No. 18-866

In the Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

TENNESSEE DEPARTMENT OF REVENUE AND DAVID GERREGANO, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,
Respondents.

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

BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General and Reporter
ANDRÉE S. BLUMSTEIN
Solicitor General
CHARLES L. LEWIS
Deputy Attorney General
TALMAGE M. WATTS
Counsel of Record
Senior Assistant Attorney General
Attorney General's Office Tax Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-6431
talmage.watts@ag.tn.gov
Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Did the Sixth Circuit correctly hold, in accordance with *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011), and *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015), that Tennessee did not discriminate against rail carriers under 49 U.S.C. § 11501(b)(4) by imposing a fuel tax on rail carriers while exempting motor carriers, because Tennessee also imposed an "alternative, roughly equivalent" fuel tax on motor carriers?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below. Respondent Tennessee Department of Revenue is an executive-branch agency of the State of Tennessee. By automatic substitution pursuant to Fed. R. Civ. P. 25(d) and U.S. Sup. Ct. R. 35.3, David Gerregano is the current Commissioner of Revenue of the State of Tennessee.

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The August 31, 2018 opinion of the Sixth Circuit (Pet. App. 1a) is unreported but is available at 748 Fed. App'x 26 (2018 WL 4183464). The April 12, 2017 opinion of the district court (Pet. App. 12a) is unreported but is available at 2017 WL 1347269.

JURISDICTION

The Sixth Circuit entered judgment on August 31, 2018, and denied petitioner's application for rehearing or rehearing *en banc* on October 3, 2018. (Pet. App. 34a.) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), currently codified at 49 U.S.C. § 11501, provides, in pertinent part, that a State may not:

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

49 U.S.C. § 11501(b)(4). The full text of 49 U.S.C. § 11501 is reproduced at Pet. App. 36a.

STATEMENT OF THE CASE

Petitioner, Illinois Central Railroad Company, commenced this action in 2010, alleging that the sales and use tax Tennessee imposed on its purchase and consumption of diesel fuel discriminated against railroads, in violation of 49 U.S.C. § 11501(b)(4), because the State exempted motor carriers from such taxes. (Pet. App. 3a.) The district court agreed, and Respondents, the Tennessee Department of Revenue and its Commissioner, appealed. The Sixth Circuit held that appeal in abeyance pending this Court's decision in *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015) ("*CSX II*").

Before *CSX II*, this Court had held that a tax discriminates under the 4-R Act when it treats similarly situated groups differently without "sufficient justification" for the difference in treatment. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 288 n.8 (2011) ("*CSX I*"). *See* Pet. App. 4a. In *CSX II*, this Court elaborated on what it meant by "sufficient justification" in *CSX I*. Specifically, the Court held that a state "can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax." 135 S. Ct. at 1143. "We think that an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory." *Id.* After this Court's decision in *CSX II*, the Sixth Circuit remanded this case for further proceedings in light of that decision. (Pet. App. 4a.)

On remand, the district court granted summary judgment for Respondents, finding that Tennessee sufficiently justified the exemption for motor carriers from the sales and use tax imposed on railroads because motor carriers paid a roughly equivalent tax—"a motor fuel tax totaling 18.4¢ a gallon" (Pet. App. 17a.):

> In this instance, the Court finds the taxes paid by motor carriers and rail carriers roughly equivalent. It is undisputed (and even stipulated to in the prior trial) that from 1941 through 2010 motor carriers actually paid more tax per gallon than railroads paid in every year except one, which was in 2008 when fuel prices spiked. While it is true, and not contested, that the sales tax rate of 7% on ICRR's purchase of railroad diesel fuel in Tennessee exceeded the rate of 17¢ per gallon paid by interstate motor carriers on their consumption of diesel fuel in Tennessee in recent years, *on average, motor carriers have a higher tax burden*—which refutes the railroads being at an overall disadvantage.

(Pet. App. 30a (emphasis added); *see* Pet. App. 4a, 6a-7a.) Petitioner appealed.

The Sixth Circuit affirmed. (Pet. App. 11a.) It concluded that "taxes are roughly equivalent if they impose similar rates," and it agreed with the district court's conclusion that the tax on railroads and the tax on motor carriers were roughly equivalent. (Pet. App.

8a, 9a.)[1] The court rejected Petitioner's argument that it should apply the compensatory tax doctrine, disagreeing with the contention that this Court's citation in *CSX II* to *Gregg Dyeing v. Query*, 286 U.S. 472 (1932), mandated the use of dormant-Commerce-Clause analysis to determine tax discrimination under the 4-R Act. (Pet. App. 8a.) The court also rejected Petitioner's assertion that a State's allocation of tax proceeds must be considered on the issue of tax discrimination under the 4-R Act. (Pet. App. 9a-10a.) The court declined to revisit its decision in *BNSF Ry. Co. v. Tenn. Dep't of Revenue*, 800 F.3d 262 (6th Cir. 2015), where it concluded that "how Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4-R Act." 800 F.3d at 274.

Petitioner now seeks this Court's review.

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[1] Even looking at the seven-year period between 2007 and 2014, as Petitioner's expert had requested, the Sixth Circuit found that "the tax rates were roughly equivalent." (Pet. App. 8a.) Petitioner unfairly rephrases the court's opinion when it asserts that "[t]he 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." (Pet. 10 (citing Pet. App. 9a).) What the court said was that "[t]he 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." (Pet. App. 9a.)

REASONS FOR DENYING REVIEW

The petition for writ of certiorari should be denied. First, Petitioner's asserted split of authority—between the Sixth (and Eleventh) Circuit and the Iowa Supreme Court—is illusory and does not warrant this Court's review. Second, the decision below is entirely correct. The Sixth Circuit properly applied this Court's decisions in *CSX I* and *CSX II*, and its determination not to apply the compensatory tax doctrine or to consider the allocation of tax revenues fully comports with this Court's decisions.

I. There Is No Split of Authority Warranting Supreme Court Review.

In the four years since this Court established in *CSX II* the "alternative, roughly equivalent tax" standard for evaluating tax-discrimination claims, two circuits, the Sixth and Eleventh, have applied it. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163 (11th Cir. 2018) ("*CSX III*"), *pet. cert. filed* (Nos. 18-447, 18-612) (U.S.). Both circuits were presented with virtually identical facts. Both used the same analysis. And each, acting independently, consistently, and unanimously, reached the same result. There is no confusion in the lower courts requiring this Court's intervention.

Petitioner points to the Sixth Circuit's rejection of its argument that the allocation of tax revenues must be considered when evaluating a 4-R Act discrimination claim, and it asserts that there is an "untenable" split of authority on the issue that necessitates this Court's review. (Pet. 11.) But that

assertion is based on one, 35-year-old decision of a state supreme court: *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983). (Pet. 11-12.) And with regard to the relevance of tax-revenue allocations in 4-R Act discrimination claims, that decision is an outlier.

In *Bair*, the Iowa Supreme Court considered that State's allocation of tax revenues in a 4-R Act challenge under Subsection (b)(4). The court held that even though trucks paid a higher fuel tax than railroads, Iowa's tax scheme discriminated against railroads because the State devoted fuel-tax revenues paid by trucks to highway construction. *See Bair*, 338 N.W.2d at 346-47. Four of the five judges in the majority considered the allocation of proceeds relevant to their "competitive advantage" analysis. *Id.* One other judge concurred only in the judgment. *Id.* at 348-49. But the single concurring judge and all four dissenting judges rejected the "competitive advantage" analysis. *Id.* Indeed, the dissenting judges advocated "consideration only of the burden from the type of tax involved." *Id.* at 350.

The precedential authority of *Bair* for the use-of-tax-revenues proposition advanced by Petitioner is thus dubious from the outset. More importantly, since 1983 only one court, a federal district court in the Eighth Circuit, has followed *Bair* to consider the use of tax revenues in an analysis under Subsection (b)(4). *See Burlington N. R.R. Co. v. Triplett*, 682 F. Supp. 443, 446 (D. Minn. 1988) ("The court accepts the rationale of the Iowa Supreme Court."). And that district-court decision has since been abrogated.

In *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir. 1991), the Eighth Circuit held that in an analysis under the 4-R Act "the use of the proceeds of a tax has no bearing on the question of whether the tax is discriminatory." 929 F.2d at 1303. Five years later, the Ninth Circuit likewise held that "[t]he 4-R Act reaches only tax burdens and not tax benefits." *Atchison, Topeka and Santa Fe Ry. Co. v. State of Arizona*, 78 F.3d 438, 443 (9th Cir. 1996) ("*ATSF*"), *abrogated on other grounds by CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011) ("*CSX I*").[2]

The Sixth Circuit followed suit in *BNSF Ry. Co. v. Tenn. Dep't of Revenue*, 800 F.3d 262 (6th Cir. 2015), holding that "how Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4-R Act." 800 F.3d at 274. And in *CSX III*, the Eleventh Circuit did the same. After engaging in a thorough statutory-construction analysis, the court held "that how a State allocates its tax revenues is irrelevant to whether it '[i]mposes [a] tax that discriminates against a rail carrier.'" *CSX III*, 888 F.3d at 1176. And in *Burlington N. R.R. Co. v. Comm'r of Revenue*, 606 N.W.2d 54 (Minn. 2000), yet another 4-R Act fuel-tax case, the Minnesota Supreme Court relied on the Eighth Circuit's decision in *Trailer Train* to reject the argument that the use of tax revenues is a determinative factor as to whether a tax is discriminatory. 606 N.W.2d at 60. *See id.* ("*Trailer*

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[2] *ATSF* held that a Subsection (b)(4) exemption-based challenge was not cognizable under the holding of *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332 (1994). It is only this precise holding that was abrogated by *CSX I*.

Train, which was decided after [*Bair*] and [*Triplett*], indicates that a 'use' analysis is not appropriate under subsection (b)(4).").

Here, the Sixth Circuit again held that the allocation of tax revenues was irrelevant to the discriminatory-tax question, following its own decision in *BNSF* and the Eleventh Circuit's decision in *CSX III*. (Pet. App. 9a-10a.) No federal circuit court and no state supreme court since *Bair* has considered the use of tax revenues in a challenge under Subsection (b)(4) of the 4-R Act. There is thus no "split" warranting this Court's review.

II. The Decision of the Sixth Circuit Comports with this Court's Precedents.

Petitioner asserts that this Court's review is warranted because the case was wrongly decided. (Pet. 15.) It says that in *CSX II* this Court injected the compensatory tax doctrine, developed in the Court's dormant Commerce Clause cases, into 4-R Act analysis. (Pet. 17-18.) Petitioner also insists that the allocation of tax revenues is relevant to the analysis and that the Sixth Circuit approach conflicts with this Court's decision in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), another dormant Commerce Clause case. (Pet. 16.)

But it is Petitioner that is incorrect. Because the Sixth Circuit properly decided this case in accordance with this Court's precedents, review is unnecessary.

A. *CSX II* does not embrace the compensatory tax doctrine.

Petitioner is wrong in contending that in *CSX II* this Court "specifically invoked" its compensatory-tax-doctrine jurisprudence because it announced a "'rough equivalence' standard" and cited its decision in *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). (Pet. 17, 18.) After citing *Gregg Dyeing*, the Court observed 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. That is *all* the Court said about the Commerce Clause. Immediately following that observation, the Court said: "We think that an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory." *Id.* It did *not* say: "We think the compensatory tax doctrine developed in our negative Commerce Clause cases should apply here," or anything else even remotely suggesting an endorsement, adoption, or injection of that constitutionally based doctrine into 4-R Act analysis.

The Sixth Circuit correctly read the *Gregg Dyeing* citation merely as "support for the general proposition that a state may be justified in exempting a competitor from one tax if it levies an alternative tax on that competitor." (Pet. App. 8a.) *See also CSX III*, 888 F.3d at 1178 (Eleventh Circuit interpreting the citation to *Gregg Dyeing* "as simply a reference to the general principle that courts should consider other taxes a state imposes when assessing a facially discriminatory tax for 4-R Act purposes").

Nor did the Court invoke the compensatory tax doctrine by using the phrase "alternative, roughly equivalent tax." Indeed, by using this phrase, the Court implicitly rejected the exactitude of the compensatory tax doctrine. The phrase "compensatory tax doctrine" is a term of art and one with no obvious or apparent meaning (even to many lawyers). By contrast, the words "roughly equivalent" are commonly understood as referring to an inexact or imprecise equality in value. *See Oxford English Dictionary* (3rd ed. 2011) ("rough" defined as "not finished, exact, or precise"). This Court does use the term "roughly equivalent" in tax cases, but when discussing different tax rates, not as code for the "compensatory tax doctrine." *See, e.g., Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143 (1979) ("That Act imposes a tax on the privilege of generating electricity at the rate of 4/10 of a mill on each net kilowatt hour of electricity generated. This is roughly equivalent to a 2% tax on the retail value of the electricity."); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978) ("In this case appellant's actual income tax obligation was the rough equivalent of a 1% tax on the entire gross receipts from its Iowa sales.").

The text of the 4-R Act supports this reading of *CSX II*. Literal application here of the second compensatory-tax-doctrine factor—roughly equivalent but not higher than[3]—would contradict the express language of the 4-R Act, which provides a safe harbor for property-tax discrepancies. Those discrepancies are

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[3] *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 103 (1994).

not actionable unless assessment ratios or tax rates on railroad property exceed by at least 5% the ratios or rates on other commercial and industrial property. *See* 49 U.S.C. § 11501(c). Determining whether a tax is discriminatory under Subsection (b)(4) should be no more exacting.

B. *West Lynn Creamery* does not support consideration of tax-revenue allocations in 4-R Act cases.

Petitioner is also wrong in contending that this Court's decision in *West Lynn Creamery* shows that this case was not correctly decided by the Sixth Circuit. (Pet. 16.) *West Lynn Creamery* is inapposite; it does not stand for the proposition that 4-R Act cases, or tax-discrimination cases generally, require consideration of tax-revenue allocations. *See, e.g., DirecTV, Inc. v. Treesh*, 487 F.3d 471, 479-80 (6th Cir. 2007).

In *West Lynn Creamery*, this Court considered a tax on all sales of milk to Massachusetts retailers. On its face, the tax applied to in-state and out-of-state producers alike. *West Lynn Creamery*, 512 U.S. at 188. But under another provision of the scheme, proceeds from both in-state and out-of-state producers were paid back as direct subsidies to in-state producers. *Id.* at 194. As a result, the facially neutral tax placed no burden at all on in-state producers. *Id.* at 199 n.16. This Court thus held this particular tax-plus-subsidy arrangement to be an unconstitutional protective tariff. *Id.* at 193-95.

There is simply no comparison between the protective tariff scheme struck down in *West Lynn*

Creamery and Tennessee's imposition of fuel taxes on railroads and motor carriers upheld by the Sixth Circuit. The Massachusetts scheme had the "avowed purpose" and "undisputed effect" of benefitting private in-state taxpayers at the expense of private out-of-state taxpayers. *Id.* at 194. It effectively turned out-of-state producers into profit centers for their in-state competitors. Tennessee, by contrast, provides no direct subsidy to motor carriers; state expenditures for highway construction are not subsidies to the trucking industry or any other group. Public roads are essential public commodities in a modern industrialized society, without which persons and goods could not move from one place to another without trespassing on private property. They provide significant benefits to all persons and businesses in that society, and constructing and maintaining them are core state-government functions. *See Atkin v. Kansas*, 191 U.S. 207, 222 (1903) (observing that "it is one of the functions of government to provide public highways for the convenience and comfort of the people"); *Robbins v. Limestone Cty.*, 114 Tex. 345, 356, 268 S.W. 915, 918 (1925) ("it is one of the functions of government to establish and maintain public roads").

Nothing in Subsections (b)(1), (b)(2), and (b)(3) of the 4-R Act indicates that Congress had any interest in how tax proceeds are allocated. Those subsections define tax discrimination in terms of assessment ratios and tax rates. They say nothing about tax benefits or the allocation of proceeds. A railroad cannot state a claim for discrimination under those subsections by alleging that a state allocates every penny of property tax proceeds derived from railroads to the construction

and maintenance of highways. *See Carmichael v. S. Coal & Coke*, 301 U.S. 495, 523 (1937) ("This Court has repudiated the suggestion . . . that . . . [a taxpayer] can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.") There is no reason to conclude that Congress intended for tax discrimination under Subsection (b)(4) to be determined any differently.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

CHARLES L. LEWIS
Deputy Attorney General

TALMAGE M. WATTS
Counsel of Record
Senior Assistant Attorney General
Attorney General's Office Tax Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-6431
talmage.watts@ag.tn.gov

Counsel for Respondents
Tennessee Department of Revenue
and David Gerregano, Commissioner
of Revenue