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,

Respondents.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. AAR's Class I members (the seven largest freight railroads operating in North America) account for about 69 percent of freight rail mileage, 94 percent of revenues, and 90 percent of employees. Each Class I railroad operates in multiple states over thousands of miles of track. In matters of industrywide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.[1]

This petition presents such a matter. Taxes represent the third largest expense for railroads, surpassed only by wages and fuel. The railroad industry paid approximately $12.6 billion in taxes in 2017. *See* Ass'n. of Am. R.R., Railroad Facts (2018 ed.). AAR routinely represents the railroad industry in tax-related matters before the courts and regulatory bodies. AAR has filed amicus briefs with appellate courts and this Court in a number of important tax cases affecting the railroad industry (*e.g.*, *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018)) and *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *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* or their counsel made a monetary contribution to this brief's preparation or submission. All parties were timely notified and have consented to the filing of this brief.

277 (2011) ("*CSX I*"); *Alabama Dep't of Revenue* v. *CSX Transp., Inc.*, 135 S. Ct. 1136 (2015) ("*CSX II*"); and as *amicus curiae* supporting CSX Transportation, Inc.'s Conditional Cross-Petition for a Writ of *Certiorari* in *Alabama Dep't of Revenue v. CSX Transp., Inc.*, Supreme Court of the United States, No. 18-612 (2018) ("*CSX III*").

This case is important to all of AAR's Class I member railroads, not just petitioner Illinois Central Railroad Company (ICRR) (which is owned by AAR member Canadian National Railway). The protection from discriminatory state taxes promised in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified at 49 U.S.C. § 11501, is vital to the railroads' continued competitiveness and financial health and stability. *See* 49 U.S.C. § 11501. The Tennessee tax scheme challenged by ICRR provides a direct competitive advantage to trucking companies relative to rail carriers. The highway use taxes trucking companies pay flow back to them in the form of direct investment in the assets they use to generate revenue. Rail carriers get no such direct benefit from the state sales and use taxes they are required to pay. Ignoring this reality renders the discrimination analysis required by the 4-R Act meaningless, and causes precisely the type of competitive harm to the rail industry that Congress intended to prevent.

SUMMARY OF ARGUMENT

Railroads operate on infrastructure they build, pay for, own, and maintain, using money they earn from doing business. Trucking companies, on the other hand, operate on infrastructure that is built, paid for, owned and maintained by local, state and federal governments, using taxpayer dollars. While trucking companies contribute to the cost of maintaining roads

and highways through highway motor fuel taxes, they do not contribute enough to cover the substantial wear and tear they inflict on those assets. The balance of truck-created maintenance expenses are paid for by other taxpayers. This fundamental asymmetry between the privately owned railroads – operating on infrastructure they must build, pay for and maintain themselves – and trucking companies – operating on publicly paid for roads and highways the maintenance of which is subsidized by the general public – is a distinct competitive advantage for trucking companies relative to rail carriers.

Tennessee's sales and use tax exemption for trucking companies but not railroads is facially discriminatory, and further tips the competitive scales against Class I railroads who operate in Tennessee. In justifying special treatment for trucking companies, the courts below were willing to open one eye to find a "roughly equivalent" tax paid by trucking companies, in the form of the highway motor fuel tax. But they refused to open the other eye and see that highway motor fuel tax for what it is: a mechanism by which trucking companies pay for some of the costs to maintain the infrastructure they use to generate revenue. The money paid is returned directly to the trucking companies as a subsidy. Given that Class I railroads pay *all* of their own infrastructure costs, *and* state sales and use tax, too, there is nothing "equivalent" about excusing trucking companies from paying the sales and use tax. The equivalency analysis engaged in below was incomplete, and thus defective.

ARGUMENT

I. RAILROADS PAY FOR THE CONSTRUCTION AND MAINTENANCE OF THEIR INFRASTRUCTURE, WHILE TRUCKING COMPANIES OPERATE OVER PUBLIC INFRASTRUCTURE AND DO NOT PAY THEIR TRUE SHARE OF THE COST TO MAINTAIN IT.

America's freight railroads are almost entirely privately owned and operated. Freight railroads operate overwhelmingly on infrastructure that they own, build, maintain, and pay for. Railroads pay these costs out of the funds generated by their businesses, with little or no public subsidies. On the other hand, motor carriers operate over public roads that are built and maintained by federal, state and local authorities.

In recent years, railroads have spent increasing amounts on maintaining and enhancing their nearly 140,000-mile network. From 1980 to 2017, America's freight railroads spent more than $330 billion – of their own funds – on capital expenditures and maintenance expenses related to tracks, bridges, tunnels and other infrastructure. However, motor carriers have no need to make a similar, substantial investment in infrastructure because they operate over public roads that are built and maintained by federal, state and local authorities. Motor carriers significantly benefit from this competitive advantage.

At issue in this case is whether the Tennessee highway user fuel tax paid by motor carriers is roughly equivalent to the general sales tax on diesel fuel paid by railroads but not motor carriers. They are not equivalent. While labeled a tax, Tennessee's highway user fuel tax is essentially a charge for highway use.

Virtually all (98%) of the revenue raised by Tennessee's highway user fuel tax is earmarked for the construction and maintenance of roads that are used by the taxed entities. *See* Pet. App. 43a. The user fuel tax is tantamount to a charge for highway and road use and is intended to reflect the costs directly attributable to motor carriers' use of publicly-funded roads. *See* Tenn. Code Ann. § 67-3-1204.

Importantly, this tax does not nearly cover those costs. According to the Addendum to the 1997 U.S. Department of Transportation's Federal Highway Cost Allocation Study, 80,000-pound, five-axle combination trucks cover just 80 percent of their share of federal highway costs. *See* U.S. Dep't of Transp., Federal Highway Administration, *Addendum to the 1997 Federal Highway Cost Allocation Study Final Report,* 2000. Likewise, the State of Tennessee itself concluded that gasoline and diesel taxes are insufficient to maintain existing infrastructure in Tennessee, noting that current fuel taxes do not reflect the additional cost of wear and tear on the roads due to the weight of vehicles. *See Tennessee Transportation Funding: Challenges and Options*, Tennessee Comptroller of the Treasury, Office of Research and Education Accountability (2015).

The benefits that motor carriers receive from use of the publicly-funded infrastructure more than offset the burden imposed by the tax. However, as explained below, the railroads do not receive similar benefits from the general sales and use tax they pay. This fundamental inequity between the railroads and motor carriers must be taken into account when comparing the two taxes.

II. THE TENNESSEE HIGHWAY USER FUEL TAX CANNOT BE USED TO JUSTIFY A DISCRIMINATORY TAX ON THE RAILROADS BECAUSE THE FUEL TAX IS SUBSTANTIALLY DIFFERENT FROM THE GENERAL SALES TAX: ONE CONFERS A DIRECT FINANCIAL BENEFIT ON THOSE WHO PAY IT, THE OTHER DOES NOT.

Tennessee's highway user fuel tax paid by motor carriers is earmarked for the construction and maintenance of the state's roads that are used by the taxed entities. This directly benefits motor carriers that operate over that publicly owned infrastructure, as discussed *supra*. Therefore, the highway user fuel tax and the general sales and use tax are not comparable under the 4-R Act's anti-discrimination provisions. The former is meant to fund the public infrastructure motor carriers use to operate their businesses, while the latter provides no such benefit to the nation's large freight railroads.

In fact, the first congressional report recommending what would eventually become the 4-R Act specifically identified state motor fuel taxes as "user charges" and "highway user taxes." *See Special Study Group on Transp. Policies in the U.S.*, Sen. Comm. on Commerce, Nat'l Transp. Policy, S. Rep. No. 87-445, at 185-86 (1961) (the "Doyle Report"). The Doyle Report went on to state that "The basic difference between user charges and taxes on right-of-way is that user charges are assessed to pay for the construction, maintenance and administrative costs of publicly provided transportation facilities . . ." *Id* at 450. This difference is what creates the discriminatory treatment of the large freight railroads in Tennessee.

In contrast to the highway user fuel tax, the proceeds of the sales tax paid in Tennessee by the freight railroads that operate in the state are deposited partially in the State's general fund and partially in a Transportation Equity Trust Fund (TETF). The stated purpose of the TETF is to benefit railways, aeronautics, waterways programs and related activities; however, *public rail authorities* – not privately owned railroads – are the only recipients eligible to receive railroad-related grants from the TETF. *See* Pet. App. 46a. Furthermore, only track and bridge rehabilitation programs of the state's smallest public rail authorities are eligible for the funds. *See* State of Tennessee, Comptroller of the Treasury, *Performance Audit Report for Tennessee Department of Transportation and Regional Transportation Authority of Middle Tennessee* (2015). In other words, the large freight railroads, which among the railroad taxpayers pay the bulk of the sales tax, do not receive any benefit from it. The allocation of a portion of the taxes paid by railroads to a so-called "transportation" fund – which by charter cannot undertake investment to benefit those large freight railroads – does not cure the discrimination. As a direct tax subsidy, the highway user fuel tax is not sufficiently comparable to, nor a substitute for, the general sales and use tax on locomotive diesel fuel sufficient to justify the discriminatory treatment of railroads under the 4-R Act.

III. THE COURT SHOULD GRANT THE PETITION TO ENSURE THAT THE ANALYSIS OF ROUGH EQUIVALENCY, AND THE ANTI-DISCRIMINATION PROMISE OF THE 4-R ACT, ARE MEANINGFUL.

The 4-R Act prohibits states from imposing a "tax that discriminates against a rail carrier." 49 U.S.C.

§ 11501(b)(4). Congress enacted Section 11501 to eliminate harmful state tax discrimination against interstate railroads. The decision of the Sixth Circuit in this case conflicts with *CSX II* by adopting a test that differs from the one the Court prescribed. Moreover, the Sixth Circuit's decision conflicts with the Iowa Supreme Court's decision in *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983), as well as with the Congressional intent of preventing discriminatory state taxation of interstate rail carriers through the 4-R Act.

The Sixth Circuit's refusal to apply the compensatory tax doctrine (or its functional equivalent) is inconsistent with the text and purpose of the 4-R Act which prohibits states from imposing "discriminatory" taxes on railroads. The Sixth Circuit's overly simplistic approach focusing solely on a comparison of tax rates – without regard for how the taxes are used – cannot possibly be what Congress envisioned when it passed the 4-R Act, nor would such a focus have required a remand for further proceedings in *CSX II*. The 4-R Act was one means Congress chose to protect railroads by removing the threat of being taxed by states less favorably than their competitors. The Sixth Circuit's approach to applying the 4-R Act would enable states to achieve that impermissible end simply by enacting taxes that appear similar on their face but in effect impose a heavier tax burden on railroads.

Expenses for diesel fuel account for approximately 13.3 percent of the Class I railroads' total operating expenses. *See* Ass'n of Am. R.R., Railroad Facts (2018 ed.). In 2017, the Class I freight railroads consumed 3.5 billion gallons of diesel fuel at a total cost of $6.3 billion. *Id*. The approach of the Sixth (and Eleventh) Circuits creates an incentive for additional states and

localities to shift improper tax burdens onto interstate railroads. The Court should provide guidance for how to determine when two taxes are roughly equivalent after a *prima facie* showing of discrimination has been made under the 4-R Act.

CONCLUSION

This Court should grant ICRR's petition for *certiorari* to address the deepening split in the lower courts and resolve the proper application of the 4-R Act's anti-discrimination mandate.

Respectfully submitted,

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