases reflecting the application of the Court's "constitutional doctrine that protects an apparently discriminatory tax from attack when the state can identify a 'complementary' exaction that cures the apparent discrimination." Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Law. 405, 406 (1986) (cited in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341 n.7 (1996)). The Court's complementary or compensatory doctrine (as reflected in *Gregg Dyeing*) therefore provides an analytical template for approaching the "rough equivalence" issue raised in this case.

Gregg Dyeing involved a challenge to a South Carolina license tax of six cents per gallon upon persons importing gasoline and other petroleum products into South Carolina for use or consumption in the state. The taxpayer, who used gasoline

purchased outside the state for operating its South Carolina bleachery, contended that the statute discriminated against interstate commerce by singling out for taxation petroleum products imported from sister states. The South Carolina Supreme Court had disposed of this objection on the ground that the allegedly discriminatory levy was "complementary" to other South Carolina statutes imposing license taxes of six cents per gallon on dealers in petroleum products sold in the state. *Gregg Dyeing Co. v. Query*, 164 S.E. 588, 590 (S.C. 1931) (quoted in *Gregg Dyeing*, 286 U.S. at 476). Taking the provisions collectively, the state court held that the taxes in substance imposed the same six cents per gallon tax upon all consumers of petroleum products in the state, even though the legal incidence of the levies fell variously on "dealers" selling such products in the state and on "importers" using or consuming such products in the state. *Gregg Dyeing*, 286 U.S. at 476-77. Moreover, payment of the license tax imposed on dealers guaranteed immunity from the license tax imposed on importers so that only one tax was imposed on the sale or use of any particular gallon of petroleum in the state.

In this Court, the taxpayer launched a frontal assault on the complementary or compensatory tax theory, arguing that "to stand the test of constitutionality . . . the act must be constitutional 'within its four corners,' that is, considered by itself." *Id.* at 479-80. The Supreme Court rebuffed the attack:

> 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. It may distribute them as it sees fit, if the *result, taken in its totality,* is within the State's constitutional power.

Id. at 480 (emphasis supplied).

Reading the statutes together, the Court found nothing objectionable in South Carolina's taxing scheme. It saw "no reason . . . to challenge [the state court's] view" that the "burden" of the tax on sales of petroleum products within the state "actually rests upon the consumer, although not placed upon the consumer directly." *Id.* Accordingly, the taxpayer was treated no worse than other in-state consumers of petroleum products who purchase such products from dealers and "are in effect required to pay through the tax on the dealers from whom such consumers buy." *Id.* Nor was the taxpayer treated any worse than manufacturers who produced gasoline in the state and consumed it in their own enterprises because the state court had construed the statute as imposing a tax upon the gasoline that such a company uses as well as that which it sells. In short, the taxpayer had "failed to show that, whatever distinction there existed *in form*, there was any substantial discrimination *in fact*." *Id.* at 482 (emphasis supplied).

II. THIS COURT'S GUIDANCE IN CSX II REQUIRES THAT THE INQUIRY INTO "ROUGH EQUIVALENCE" FOCUS ON THE SUBSTANCE OF THE EXACTIONS AND NOT THEIR FORM.

The clear message from this Court's opinion in *CSX II*, and the Commerce Clause authority it invokes, is that the inquiry into "rough equivalence" should be determined by whether there is any "discrimination in fact," and should "not . . . be determined by artificial standards." *Gregg Dyeing*, 286 U.S. at 480. In this respect, the Court is essentially reaffirming the fundamental principle of tax adjudication that it has long embraced, in cases involving both constitutional and statutory issues, that the substance rather than form of the taxes at issue governs the analysis. *See*, *e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (declaring that "The Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects'" (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)); *PPL Corp. v. Comm'r of Internal Revenue*, 133 S. Ct. 1897, 1905 (2013) (adverting to "the black-letter principle that 'tax law deals in economic realities, not legal abstractions'"); *Ry. Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959) (declaring that Commerce Clause is contemptuous of "magic words or labels"); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372-73 (1991) (declaring that Commerce Clause analysis rejects "formalism"); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 443 (1980) (observing that Commerce Clause analysis looks to "the practical effect of a challenged tax"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that Commerce Clause jurisprudence is

grounded in "economic realities"); *Comm'r of Internal Revenue v. Hansen*, 360 U.S. 446, 461 (1959) (noting that "the incidence of taxation depends upon the substance, not the form, of the transaction"); *Comm'r of Internal Revenue v. Sw. Expl. Co.*, 350 U.S. 308, 315 (1956) (noting that "the tax law deals in economic realities, not legal abstractions").

There is no litmus test for determining whether, as a matter of substance and not form, two taxes are "roughly equivalent." Nevertheless, as noted above, the Court recognized in *CSX II* that "[o]ur 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. Moreover, in citing *Gregg Dyeing* in support of that proposition, the Court was clearly signaling that *Gregg Dyeing*, and the "compensatory" or "complementary" tax doctrine (*Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996)) it applied, embodied an appropriate analytical framework for adjudicating the "rough equivalence" issue.

Although the compensatory tax doctrine has been reflected in the U.S. Supreme Court's constitutional jurisprudence for the past 150 years, *see* 1 J. Hellerstein, W. Hellerstein & J. Swain, *State Taxation* ¶ 4.14[3][c] (3d ed. 2018 rev.) (tracing development of doctrine), the Court's contemporary constitutional jurisprudence has "distilled three conditions necessary for a valid compensatory tax." *Fulton*, 516 U.S. at 332.

- First, the state must identify the tax burden for which the facially discriminatory tax allegedly compensates.

- Second, the facially discriminatory tax "must be shown roughly to approximate – but not to exceed" the amount of the tax for which the state is attempting to compensate.
- Third, the taxes "must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other."

Id. at 332-33 (citations omitted). *See also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994).

There is nothing talismanic about the Court's compensatory doctrine. Indeed, the Court itself has recognized that the compensatory tax doctrine was not "a doctrine unto itself, [but] merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." *Oregon Waste*, 511 U.S. at 102. Moreover, it is not the only way in which a determination of "rough equivalence" can be made when a tax that appears to discriminate is offset by another levy that, as a matter of substance, does not discriminate. But it is indisputably an instructive framework for determining "rough equivalence," and it is a framework that this Court has endorsed, in general, and in a case that, in relevant respects, is virtually indistinguishable from the instant case, in particular. Accordingly, failure of a tax to satisfy the strictures of the compensatory tax doctrine reveals, at a minimum, that there is a prima facie case that the

tax is not the "rough equivalent" of the apparently discriminatory tax for which it allegedly compensates.

As the ensuing discussion demonstrates, it was plain error of the Court of the Appeals for the Sixth Circuit summarily to refuse *to* apply that doctrine in undertaking its "rough equivalence" analysis. Moreover, wholly apart from the application of the Court's compensatory tax doctrine to the taxes at issue, the Sixth Circuit's analysis cannot withstand scrutiny even under a generic "rough equivalence" standard that focuses simply on the taxes' substance rather than their form.

III. THE SIXTH CIRCUIT COURT'S FAILURE TO APPLY THE COMPENSATORY TAX DOCTRINE IN ITS "ROUGH EQUIVALENCE" INQUIRY CONSTITUTES PLAIN ERROR REQUIRING THIS COURT'S REVIEW.

In light of the U.S. Supreme Court's reference to the compensatory tax doctrine as guidance for the "rough equivalence" inquiry on remand from *CSX II* and citation to *Gregg Dyeing*, a leading compensatory tax decision embodying the principle that "an alternative, roughly equivalent tax . . . renders a tax disparity nondiscriminatory," (*CSX II*, 135 S. Ct. at 1143), the Sixth Circuit's wholesale rejection of the doctrine in its analysis of the "rough equivalence" question is inexplicable. The Sixth Circuit effort to justify its position on the grounds that the Court in *CSX II* "never mention[ed] that doctrine" (Pet. App. 7a) and that the Court' reference to *Gregg Dyeing* does not "require[] us to apply the compensatory tax doctrine" (*id.*) is unpersuasive at best.

What the Sixth Circuit ignores is that it was the this Court itself – *fully aware of the fact that the discrimination issue before it involved a comparison between interstate railroads and interstate motor carriers* – that recognized the relevance of "[o]ur negative Commerce Clause cases" and to a leading compensatory tax decision (*Gregg Dyeing*) in the inquiry into "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." *CSX II*, 135 S. Ct. at 1143-44. In short, the Sixth Circuit's summary refusal to consider this Court's compensatory tax doctrine in undertaking its "rough equivalence" analysis disregards this Court's opinion in *CSX II*, and it plainly warrants this Court's review.

IV. Even Taken on Its Own Terms, and Without Regard to Negative Commerce Clause Jurisprudence or the Compensatory Tax Doctrine, the Sixth Circuit Court's "Rough Equivalence" Analysis is indefensible and warrants this court' review.

The Sixth Circuit's entire analysis of the "rough equivalence" issue is contained in a single paragraph:

> [T]axes are roughly equivalent if they impose similar rates. In comparing the taxes, Illinois Central's expert asks us to focus on the period between 2007 and June 2014. But even looking only at that seven-year stretch, the tax rates were roughly equivalent. According to the railroad's own expert, between 2007 and June 2014, the railroads' and motor

> carriers' tax rates differed by between less-than-half-of-one cent and approximately five cents per gallon. The railroads paid a higher rate in 2008 and again from 2011 through June 2014, but motor carriers paid more in every other year. The excess tax burden for railroads was, at most, an extra 5.2 cents per gallon; motor carriers paid up to 4.2 extra cents per gallon . . . . We [] conclude that the taxes are roughly equivalent.

Pet. App. 8a-9a (citations omitted). The Sixth Circuit's narrow focus on the "dollar equivalence" between the diesel fuel taxes imposed on rail carriers and motor carriers as the exclusive factor for determining "rough equivalence" for purposes of the 4-R Act's bar against imposing "another tax that discriminates against a rail carrier" cannot withstand analysis.

A. The Sixth Circuit's Limited Focus on the "Dollar Equivalence" in Determining Whether Diesel Fuel Taxes Imposed on Railroads Are "Roughly Equivalent" to Diesel Fuel Taxes Imposed on Motor Carriers Without Regard to the Use of the Revenues Elevates Form Over Substance in Violation of Fundamental Principles of Sound Tax Analysis.

As we have already observed (*see supra* pp. 7-10), this Court has consistently embraced the fundamental principle that the substance rather than form of the tax under consideration controls the analysis of both statutory and constitutional issues. Accordingly, in approaching the question of whether the diesel fuel taxes imposed on railroads are "roughly

equivalent" to the diesel fuel taxes imposed on motor carriers within the meaning of the 4-R Act's bar against "another tax that discriminates against a rail carrier," the analysis should focus on "economic realities," look "to the practical effect of a challenged tax," and reflect "the substance, not the form" of the taxes under consideration. *See* pp. 8-10 *supra* (citing cases in which the quoted language appears).

Under these criteria, one cannot maintain that diesel fuel taxes imposed on railroads are "roughly equivalent" to the diesel fuel taxes imposed on motor carriers. The "economic reality" is that railroads pay a tax whose revenues are used for economic development and general governmental purposes in local communities whereas motor carriers pay a tax whose revenues are dedicated to uses that are of particular benefit to the motor carriers. The "practical effect of the challenged tax" is that the motor carriers are effectively getting the tax back in the form of highway infrastructure. And the "substance" of the "tax" on motor carriers is a user charge for the use of state-provided transportation facilities. The substance and effect of the taxes should not be confused with the "dollar equivalence" of the two taxes, which simply reflects their "form."[3] In short, there can be no "rough equivalence" between two taxes when the revenues from one of the taxes are effectively rebated to the taxpayers but the revenues from the other tax are not.

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[3] Indeed, if "dollar equivalence" alone were the appropriate criterion for determining "rough equivalence," one must wonder how this Court could have been "inclined to agree" with the Eleventh Circuit's observation in *CSX II* that the "task" that "Congress assigned . . . to the courts by drafting an antidiscrimination command in such sweeping terms" will often be "Sisyphean." *CSX II*, 135 S. Ct. at 1144.

B. Controlling Case Law Requires That the Inquiry into Taxes on Railroads and Motor Carriers to Determine the Existence of Discrimination Consider How the Tax Revenues Are Spent.

As noted at the outset of this brief (*see* pp. 2-3 *supra*), the Sixth Circuit narrow approach to the "rough equivalence" analysis, which is confined to an inquiry into the "dollar equivalence" of taxes on railroads and motor carriers, is rooted in that court's statement in a prior opinion that how a state "'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.'" Pet. App. 29a (quoting *BNSF Ry. Co. v. Tennessee Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015). The Sixth Circuit cited no authority for the quoted proposition. That is hardly surprising, since the proposition cannot be reconciled with controlling precedent.

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), this Court considered a Massachusetts milk "pricing order" that, in substance, placed a tax on wholesale distributors for every local sale of milk, whether the milk was produced inside or outside the state. In addition, the order stipulated that all proceeds of the tax would go into a segregated fund that the state periodically would disperse to in-state milk producers (that is, local dairy farmers).[4] The question in the case was whether the tax

[4] Under limited circumstances, portions of the fund would not be paid to producers; such undistributed funds would simply be returned to milk dealers, thus effectively reducing their total tax burden. *West Lynn Creamery*, 412 U.S. at 191 n.8.

discriminated against out-of-state interests in favor of in-state interests in violation of the Commerce Clause.

Under this Sixth Circuit's approach to tax discrimination, the tax in that case would be nondiscriminatory, because wholesale sales of milk were subject to the same tax and how the state "uses the proceeds of its taxation of [milk] is irrelevant to the question of . . . discriminat[ion]." Pet. App. 9a. In short, under the "dollar equivalence" approach to tax discrimination that lies at the heart of the Sixth Circuit's decision, in reliance on its own declaration in *BNSF*, the Massachusetts milk tax regime passes the nondiscrimination test with flying colors. This Court's decision in *West Lynn Creamery* demonstrates why a tax discrimination analysis confined to a "dollar equivalence" inquiry cannot survive scrutiny.

In *West Lynn Creamery*, the Court held that the Massachusetts tax regime was discriminatory. In response to the state's contention that the pricing order was a "nondiscriminatory tax" and that the state "is free to use the proceeds of the tax as it chooses" (*West Lynn Creamery*, 512 U.S. at 198), the Court flatly rejected the state's effort artificially to separate the taxing measure from the spending measure. The state's argument, the Court declared,

> would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the premium payments from the use to which the payments are put*. It is the *entire program*–not just the contributions to the fund or the distributions from that fund–*that* . . .

> *discriminates* in favor of local producers. The choice of constitutional means–nondiscriminatory tax and local subsidy–cannot guarantee the constitutionality of the program as a whole.

Id. at 201 (emphasis supplied). The Court noted that its Commerce Clause jurisprudence, which it would subsequently invoke in *CSX II*, was "not . . . controlled by the form" (*id.*) of the state legislation; "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects," (*id.*); and "'forbids discrimination, whether forthright or ingenious.'" *Id.* (citation omitted). Guided by the principle "'whether the statute under attack, whatever its name may be, will in its practical operation work discrimination,'" *id.* (citation omitted), the Court concluded that the nondiscriminatory tax, when considered in conjunction with the "use to which the payments are put," was unconstitutionally discriminatory.

Precisely the same analysis demonstrates that Tennessee's motor fuel tax regime discriminates against railroads, that the Sixth Circuit's decision to the contrary cannot withstand scrutiny, and that it compels this Court's review.

- Just as this Court in *West Lynn Creamery* Court rejected the state's contention that the pricing order was a "nondiscriminatory tax" and that the state "is free to use the proceeds of the tax as it chooses," one must reject the Sixth Circuit's position that the sales tax on diesel fuel purchased by railroads and the motor fuel tax on diesel fuel purchased by motor carriers constitute a "nondiscriminatory tax" and repudiate the court's unsubstantiated declaration that how a state "uses the proceeds of its taxation of diesel fuel is

irrelevant to the question of whether the Railroads have been discriminated against."

- Just as this Court in *West Lynn Creamery* Court rejected the state's effort artificially to separate the taxing measure from the spending measure in determining whether the Massachusetts tax regime was discriminatory, so one must reject the Sixth Circuit's the position that artificially separates the taxes on railroads and motor carriers from the spending of the tax revenues, with railroad fuel tax revenues used for the benefit of the general public and motor fuel tax revenues used for the benefit of the motor carriers.

- Just as this Court in *West Lynn Creamery* declared that the state's argument

> would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the premium payments from the use to which the payments are put*. It is the *entire program*–not just the contributions to the fund or the distributions from that fund–*that* . . . *discriminates* in favor of local producers. The choice of constitutional means–nondiscriminatory tax and local subsidy–cannot guarantee the constitutionality of the program as a whole (*id.* at 201),

so one must conclude that Sixth Circuit's approach would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the motor carrier tax payments from the use to which the payments are put*. It is the *entire taxing and spending regime* – not just the taxes or the spending – *that* . . . *discriminates*

in favor of motor carriers. The choice of legislative measures – nondiscriminatory tax and motor carrier subsidy – cannot guarantee the nondiscriminatory character of the program as a whole.

- Just as this Court's analysis in *West Lynn Creamery* Court's of tax discrimination was "not . . . controlled by the form" of the state legislation, "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects," and "'forbids discrimination, whether forthright or ingenious,'" so this Court's analysis should reflect the same approach to tax discrimination in contrast to the narrow and formalistic approach reflected in the Sixth Circuit's "dollar equivalence" standard.

- Finally, just as this Court in *West Lynn Creamery* Court was guided by the principle "'whether the statute under attack . . . will in its practical operation work discrimination'" in concluding that the nondiscriminatory tax considered in conjunction with the "use to which the payments are put" was unconstitutionally discriminatory, so this Court should be guided by the principle "'whether the statute under attack . . . will in practical operation work discrimination'" in concluding that the nondiscriminatory taxes on railroads and motor carriers considered in conjunction with the "use to which the payments are put" discriminates against railroads in violation of the 4-R Act.

In short, *West Lynn Creamery* makes it clear that in determining whether a tax is discriminatory one cannot "divorce" the tax "payments from the use to which the payments are put." 521 U.S. at 201. This Court has reaffirmed this principle in evaluating the

question of discrimination under the compensatory tax doctrine, emphasizing the distinction between "general form[s] of taxation" and "revenues . . . earmarked for particular purposes." *Fulton*, 516 U.S. at 338. Indeed, in inquiring into alleged tax discrimination against railroads in favor of motor carriers under the 4-R Act, courts have inquired into "the use to which the [tax] payments are put" in addressing the discrimination question. *See Atchison, Topeka and Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Ia. 1983) ("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. 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 . . . . This gives the trucks a distinct competitive advantage." (internal citation omitted)); *see also Burlington Northern R.R. Co. v. Triplett*, 682 F. Supp. 443, 446 (D. Minn. 1988) ("While 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. As the Iowa Supreme Court stated, this difference 'gives the trucks a distinct competitive advantage.'")

The conclusion is therefore inescapable that the inquiry into taxes on railroads and motor carriers to determine the existence of discrimination must take account of how the tax revenues are spent.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for certiorari seeking

review of the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Walter Hellerstein
Counsel of Record
University of Georgia School of Law
303 Rusk Hall
Athens, Georgia 30602
(706) 542-5175
wallyh@uga.edu

Eric S. Tresh
Maria M. Todorova
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000
EricTresh@eversheds-sutherland.com
MariaTodorova@eversheds-sutherland.com

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