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

REPLY BRIEF FOR PETITIONER

STEPHEN D. GOODWIN
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
165 Madison Avenue
Suite 2000
Memphis, TN 38103
(901) 577-2141

THOMAS H. DUPREE JR.
Counsel of Record
CLAIRE L. CHAPLA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner
[Additional counsel listed on inside cover]

MISTY SMITH KELLEY
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
633 Chestnut Street
Suite 1900
Chattanooga, TN 37450
(423) 209-4148

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

REPLY BRIEF FOR PETITIONER

The 4-R Act prohibits states from imposing any "tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). Tennessee does not deny that the question presented by this case—whether the way a state *allocates* tax revenue is relevant to the discrimination inquiry—is substantial and recurring, and that this case provides the ideal vehicle for resolving it. Indeed, Alabama, in a case in which this Court has called for the views of the Solicitor General, has acknowledged that resolving this question is "in the nation's best interest" because it has split the lower courts and will recur with great frequency. *See* Response of Alabama to Conditional Cross-Petition at 1, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, No. 18-612 (Dec. 7, 2018).

Tennessee takes a different approach. It contends that the lower courts are actually in harmony (Opp. 5-8), and defends the Sixth Circuit's conclusion that allocation is not relevant as consistent with this Court's decisions (Opp. 8-13).

Both of Tennessee's arguments are wrong. The lower courts are indeed split. Two federal circuits are directly at odds with the highest court of a state—a point Tennessee itself effectively concedes when it describes the Iowa Supreme Court's opinion as an "outlier" compared to the approach followed by the Sixth Circuit and other courts. Opp. 6. Moreover, the Sixth Circuit's decision is plainly incorrect. It contradicts this Court's approach to discriminatory taxation as set forth in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994). It defies *Alabama Department of Revenue v. CSX Transportation, Inc*., 135 S. Ct. 1136 (2015) ("*CSX II*"), which indicates that the comparative tax doctrine or its functional equivalent

should guide antidiscrimination analyses under the 4-R Act. And it denies railroads the full measure of antidiscrimination protection Congress afforded them, by upholding a tax that is indisputably discriminatory as a matter of basic economics and common sense. Tennessee uses the fuel tax paid by motor carriers to subsidize their business, but does not do the same for the railroads.

The amici underscore the importance of this issue. The Association of American Railroads explains that "[t]he protection from discriminatory state taxes promised in the [4-R Act] is vital to the railroads' continued competitiveness and financial health and stability," yet the decision below renders those protections meaningless and "causes precisely the type of competitive harm to the rail industry that Congress intended to prevent." AAR Br. 2. The Tax Foundation faults the Sixth Circuit for "trying to determine discrimination through piecemeal formalism rather than looking at how the taxes operate," concluding that "[w]hen 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." TF Br. 3, 5 (emphasis added). And tax professor Walter Hellerstein, writing on behalf of the Tennessee Railroad Association, warns that the Sixth Circuit's approach "ignore[s] the cardinal rule of interpretation of tax statutes, namely, that substance rather than form is the touchstone of analysis." TRA Br. 3.

This Court has called for the views of the Solicitor General in No. 18-612. The question presented in that case is essentially the same one presented here. Accordingly, the Court should either grant the instant

petition or, at a minimum, hold it pending a disposition in No. 18-612.

ARGUMENT

I. The Lower Courts Are Split Over Whether The Way A State Allocates Tax Revenue Is Relevant To Analyzing Discrimination.

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

Although Tennessee appears to concede the split by describing Iowa as an "outlier" (Opp. 6)—a description that would make no sense if Iowa's approach was consistent with that of the Sixth and Eleventh Circuits—at other points it claims the split does not exist. To that end, Tennessee suggests that a majority of Iowa Supreme Court justices did not agree that a state's method of allocation was relevant to the discrimination inquiry. Opp. 6. That is incorrect: Justice Carter, who specially concurred and provided the fifth vote for a majority, wrote that where "a tailored tax on the activities of interstate rail carriers is placed in a separate fund to be expended for specific purposes, the carriers protected by section [11501(b)(4)] *must receive from that fund benefits which are proportionate to the tax imposed*." *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 349 (Iowa 1983) (Carter, J., specially concurring) (emphasis added). Thus, it is beyond dispute that a majority of the Iowa Supreme Court held that allocation is relevant to discrimination under the 4-R Act.

Because it cannot credibly deny the existence of a split, Tennessee labels *Atchison* a "35-year-old decision." Opp. 6. But Tennessee cannot dispute that *Atchison* remains good law in Iowa and has been followed elsewhere. *See Burlington N. R.R. v. Triplett*, 682 F. Supp. 443, 446 (D. Minn. 1988) ("The court accepts the rationale of the Iowa Supreme Court."). Tennessee also argues that other courts have taken a similar approach to the Sixth Circuit. *See* Opp. 7 (citing *Burlington N. R.R. v. Comm'r of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438 (9th Cir. 1996); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir. 1991)). But even accepting *arguendo* Tennessee's reading of these cases, that only provides further confirmation of the split and shows it is well entrenched—and deepening

II. The Sixth Circuit's Decision Is Inconsistent With Decisions Of This Court And Erases A Critical Protection Against Discrimination.

The Sixth Circuit's mistaken approach cannot be reconciled with this Court's decisions in *West Lynn Creamery* and *CSX II*, and all but nullifies the 4-R Act's antidiscrimination mandate. Basic economics and common sense alike dictate that two taxes cannot be roughly equivalent if the revenue from one tax is returned to the taxpayer, either directly or through a subsidy of the taxpayer's business, while the revenue from the other tax is kept by the government.

A. *West Lynn Creamery* holds 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. 512 U.S. at 201. That reasoning applies with full force here, and the Sixth Circuit erred in concluding otherwise.

Tennessee suggests that because *West Lynn Creamery* involved discrimination under the Commerce Clause, it is not applicable to assessing discrimination under the 4-R Act. Opp. 11. But the 4-R Act expressly provides that taxes that discriminate against railroads "discriminate against interstate commerce," 49 U.S.C. § 11501(b), and this Court looked to Commerce Clause cases in interpreting the 4-R Act in *CSX I* and *CSX II*. Moreover, Tennessee never explains why *West Lynn Creamery* should be limited to its facts, especially since it states a general, broadly applicable principle for determining when a tax is discriminatory. *West Lynn Creamery* recognizes that tax discrimination can arise from discriminatory allocations of tax revenue—the very principle the Sixth Circuit rejected.

Tennessee insists that there is "no comparison" between the tax scheme at issue in *West Lynn Creamery* and the tax scheme challenged here. Opp. 11. It argues that the Massachusetts scheme had the effect of benefiting in-state taxpayers, whereas Tennessee "provides no direct subsidy to motor carriers." Opp. 12. But the Sixth Circuit's error was that it did not even *consider* the effect of Tennessee's method of allocating tax revenue; it deemed allocation irrelevant as a matter of law. *See* Pet. App. 9a ("'[H]ow 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.'"). For this reason, Tennessee's citation to *DirecTV, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007), undercuts its position

because in that case, the court *considered* how Kentucky allocated revenue; it simply concluded that there was no discrimination. *Id*. at 480-81.

Tennessee is wrong in contending that its method of allocating tax revenue does not give rise to discrimination under the 4-R Act. Opp. 12. Tennessee directs the revenue from the motor carrier tax to building and maintaining the infrastructure the motor carriers use for their business, but does not do the same for the railroads. That amounts to a direct subsidy of motor carriers, indistinguishable from the scheme at issue in *West Lynn Creamery*, and establishes that the motor carrier tax and the railroad tax cannot be rough equivalents, as the railroads do not enjoy a similar subsidy but are left to pay for their own infrastructure. Tennessee's argument that there can be no discrimination because constructing and maintaining public roads "are core state-government functions," Opp. 12, was rejected in *West Lynn Creamery*. There, the Court recognized that "States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads," 512 U.S. at 199 n.15, and noted that even if the subsidy standing alone were permissible as a way of helping in-state businesses, it could not be made part of a discriminatory tax scheme. *Id*. at 199. So too here. Tennessee is free to spend public money on building and maintaining roads. But what it cannot do is claim that two tax schemes are rough equivalents when one directly subsidizes the taxpayers' business and the other does not.

Finally, Tennessee argues that nothing in the property-tax provisions of the 4-R Act suggests that the way the taxes are allocated is relevant to discrimination. Opp. 12 (citing 49 U.S.C.

§ 11501(b)(1)-(3)). But the property-tax provisions do not control the analysis under subsection (b)(4), the provision at issue here. This Court has recognized that subsection (b)(4) is a "catch-all" provision that "speaks both clearly and broadly," and gives railroads *additional* protection from discrimination. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 284-85 (2011) ("*CSX I*"). Subsection (b)(4) is aimed at preventing discrimination in ways that are not already captured by the prior three property-tax subsections. *See id*. at 283 (prohibiting states from "[i]mpos[ing] *another* tax that discriminates against a rail carrier") (first alteration in original; emphasis added). Indeed, this Court has twice rejected efforts to narrow the scope of (b)(4)'s protections by importing limitations found in (b)(1), (2) and (3). In *CSX I*, the Court explained that (b)(4) is "very different terrain" from the "construction of subsections (b)(1)-(3)," and noted that the 4-R Act is "an asymmetrical statute." 562 U.S. at 288 n.8, 296. And in *CSX II*, the Court again emphasized that the 4-R Act is "an asymmetrical statute" in rebuffing another attempt to limit the protections of (b)(4) by importing limitations found in subsections (b)(1)-(3). 135 S. Ct. at 1141 (internal quotation marks omitted).

B. In assessing rough equivalence, the Sixth Circuit failed to apply the compensatory tax doctrine, even though this Court in *CSX II* used the term of art "rough equivalent" and specifically invoked this line of caselaw. *See* 135 S. Ct. at 1143-44 (citing *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932)); *see also, e.g*., *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 102-03 (1994) (describing a compensatory tax as the "rough equivalent" of a substantially similar discriminatory tax). To establish rough equivalence under the compensatory

tax doctrine, the state must show that the challenged tax roughly approximates the comparator tax, and the two taxes "must be sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Or. Waste*, 511 U.S. at 103 (internal quotation marks omitted). Under this standard, a court must do far more than simply compare tax rates: It must undertake a careful comparison of the substance and effect of the two taxes, and how they operate in practice.

Tennessee contends that because the Court did not expressly order the lower courts to apply the compensatory tax doctrine, the Sixth Circuit was free to fashion its own rough equivalence test. Opp. 9. But this misapprehends *CSX II*. It would make no sense for the Court to have wanted the lower courts to develop a *different* test for assessing rough equivalence, particularly since the comparative tax doctrine is by now familiar and there is an ample body of caselaw to guide the courts in its application. Indeed, the same term the Court decided *CSX II*, it stated in a different case that taxes "are 'compensatory' if they are rough equivalents imposed upon substantially similar events." *Comptroller of Treas. of Md. v. Wynne*, 135 S. Ct. 1787, 1803 n.8 (2015).

Tennessee errs in suggesting that the rough equivalence determination should be confined to merely comparing tax rates. Opp. 10. Such an approach would undermine the 4-R Act because it would permit tax schemes that are indisputably discriminatory, such as a tax that is immediately refunded to truckers but not to railroads. The two older cases Tennessee cites—*Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143 (1979) and *Moorman Mfg.*

Co. v. Bair, 437 U.S. 267, 280 (1978)—are inapposite, as both used the phrase "roughly equivalent" as a description, not as a test for comparing tax statutes.

Finally, Tennessee's suggestion that application of the compensatory tax doctrine would frustrate the 4-R Act's "safe harbor for property-tax discrepancies," Opp. 10, falls wide of the mark. As discussed above, this Court has repeatedly rebuffed efforts to limit the broad protections afforded by subsection (b)(4) by importing limitations (such as the 5% safe harbor provision) contained in the sections of the 4-R Act that address property taxes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN D. GOODWIN
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
165 Madison Avenue
Suite 2000
Memphis, TN 38103
(901) 577-2141

THOMAS H. DUPREE JR.
Counsel of Record
CLAIRE L. CHAPLA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

MISTY SMITH KELLEY
BAKER, DONELSON,
BEARMAN, CALDWELL &
BERKOWITZ, PC
633 Chestnut Street
Suite 1900
Chattanooga, TN 37450
(423) 209-4148

Counsel for Petitioner

April 2, 2019