No. 18-447

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND VERNON BARNETT, COMMISSIONER, DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

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

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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CSX agrees with Alabama on three key points:

1. The Eleventh Circuit decided "important issues of federal law," BIO 4;
2. The record is "clean" and "fully developed," BIO 13; and,
3. "Millions of public dollars are at stake," as are millions of the railroads' dollars. BIO 12.

CSX nonetheless argues against review because this case presents the first decision regarding justification for water carrier exemptions post-*CSX II*. In CSX's opinion, the Court should eschew "error correction" and wait for circuit courts to split on the issue before deciding it. BIO 11-13. But CSX's call for percolation ignores the history and importance of this case.

I. *CSX II* proves that the importance of getting the 4-R Act right transcends circuit splits.

CSX forgets that the Court reviewed and reversed a conflict-free issue in *CSX II* and thus omits that the Rule 10(c) reasons the Court did so still ring true.

1. Congress passed the 4-R Act in 1976, but the rail carriers waited 32 years before they sued Alabama as part of a nationwide strategy to avoid paying tax on fuel. The Eleventh Circuit initially barred their claim outright, so CSX very carefully asked the Court in *CSX I* to allow the railroads' claim to proceed, while ignoring everything that made their claim baseless—particularly, that trains do not need an injunction because (as the following chart shows) they are already

Alabama's most-favored-taxpayer when carrying goods interstate:

	State	State + Local + Federal
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
Trains	9.85¢	23.48¢

See App. 55a-56a (district court's fact findings on per gallon taxes); Reply Br. 1-2, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277 (2011) ("In this proceeding, this Court need say no more than that a railroad may challenge a non-property tax imposed on it as discriminatory based on exemptions.").

The Court gave CSX what it wanted; a "limited" ruling that CSX could challenge Alabama's sales and use tax under the residual clause. *CSX I*, 562 U.S. at 296-97. But the Court noted that, at CSX's request, "[w]e do not address whether CSX should prevail" on its request for an injunction and that the upcoming questions of justification "sometimes do raise knotty questions." *Id.* at 297. The first knotty question came in *CSX II*, and the Court took it immediately.

2. In *CSX II*, the Eleventh Circuit held that Alabama could not justify exempting trucks from paying the State's 4% sales tax by pointing to the trucks' payment of the State's 19¢ per gallon fuel excise tax. *See Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136, 1143-44 (2015) ("*CSX II*"). The circuits had not split on that issue before *CSX II*; they had uniformly ruled against the States. *See* Brief for the

United States as Amicus Curiae, 10, *CSX II* ("There is also no square conflict on the second issue (*i.e.,* whether other aspects of the State's tax scheme are relevant to the discrimination inquiry), but the courts of appeals that have squarely addressed the question have reached the wrong conclusion."). As it does here, CSX argued that review was not warranted because "[a]s the Government concedes, there is no conflict in the lower courts on the 'other tax' issue, and no court of appeals has adopted its proposed approach" (*i.e.* comparing the state taxes for rough equivalence). Supplemental Brief of Respondent in Response to Brief of the United States, 5, *CSX II*.

The Court rejected CSX's 'lack of conflict' objection, granted review, and reversed. *CSX II*, 135 S.Ct. at 1143-44. Just as the Court indicated that it might in *CSX I*, 562 U.S. at 296-97, the Court immediately resolved one such "knotty" justification question related to trucks, who already paid more fuel tax than trains:

	State	State + Local + Federal
Trucks	19.00¢	47.40¢
Trains	9.85¢	23.48¢

3. Now it's time to promptly resolve the "knotty questions" related to water carriers. *CSX I*, 562 U.S. at 296-97. The same two reasons that gave this case Rule 10(c) importance in *CSX II* exist here: (1) Alabama public schools stand to lose millions of tax dollars annually and (2) the national litigation will continue because rail carriers will use the ruling as a basis to enjoin other state and local taxes. And, just as

in *CSX II*, CSX already pays less tax than the similarly-situated competitor who claims the exemption:

	State	State + Local + Federal
Barges	0¢	29.1¢
Trains	9.85¢	23.48¢

* * *

In short, the Court took *CSX I* to ensure that rail carriers could challenge state tax exemptions, in case *some* State's exemption(s) actually discriminated against the rail carriers *vis-à-vis* their competitors. But Alabama was never that State. Trains have enjoyed most-favored status since the inception of this litigation. The Court took *CSX II*, without waiting for a circuit split, because it was clear that CSX did not need an injunction to gain equal footing with trucks. The Court should take *CSX III*, without waiting for a circuit split, because the same is true of water carriers, yet the Eleventh Circuit again granted CSX an injunction that widens their competitive advantage:

If Sales Tax Enjoined Against Trains		
	State tax (per gallon)	State + Local + Federal (per gallon)
Trucks	19.00¢	47.40¢
Barges	0¢	29.1¢
Trains	0¢	0¢

II. Alabama's case is the best vehicle.

To the rail carriers, further percolation means 'wait one month.' Specifically, the rail carriers' petition from an adverse ruling in *Illinois Central Railroad v. Tennessee*, 2018 WL 4183464 (CA6 Aug. 31, 2018) is due to be filed with this Court on January 2, 2019.[1] Like the Eleventh Circuit below, the Sixth Circuit held that the trucks' payment of Tennessee's 17¢ per gallon fuel excise tax justifies their exemption from paying the State's 7% sales tax. *Id.*

Unlike this case, however, the Tennessee case does not contain the water carrier justification issue. Accordingly, the Tennessee case does not present the Court with the opportunity to resolve the two issues (trucks and water carriers) present in every other 4-R Act case cited by the Parties in their petitions. *See* Petition 5, 15; Pet. App. 77a-82a; Cross-Petition 20-21, 24 (citing rail carriers' lawsuits in Alabama, Iowa, Georgia, Louisiana, Missouri, and Tennessee). The Court should take this case; the one it knows best, and thanks to Alabama's acquiescence to CSX's cross-petition, the only one that tees up all necessary issues.

III. CSX is wrong on the merits.

Alabama will address each of CSX's merits arguments should review be granted. But three arguments warrant a brief response now because they impact the proper standard and/or the issues before the Court.

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[1] The Sixth Circuit granted Illinois Central's request to stay its mandate pending Illinois Central's filing of a petition with this Court by January 2, 2019. *See* CA6 Case No. 17-5553, Doc. 51.

A. CSX wrongly defines justification.

CSX's discrimination claim has three distinct parts: (1) differential tax treatment, (2) of similarly-situated taxpayers, (3) without sufficient justification. The Court defined sufficient justification in two statements in *CSX I*. The first comes in the definition of "discrimination" the Court used to permit CSX's claim to move forward: the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX I,* 562 U.S. at 286 (quoting Black's Law Dictionary 534 (9th ed. 2009)). The second came in the Court's analysis of the dissent's hypothetical discrimination claim: "So if, to use the dissent's example, a railroad challenged a scheme in which 'every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt,' *for some reason having nothing to do with railroads*, we presume the suit would be promptly dismissed." *Id.* at 288, n.8 (emphasis added).

Taken together, the Court's statements in *CSX I* provide that Alabama can justify its water carrier exemption by providing "a reasonable distinction between railroads and water carriers that has nothing to do with railroads." Alabama bases its justification arguments on this distinction-based standard—*i.e.* (1) federal law precluded States from taxing water carriers when Alabama passed the exemption, (2) Alabama risks being sued if it repeals the exemption, (3) water carriers have a unique relationship with the federal government, and (4) interstate water carriers impose little to no financial burden on Alabama. Pet. 22-28.

CSX argues that Alabama's distinction-based analysis is wrong for two reasons. First, CSX says

that Alabama's justifications "ha[ve] everything to do with railroads," BIO 21, because "numerous government reports … recognize that taxes that discriminate against railroads *vis-à-vis* their competitors exacerbate the inherent competitive disadvantage railroads face" because railroads pay for track maintenance while tax revenues fund highway and waterway maintenance. BIO 21-22. But we know that justification in this context is based on distinctions, not effects, for two reasons. First, the Court said so in *CSX I*, as quoted above. Second, the Court held in *CSX II* that Alabama could justify the trucks' sales tax exemption based on their payment of excise tax, even though Alabama uses the funds to repair highways. In fact, CSX implicitly acknowledges that effects do not matter by accepting that a court order compelling Alabama to exempt water carriers would be a sufficient justification, *see* BIO 13-15, even though the result of such an order would (in CSX's view) detrimentally affect CSX.

Second, CSX argues that "the State's alleged benign intentions … [are] irrelevant in the Section 11501 analysis." BIO 22. This is a red herring. Alabama's arguments accept the premise that its justifications must have "nothing to do with railroads," such as Alabama's intentions toward railroads and the effect of our decisions on railroads. *CSX I*, 562 U.S. at 288. Instead, justification is all about water carriers.

B. The Court did not implicitly decide the State's justifications in *CSX II*.

The Court said that it did not consider any of the State's water carrier justifications in *CSX II*: "We do not consider whether Alabama's alternative rationales justify its exemption, but leave that question for

the Eleventh Circuit on remand." *CSX II*, 135 S.Ct. at 1144. Despite this plain statement, CSX argues that the Court implicitly ruled against two of the State's justifications: "federal relationship" and "risk of litigation." CSX is wrong on both.

1. The Court did not decide the "federal relationship" justification in CSX II.

Alabama argues that the water carriers' unique relationship with the federal government, which results in the water carriers' payment of a federal excise tax that *triples* the state sales tax rail carriers pay, is a sufficient justification for treating water carriers differently that railroads.[2] Pet. 23-25. CSX claims this distinction would "undermine" *CSX II's* holding that trains and water carriers are similarly situated and is thus barred as "law of the case." BIO 19-20.

CSX is conflating two distinct elements of a discrimination claim: similarly-situated taxpayers and sufficient justification. The Court's treatment of trucks in *CSX II* proves our point. In Part II(A) of its *CSX II* opinion, the Court held that trucks and rail carriers were similarly-situated because they competed to ship goods in Alabama. *CSX II*, 135 S.Ct. at 1141-43. Then, in Part II(B), the Court held that Alabama could justify the trucks' exemption by showing the trucks paid a different tax. *Id.* at 1143-44. In short, the "similarly situated" inquiry requires actual competition while the "justification" inquiry looks for characteristics that distinguish the competitors.

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[2] Water carriers pay a 29.1¢ per gallon federal excise tax, while the average cost of Alabama's 4% sales tax between 2007 and 2016 was 9.85¢ per gallon. Pet. App. 55a-56a.

The same is true here. *CSX II* precludes Alabama from arguing that trains and water carriers are not similarly-situated because they compete to ship goods in Alabama. But Alabama can still point to distinctions between the competitors—*e.g.* the water carriers' unique relationship with the federal government—that justifies treating them differently.

2. The Court did not decide the "risk of litigation" justification in *CSX II*.

Alabama argues that the risk of litigation against water carriers should Alabama repeal the historic interstate water carrier exemption justifies leaving the exemption in place. Pet. 25-28. CSX argues that the Court held in *CSX II* that Alabama must show court-ordered "compulsion," rather than an "articulable risk of litigation," to justify leaving the exemption in place. BIO 14. This argument fails CSX for two reasons.

First, it's not true. The Court merely stated that "[t]he State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law." *Id.* at 1144. A recitation of one of the State's arguments that the Court goes on to say, "We do not consider," *id.*, is not a holding that amounts to law of the case. The Court meant what it said—*i.e.* it left open the question of whether sufficient justification requires an articulable risk of litigation or court-ordered compulsion.

Second, even if CSX is right about compulsion, Alabama *was* compelled by federal law to pass the water carrier exemption. *See* Pet. 22-23 (arguing compulsion). As we noted in the petition, Chief Justice Roberts indicated during the *CSX II* oral argument that

this compulsion (specifically, the Enabling Act) could amount to sufficient justification. Pet. 22. (quoting Transcript of Oral Argument 50-51, *CSX II*).

C. Like the Eleventh Circuit, CSX ignores Alabama's MTSA argument.

CSX is also wrong to dismiss Alabama's risk of litigation. *See* BIO 15-19. Due to word limits, Alabama cannot address CSX's points on each risk. But we do note that CSX perpetuates the mistake the Eleventh Circuit made regarding the Maritime Transportation and Securities Act ("MTSA").

CSX argues that a sales tax on a vessel's fuel falls outside the MTSA's reach because "the unambiguous language used by Congress in the MTSA deals with taxes levied upon 'any vessel' or 'passengers or crew.'" BIO 17. But, like the Eleventh Circuit, CSX omits the statutory language that makes Alabama's point: "No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon ***or collected from*** any vessel or other water craft, or from its passengers or crew." 33 U.S.C. § 5(d) (emphasis added).

Alabama agrees that Congress amended 33 U.S.C. § 5(b) in an attempt to "codif[y] the body of law surrounding the Tonnage Clause," which prohibits States from levying certain taxes upon a vessel or its passengers and crew. *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 805 F.3d 98, 111 (CA3 2015). But Congress' words don't always match Congress' intent. While Congress might have intended to limit the MTSA's scope to "taxes levied upon any vessel or passengers or crew," as CSX reads the statute, BIO 17, Congress wrote the disjunctive phrase "levied

upon ***or collected from*** any vessel or other water craft, or from its passengers or crew." 33 U.S.C. § 5(b) (emphasis added). At some point, courts must grapple with the effect of the disjunctive phrase "or collected from"—*i.e.* does the MTSA prohibit taxes "collected from" a vessel's passengers or crew, in addition to taxes "levied upon" the vessel, its passengers, or its crew? While we hope CSX is right that the disjunctive is meaningless, and thus fuel taxes "collected from" a ship's passengers or crew are not prohibited, we have a legitimate reason to fear the Court will read the statute as Congress wrote it. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.").

* * *

CSX contends that Alabama's concern about plain language is "fanciful," BIO 18, and that expressing a reluctance to invite litigation against water carriers while we litigate this case against rail carriers "is the type of deeply ingrained anti-railroad bias that prompted Congress to pass the 4-R Act in the first place." BIO 14. But Alabama did not pick this fight; the rail carriers did. Alabama was compelled by law to pass tax exemptions in 1939 that the rail carriers waited until 2008 to challenge. *See* Pet. 5-6. That CSX sued Georgia under both exemption theories (trucks and water carriers) *after* this Court decided *CSX II* demonstrates that the rail carriers will continue picking the fight unless and until this Court finishes what it started in *CSX I*. *See* Pet. App. 78a-79a (citing the Georgia actions). This case is the best vehicle end the 30-plus year battle once and for all.

CONCLUSION

The Court should grant the petition for certiorari review.

Respectfully submitted,

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