

No. 18-612

**In the
Supreme Court of the United States**

CSX TRANSPORTATION, INC.,
Cross-Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE AND
VERNON BARNETT, COMMISSIONER, DEPARTMENT OF
REVENUE, IN HIS OFFICIAL CAPACITY,
Cross-Respondents.

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

**RESPONSE TO CSX's CONDITIONAL
CROSS-PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

States and rail carriers have fought over the application of the 4-R Act's residual clause, 49 U.S.C. § 11501(b)(4), to taxes on diesel fuel since the 1980's. This Court has twice heard this case to resolve the dispute. In its second opinion, *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136 (2015), the Court remanded two questions to the Eleventh Circuit that would resolve this case—and, by extension, the nationwide dispute. The parties now raise those questions in complimentary petitions:

1. Under 49 U.S.C. § 11501(b)(4), when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers?

Petition for a Writ of Certiorari, Case No. 18-447, and,

2. Whether Alabama's imposition of a motor fuels tax on the fuel used by interstate motor carriers sufficiently justifies Alabama's imposition of a facially discriminatory sales and use tax on railroad diesel fuel.

Conditional Cross-Petition for a Writ of Certiorari, Case No. 18-612 (language regarding split omitted).

Alabama supports review of both questions.

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**REASONS WHY THE CROSS-PETITION
SHOULD BE GRANTED**

Alabama agrees; the Court should grant both the State's petition and CSX's cross-petition.

As detailed in Alabama's petition (No. 18-447), States and rail carriers have fought over the legality of fuel tax exemptions for trucks and water carriers for decades. The Court has twice heard Alabama's case to help end the nationwide dispute. On remand, the Eleventh Circuit split the baby, finding that Alabama's exemption for trucks was justified but its water carrier exemption was not. Granting the State's petition to decide the water carrier issue would thus end Alabama's case. But it would not end *every* State or local government's case. Only a resolution of both the truck and water carrier issues would do that. So, while it is not in Alabama's interest to argue both issues; it's in the nation's best interest that the Court decide both issues to finish what it started in *CSX I*.

I. Deciding the truck issue is necessary to a nationwide resolution.

The Court will have to define sufficient justification for both truck and water carrier exemptions at some point. Five of the six State lawsuits, and all seven of the local government lawsuits, cited in the Parties' petitions featured challenges to both truck exemptions and water carrier exemptions. *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). Only the on-going case against Tennessee challenges just one of the

exemptions, and it involves trucks, not water carriers. That case—and with it, the truck issue—will soon be before this Court.

II. Rail Carriers will soon petition the Court to decide the truck issue, divorced from the water carrier issue.

By the time the Court confers on this case, the rail carriers will have likely petitioned the Court to decide the truck issue in Tennessee's case. If that fails, they will likely continue pressing the issue by dragging other States, cities, and counties through the courts.

1. *Tennessee*: Citing the Eleventh Circuit's ruling in this case, the Sixth Circuit recently 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 on the same fuel purchase. *See Illinois Central Railroad v. Tennessee*, 2018 WL 4183464 (CA6 Aug. 31, 2018). At Illinois Central's request, the Sixth Circuit stayed its mandate to allow Illinois Central to petition this Court to review its decision on the trucks issue. *See* Order of November 16, 2018 (CA6 Case No. 17-5553). That petition is due on January 2, 2019. Importantly, the upcoming Tennessee case does *not* include the water carrier issue, meaning that the rail carriers' petition will not provide a vehicle to decide the two questions necessary for a nationwide resolution.

2. *Alabama local governments*: The truck issue will also rear its head in the rail carriers' pending lawsuits against certain Alabama cities and counties. *See* Pet. App. 79a-82a (citing the local government cases). Shelby County, for example, is landlocked and does

not have a navigable river; thus, water carriers cannot comprise a comparison class of similarly-situated competitors. *See Alabama Dep't. of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1142 (2015) (“*CSX II*”) (“A comparison class will thus support a discrimination claim only if it consists of individuals similarly situated to the claimant.”). As a result, Shelby County should be a trucks-only case that ends with the rail carriers petitioning this Court to review the Eleventh Circuit’s adverse ruling on trucks—*i.e.* the same argument CSX presents in the cross-petition here.

3. *Future cases*: The rail carriers may also press the truck issue by filing lawsuits in States outside the Sixth and Eleventh Circuits. Thanks to the International Fuel Tax Agreement (“IFTA”), every State except Hawaii imposes a fuel excise tax on trucks and uses the proceeds to fund highway construction and repair projects.¹ So, every State or local government that exempts trucks from also paying sales tax on the same fuel purchase is susceptible to being sued by a rail company that pays the sales tax. If the rail carriers continue losing on the truck issue, they will come back to this Court, pointing to their initial victory in Iowa to claim a split. *See Cross-Petition 20* (citing *Atchison, Topeka, & Sante Fe Railway Co. v. Bair*, 338 N.W. 2d 338, 346-47 (Iowa 1983) (holding that Iowa’s fuel excise tax was discriminatory because trucks’ tax payments were used to fund highway repairs while trains’ tax payments did not fund track repairs)).

¹ The IFTA Articles of Agreement are published at www.iftach.org/manualnew.php.

Granted, if the Circuit Courts consistently follow the lead of the Sixth and Eleventh Circuits, the Court could deny cert every time. But perpetually brushing aside the truck issue could subject numerous other States, local governments, and lower courts to the years of litigation that Alabama, Iowa, Louisiana, Missouri, and Tennessee have suffered. The rail carriers have been suing States under the residual clause to avoid paying tax on fuel since the 1980's (when they sued Iowa), and there's little reason to doubt they will keep doing so. The best way to stop the lawsuits, once and for all, is to decide both issues—trucks and water carriers—now, in the case the Court knows best.

III. CSX misstates the district court's analysis of the truck issue.

Rule 15.2 requires parties to identify “any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted.” While Alabama disagrees with CSX's legal analysis and some of its factual assertions, only one affects the issue that would be before the Court and thus must be raised here. In its Statement of the Facts, CSX asserts:

Specifically, the district court calculated a cents-per-gallon rate for the approximately 10% sales tax by multiplying it by the average price of fuel during the years preceding the lawsuit, and compared that rate to the 19 cent motor fuel excise tax.

Cross-Petition 15 (citing Pet. App. 66a). That statement contains two errors. First, the State sales tax rate is 4%, not 10%. See Stipulation 7. CSX's

“approximately 10%” figure adds city and county sales taxes, which CSX challenges in separate proceedings against different parties, to the state sales tax CSX challenges in this case. *See* Stipulations 7, 16. Second, the district court did not compare the 10% state-plus-local sales tax rate to the state-only 19¢ fuel excise tax rate. Adding local taxes to just one side of the equation makes no sense and would disadvantage the State.

The district court instead conducted alternative comparisons—*i.e.* with and without local taxes:

	State Tax	State + Local Taxes
Trucks	19¢ per gallon	23.0¢ per gallon
Trains	9.85¢ per gallon	23.45¢ per gallon

Pet. App. 55a.² While finding that the taxes were roughly equivalent under either comparison, the district court held that the state-only tax comparison (shaded in grey) was the one dictated by the 4-R Act’s plain language because the State defendants do not “impose” city or county taxes. Pet. App. 64a (“the only ‘act’ Congress precluded Defendants from doing in Section (b)(4) was to ‘impose another tax that discriminates’”). The Eleventh Circuit left that ruling undisturbed, finding that it “need not answer that question because the sales and use tax and the excise tax are

² The district court calculated the trains’ per gallon tax rate by multiplying the relevant sales tax rate by the average per-gallon price of diesel fuel between January 2007 and February 2016. *Id.*

roughly equivalent regardless of whether we consider local taxes.” Pet. App. 26a-27a.

CSX’s cross-petition does not challenge the lower court’s ruling that local taxes play no part in the rough equivalence analysis dictated by this Court in *CSX II*. CSX instead focuses its argument on how the State spends its revenue. *See* Cross-Petition 16-24. Thus, the references to “motor fuels tax” and “sales and use tax” in the Question Presented are limited to state tax.

* * *

We agree with Eleventh Circuit: “It’s time to put this one in the shed.” Pet. App. 45a. But the door won’t shut unless the truck and the water carrier issues are both inside. This case presents the best vehicle to put both issues—and with them, a decades-old nationwide dispute—to rest.

CONCLUSION

The Court should grant the State's petition for certiorari review and CSX's conditional cross-petition for certiorari review.

Respectfully submitted,

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