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 Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF CROSS-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. In matters of industrywide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.

This case presents such a matter. Taxes represent the third largest expense for railroads, surpassed only by wages and fuel. In 2016, the railroad industry paid approximately $12 billion in taxes. *See* Ass'n. of Am. R.R., Railroad Facts (2017 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.*, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067 (2018)), including this case when it was previously before the Court, *see CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011) ("*CSX I*"); *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015) ("*CSX II*").

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[*] 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 its 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.

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), 49 U.S.C. § 11501, which prohibits states from imposing taxes that "discriminate[ ] against" rail carriers. Because most of AAR's members operate across multiple states and are subject to a variety of federal, state, and local taxes, AAR has a strong interest in ensuring that the 4-R Act is properly enforced and that its members are not subjected to discriminatory state taxation. Here, the Eleventh Circuit's decision—specifically, the portion of its opinion holding that Alabama does not discriminate against railroads by exempting motor carriers from the sales tax Alabama imposes on railroad diesel fuel—misapplies the legal standard for assessing whether a tax is discriminatory, and conflicts with decisions from this Court and others. The issues raised by this case have broad implications not just for petitioner CSX, but for most of AAR's member railroads.

AAR agrees with CSX that this Court should deny Alabama's petition for certiorari seeking review of the Eleventh Circuit's ruling that Alabama's tax is discriminatory because it exempts interstate water carriers. But in the event the Court were to grant Alabama's petition, it should also grant CSX's conditional cross-petition to resolve the important and recurring questions presented concerning the proper application of the 4-R Act's antidiscrimination mandate.

SUMMARY OF ARGUMENT

The 4-R Act prohibits states from imposing a "tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). In concluding that Alabama did not discriminate against railroads by exempting motor carriers from the state's sales tax on diesel fuel, the Eleventh Circuit misapplied *CSX II* and deepened an existing split in the lower courts over whether the way a state *allocates* its tax revenue is relevant to the discrimination analysis. In the event it grants Alabama's petition for certiorari in *Alabama Department of Revenue v. CSX Transportation, Inc.*, No. 18-447 (petition filed Aug. 27, 2018), this Court should also grant CSX's cross-petition and clarify the standard it adopted in *CSX II* for determining when two taxes are "roughly equivalent" so as to foreclose a finding of discrimination.

I. The decision below conflicts with *CSX II*, as well as with the Iowa Supreme Court's decision in *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983).

A. The 4-R Act was enacted against the backdrop of state tax regimes that discriminated against railroads. One common method of discrimination was directing the tax revenues paid by railroads to the state's general revenue fund, while directing the tax revenues paid by motor carriers to building and maintaining highways and bridges—the very infrastructure that supports their business.

B. The Eleventh Circuit erred in failing to apply the compensatory tax doctrine in analyzing whether the sales tax on diesel fuel (paid by railroads) is "roughly equivalent" to the motor fuel tax (paid by

motor carriers), thus defeating a finding of discrimination. Although the Court in *CSX II* did not elaborate on how courts should assess "rough equivalency," it sent a strong signal that the well-settled and familiar compensatory tax doctrine was the proper framework. The court of appeals' refusal to apply the compensatory tax doctrine—or its functional equivalent—is inconsistent not just with *CSX II*, but with the text and purpose of the 4-R Act, which is aimed at rooting out discriminatory tax schemes no matter what form they take.

C. The decision below also conflicts with *Atchison* and deepens an existing split in the lower courts. In deeming "irrelevant" the way Alabama allocates the two taxes, the Eleventh Circuit aligned itself with the Sixth Circuit. *See Ill. Cent. R.R. v. Tenn. Dep't of Revenue*, No. 17-5553, 2018 WL 4183464 (6th Cir. Aug. 31, 2018); *BNSF Ry. v. Tenn. Dep't of Rev.*, 800 F.3d 262 (6th Cir. 2015). That approach, however, directly conflicts with the approach followed by the Iowa Supreme Court, which holds that a state tax scheme "discriminates against the railroads" under the 4-R Act when the fuel tax paid by motor carriers "go[es] into an earmarked fund for the construction, maintenance, supervision, and administration of the highways," whereas the fuel tax paid by the railroads is directed to a fund for "rehabilitation of . . . debilitated railroad lines and branches, not for viable railroads." *Atchison*, 338 N.W.2d at 347.

II. This Court should specify the test for determining when two taxes are "roughly equivalent" for purposes of a discrimination analysis under the 4-R Act. It should hold that the analysis is holistic in nature and cannot be reduced to a narrow and

mechanical comparison of tax rates, as the court of appeals held here.

The Court should hold that the comparative tax doctrine, or its functional equivalent, governs the analysis and requires a comparison of at least three elements, all of which must be satisfied for taxes to be deemed "rough equivalents." *First*, the tax incidence must be identical; the two taxes must be taxing the same thing. *Second*, the revenues from the two taxes must be allocated in an equivalent and nondiscriminatory way. *Third*, the tax rates must be approximately the same. Construing the 4-R Act in this way will give force and meaning to the statute's antidiscrimination mandate.

ARGUMENT

Alabama imposes a sales tax on railroads for their purchase of diesel fuel in Alabama. *See* Ala. Code §§ 40-23-2(1), 40-23-61(a). The base tax rate is 4 percent, although several cities, including Montgomery and Birmingham, impose additional taxes, as do certain counties. The revenue from the sales tax goes to the state's general revenue fund, and is primarily earmarked for spending on education. Ala. Code § 40-23-35(f). Although motor carriers are a principal competitor of railroads—and although motor carriers, like railroads, purchase substantial amounts of diesel fuel—Alabama exempts motor carriers from the sales tax that the railroads must pay. *See* Ala. Code § 40-17-325.

CSX challenged the sales tax as discriminatory under the 4-R Act, 49 U.S.C. § 11501(b)(4). The Eleventh Circuit acknowledged that railroads paid the sales tax whereas motor carriers did not—a *prima*

facie violation of Section 11501(b)(4). But the court nonetheless concluded that the exemption for motor carriers did not discriminate against railroads because motor carriers pay a *different* tax—a motor fuel excise tax of 19 cents a gallon on the diesel fuel that they consume on Alabama highways. *See* Ala. Code § 40-17-325(a). In reaching this conclusion, the court deemed it "irrelevant" that, unlike the sales tax paid by the railroads, the motor fuel excise tax directly benefits motor carriers by funding their infrastructure. Pet. App. 21(a).[1] Under Alabama law, all motor fuel excise tax revenues are devoted to building and maintaining highways, roads, and bridges. *See* Ala. Code § 40-17-361(a)-(b).

The Eleventh Circuit's ruling conflicts with decisions from this Court and others. It threatens to deprive railroads of a critical protection by diluting the 4-R Act's antidiscrimination mandate. If this Court grants Alabama's petition in order to address the water-carrier portion of the ruling, it should also grant CSX's cross-petition in order to correct the court of appeals' misguided analysis regarding motor carriers and to resolve the conflicts and confusion arising from that portion of the decision.

I. THE DECISION BELOW MISAPPLIES *CSX II* AND DEEPENS AN EXISTING SPLIT IN THE LOWER COURTS.

The court of appeals did not apply the test this Court has developed for evaluating claims of discriminatory taxation. It acknowledged, but

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[1] Cites to "Pet. App." are to the Petitioner's Appendix in Docket No. 18-447.

deemed irrelevant, the difference in how Alabama allocates the two taxes: motor fuel tax revenues are devoted to building and maintaining state highways, roads and bridges—infrastructure that directly benefits motor carriers, *see* Ala. Code § 40-17-361(a)-(b)—whereas the revenues from the sales tax are deposited in the general fund and are *not* similarly used for the direct benefit of rail carriers. The court observed that the statutory text refers only to a discriminatory "tax," as opposed to discriminatory distributions of revenue, and thus "how the State allocates its tax revenues is irrelevant to whether it '[i]mposes [a] tax that discriminates against a rail carrier.'" Pet. App. 21a (alterations in original) (quoting 49 U.S.C. § 11501(b)(4)).

The court also held that *CSX II* "did not say that we were to use the compensatory tax doctrine to determine if a tax scheme violates § 11501(b)(4)." Pet. App. 22a. Declaring that "two taxes are roughly equivalent if the rates they impose approximate one another," the court concluded that the sales tax and fuel taxes were rough equivalents because the average rates over a recent nine-year period were sufficiently similar. *Id*. at 27a.

Review is warranted because the Eleventh Circuit's decision conflicts with *CSX II* and with the Iowa Supreme Court's decision in *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983).

A. The 4-R Act Prohibits "Any" Tax That Discriminates Against Railroads.

In enacting the 4-R Act, Congress sought to "restore the financial stability of the railway system of the United States." 45 U.S.C. § 801. Congress

emphasized that the railroads "'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). "Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, addresses this concern by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads." *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 336 (1994).

After forbidding certain types of property taxes, 49 U.S.C. § 11501(b)(1)-(3), the 4-R Act broadly prohibits "another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4). This Court has stated that the phrase "another tax" means "any other tax," and has described subsection (b)(4) as a "catch-all" provision that "encompass[es] any form of tax a State might impose." *CSX I*, 562 U.S. at 280, 284 n.6, 285; *see also Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991) ("Subsection (b)(4) is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. It could be an income tax, a gross-receipts tax, a use tax, an occupation tax as in this case—whatever.").

The 4-R Act was enacted against the backdrop of government studies reporting that motor carriers often benefit from tax schemes in which the revenue from the fuel taxes they pay are used to fund highway projects and maintain roads—that is, the infrastructure motor carriers use for their business. The benefits that motor carriers receive from a tax

scheme of this type substantially offset the burden imposed by the tax itself. In contrast, the fuel tax paid by rail carriers is often deposited into a general revenue fund, thus forcing the railroads to pay for their own infrastructure. *See* S. Rep. No. 87-445 (1961) (noting that the differential treatment harms the competitive position of rail carriers). Since the inception of this litigation in 2008, America's freight railroads have spent more than $136 billion—of their own funds, not government funds—on capital expenditures and maintenance expenses related to their roadways and structures.

The Eleventh Circuit's decision compounds the burden on freight railroads and deepens the divide between railroads and their competitors that the 4-R Act sought to alleviate. Diesel fuel is a very substantial expense for Class I freight railroads (the nation's largest freight railroads), accounting for approximately 11 percent of their total operating expenses. *See* Ass'n. of Am. R.R., Railroad Facts (2017 ed.). In 2016, the Class I freight railroads consumed 3.4 billion gallons of diesel fuel at a total cost of $4.9 billion. *Id*. Thus, if every state followed Alabama's lead and imposed a 4% tax on the railroads' use of diesel fuel—or a 10% combined state and local tax—the economic consequences would be devastating.

B. The Decision Below Misreads *CSX II* By Failing To Apply The Compensatory Tax Doctrine.

1. The Eleventh Circuit erred—and deviated from well-settled standards for determining when a tax is discriminatory—in refusing to review Alabama's tax scheme under the compensatory tax doctrine.

Although the Court in *CSX II* did not specify how a federal court should conduct a "rough equivalency" analysis for purposes of determining whether a tax is discriminatory vis-à-vis a purportedly comparable tax, it did not need to. That is because the Court, in a long line of cases stretching back decades, had already developed a common-law test for comparing taxes in order to adjudicate claims of discrimination under the dormant Commerce Clause.

This test—known as the compensatory tax doctrine, or the complementary tax doctrine—dates back to the late nineteenth century. In *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), the Court held that a state tax imposed on interstate commerce is not discriminatory when the state imposes the same tax burden on the same activity conducted entirely within the state. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932), the Court emphasized that discrimination in taxation is a "practical conception," and that state taxes that discriminate against interstate commerce could violate the dormant Commerce Clause. And in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937), the Court relied on *Gregg Dyeing* to hold that the inquiry turns on whether the two taxes at issue impose an "equal burden" on the taxpayers.

Over the years, the Court has refined the test as one of "rough equivalence." Under the compensatory tax doctrine, "a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause." *Or. Waste Sys., Inc. v. Dep't of Env. Quality*, 511 U.S. 98, 102-03 (1994) (internal quotation marks omitted). To establish rough

equivalence, the state must identify the state tax for which the challenged tax is attempting to compensate. *Id*. at 103. The state then must show that the challenged tax roughly approximates—but does not exceed—the comparator tax. *Id*. And finally, the state must show that "the events on which the [two] taxes are imposed [are] substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Id*. (alterations and internal quotation marks omitted); *see also Comptroller of Treas. of Md. v. Wynne*, 135 S. Ct. 1787, 1803 n.8 (2015) (state must show the taxes are "imposed upon substantially similar events").

In *CSX II*, the Court specifically invoked this line of caselaw in holding that 4-R Act discrimination claims should be evaluated under the "rough equivalence" standard. The Court stated that "[o]ur negative Commerce Clause cases"—*i.e*., the cases discussed above—"endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." 135 S. Ct. at 1143. And the Court specifically cited its ruling in *Gregg Dyeing* to make its point clear. *See id*.

2. The Eleventh 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. The plain language of the statute prohibits states from imposing "discriminatory" taxes on railroads. As shown above, at the time Congress enacted the 4-R Act, there were well settled common-law standards for determining when a state tax scheme that arguably discriminates against interstate commerce may nonetheless be upheld

based on the existence of a different, comparable tax. Thus, when Congress prohibited states from enacting taxes that "discriminate" against railroads, it was legislating in the context of this well-settled body of caselaw and should be deemed to have adopted the existing common-law antidiscrimination standard. *See Neder v. United States*, 527 U.S. 1, 23 (1999) (citing "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses"). That interpretation is also consistent with the purpose of the 4-R Act, which is to protect railroads from becoming "easy prey" for state tax assessors and remedy the imbalance between railroads and their competitors. S. Rep. No. 91-630, at 3.

The Eleventh Circuit declined to apply the compensatory tax doctrine, noting that "the Court didn't tell us" to do so. Pet. App. 22a. That conclusion is mistaken. For one thing, this Court's statement in *CSX II* that the legal standard is "rough equivalence" is a clear reference to the compensatory tax doctrine, which sets forth the test for determining when one tax is "roughly equivalent" to another for purposes of adjudicating a discrimination claim. *See, e.g.*, *Oregon Waste*, 511 U.S. at 102-03 (tax on interstate activity is not unlawfully discriminatory when it is the "rough equivalent" of a tax on the same activity conducted on an intrastate basis). Moreover, it is implausible to conclude, as the court of appeals did here, that by using the term of art "roughly equivalent," this Court wanted federal courts to create a *new* test for rough equivalence that differs from the test the Court has always applied in tax discrimination cases.

The Eleventh Circuit's narrow and simplistic approach to analyzing discrimination cannot possibly

be what Congress envisioned when it passed the 4-R Act. The Act was enacted at a time of turmoil and instability in the rail industry, when many railroads were bankrupt, or on the verge of bankruptcy and struggling to survive. As the Senate Commerce Committee explained at the time, "[e]ight major carriers in the Northeast and Midwest are bankrupt; several elsewhere in the country are in precarious financial condition and one is bankrupt." S. Rep. No. 94-499, at 3 (1975). The need for stabilization was immediate—in the Senate's words, the "present crisis" demanded "decisive action"—and the nondiscrimination mandate was a key element of the federal scheme. "Among the means chosen by Congress to fulfill [its] objectives, particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property." *Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987).

The Eleventh Circuit's approach would enable states to achieve the impermissible end of discriminatory taxation simply by enacting taxes that on their face appear similar but in effect impose a heavier tax burden on railroads. This cannot be what Congress intended in enacting the 4-R Act.

C. The Decision Below Also Conflicts With The Iowa Supreme Court's Decision In *Atchison*.

By focusing exclusively on tax rates, the Eleventh Circuit sidestepped the critical difference in how Alabama uses the *revenues* from the two taxes. Whereas Alabama directs the revenues of the motor fuel tax to highway improvements and other

measures that directly benefit motor carriers, the revenues from the sales tax are placed in the state's general operating fund and used primarily for education spending. The Eleventh Circuit did not dispute this critical difference between the two taxes; the court simply deemed it "irrelevant" to the analysis. Pet. App. 21a. The court explained that because Section 11501(b) "say[s] nothing about revenue allocation or spending that discriminates against rail carriers . . . . it is evident that Congress did not intend . . . for us to consider revenue expenditures in deciding whether a tax discriminates for purposes of subsection (b)(4)." *Id.*

In reaching this conclusion, the Eleventh Circuit aligned itself with the Sixth Circuit and thereby deepened an existing split in the lower courts. In *BNSF Railway v. Tennessee Department of Revenue*, 800 F.3d 262 (6th Cir. 2015), the Sixth Circuit rejected the railroad's argument that a Tennessee tax on diesel fuel discriminated against railroads vis-à-vis motor carriers because the tax revenues were spent on highway maintenance. The court held that "this argument fails on its face" because "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." *Id*. at 274.

The Sixth Circuit recently reaffirmed this conclusion in its unpublished opinion in *Illinois Central Railroad v. Tennessee Department of Revenue*, No. 17-5553, 2018 WL 4183464 (6th Cir. Aug. 31, 2018). There, the court considered the argument that a prior version of Tennessee's tax scheme was discriminatory on the basis that the fuel taxes paid by

motor carriers fund public highways and benefit trucks, whereas "the railroads' taxes go to state funds that allegedly afford little benefit to large railroads." *Id*. at *3. Reasoning that "this train has already left the station," the Sixth Circuit adhered to its ruling in *BNSF* and declined "to consider Tennessee's allocation of tax revenue in evaluating its discrimination claim." *Id*.

The approach followed by the Sixth and Eleventh Circuits conflicts with the approach taken by the Iowa Supreme Court. In *Atchison, Topeka & Santa Fe Railway v. Bair*, 338 N.W.2d 338 (Iowa 1983), the court invalidated a state fuel tax as discriminatory against railroads under the 4-R Act. Iowa, like Alabama in this case, had established separate tax schemes governing the taxation of fuel used by railroads, on the one hand, and trucks, on the other. The court began by acknowledging, if one were to focus solely on tax rates, "the trucks rather than the railroads appear to be at a competitive disadvantage as to fuel taxes." *Id*. at 346. However, the court explained, "[t]he various taxes which the General Assembly requires the trucks to pay go into an earmarked fund for the construction, maintenance, supervision, and administration of the highways, . . . [whereas] the railroads acquire, construct, maintain, and pay taxes on their own roads." *Id*. at 347. Revenues from the tax paid by the railroads were deposited in a "fund . . . for rehabilitation of . . . debilitated railroad lines and branches, not for viable railroads." *Id*. The court concluded that "[t]his gives the trucks a distinct competitive advantage," and therefore "the railroad tax in question discriminates against the railroads contrary to [the 4-R Act]." *Id*.

In sum, the Sixth and Eleventh Circuits hold that the way a state allocates tax revenues is *irrelevant* to analyzing whether a tax is discriminatory under the 4-R Act, whereas the Iowa Supreme Court deems it *highly* relevant. This Court's review is warranted to resolve this conflict on an important and recurring question of federal law.

II. THIS COURT SHOULD CLARIFY HOW TO ASSESS "ROUGH EQUIVALENCE" UNDER THE 4-R ACT.

In its most recent decision in this case, this Court considered Alabama's argument that the existence of a motor fuel excise tax justified its decision to exempt motor carriers from its sales tax. The Court held that "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory," because "[t]here is simply no discrimination when there are roughly comparable taxes." *CSX II*, 135 S. Ct. at 1143-44. The Court did not decide whether Alabama's two taxes were roughly equivalent. Instead, the Court "remand[ed] for [the lower] court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." *Id*. at 1144.

On remand, the court of appeals diluted the 4-R Act's antidiscrimination mandate by holding that "rough equivalence" is determined merely by comparing tax rates. Pet. App. 26a-27a. In the court's view, as long as the railroads are paying approximately the same tax rate as are motor carriers, there can be no discrimination. But if the rough equivalence standard could be satisfied by a simplistic comparison of tax rates, this Court would

have affirmed rather than remanded in *CSX II*, as the district court had already performed that analysis and found the tax rates roughly equivalent.

This Court should specify the test for determining when two taxes are "roughly equivalent." The Court should recognize that the analysis is holistic in nature, and requires far more than simply comparing tax rates. This Court should clarify what it already signaled in *CSX II* and hold that the compensatory tax doctrine governs the analysis. But even if the Court declines to formally adopt that test in the context of the 4-R Act, it should recognize that, regardless of the label, a rough equivalence analysis must consider at least three points of comparison, all of which must be satisfied for two taxes to be deemed "rough equivalents":

- Is the tax *incidence* the same—that is, are the two taxes actually taxing the same thing?

- Are the tax revenues *allocated* in an equivalent and nondiscriminatory way?

- Are the tax *rates* approximately the same?

If the answer to any of these three questions is "no," then the two taxes cannot be rough equivalents.

Incidence. A fundamental question in determining whether two taxes are rough equivalents is whether they are taxing the same thing. If they are taxing *different* things, the two taxes cannot amount to rough equivalents. The compensatory tax doctrine recognizes this point by requiring the taxes to be "proxies" for one another. *See Oregon Waste*, 511 U.S. at 103 (alteration omitted).

In this case, Alabama's sales tax and motor fuel tax are taxing different things. The sales tax is levied on the diesel fuel that railroads *purchase* in Alabama, regardless of where it is consumed. In contrast, the motor fuel tax is levied on the diesel fuel that motor carriers *consume* in Alabama, regardless of where it is purchased. Because the incidence of Alabama's sales tax and motor fuel tax differs—fuel purchase versus fuel consumption—they cannot be rough equivalents.

Allocation. In comparing two taxes, the state's allocation of the tax revenues is highly relevant. Two taxes imposing the identical tax rate would not be rough equivalents if, for example, the revenues from one tax were kept by the government, while the revenues from the other tax were refunded to the taxpayer. In the former scenario, the taxpayer bears the full burden of the tax at the assessed rate, whereas in the latter scenario, the taxpayer bears no burden other than administrative costs and the time value of money.

Taking into account the way tax revenues are spent is consistent with how this Court has historically approached questions of discrimination in the context of state taxes. In *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), this Court held that a Massachusetts milk pricing order violated the Commerce Clause prohibition on discriminatory taxes by favoring in-state milk producers over out-of-state producers. In reaching that conclusion, the Court looked to how Massachusetts allocated the tax revenues as a critical part of the discrimination inquiry. The Court noted that "[a]lthough the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more

than) offset by the subsidy provided exclusively to Massachusetts dairy farmers." *Id*. at 194. The Court emphasized 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. *Id*. at 201.

The same logic applies here. Alabama's use of the tax revenues gives rise to discrimination in that the tax paid by the motor carriers is used to subsidize their business, whereas the tax paid by the railroads is not. That is a textbook example of a discriminatory tax prohibited by the 4-R Act and directly contravenes the Act's purpose—to remedy the competitive disadvantage between railroads, which must build and maintain their own infrastructure, and the trucking industry, which operates on publicly funded infrastructure. *See* S. Rep. No. 87-445, at 449-66 (1961).

Rates. Although a comparison of tax rates is not the *only* element of the analysis, as the Eleventh Circuit held, it is nonetheless a key consideration. While slight deviations in tax rates do not, in and of themselves, establish discrimination, any significant difference should preclude a finding of rough equivalence.

CONCLUSION

This Court should deny Alabama's petition for certiorari. But in the event it grants Alabama's petition, it should also grant CSX's conditional cross-petition to address the deepening split in the lower courts and resolve the proper application of the 4-R Act's antidiscrimination mandate.

Respectfully submitted.

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