**No. 17-11705**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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CSX TRANSPORTATION, INC.
*Plaintiff-Appellant,*

vs.

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
*Defendants- Appellees.*

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On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:08-cv-00655-AKK

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# BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amicus curiae,* the Tax Foundation, certifies that it is a non-profit organization and does not issue stock. It has no parent corporation. The following is a list of individuals or entities that have an interest in the outcome of this case, other than those already listed in the brief of Appellant:

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## STATEMENT OF INTEREST

The Tax Foundation respectfully submits this brief as *Amicus Curiae* in support of Appellant CSX Transportation, Inc., urging this Court to reverse the decision of the United States District Court for the Northern District of Alabama, Southern Division. That court improperly held that Alabama's sales tax imposed on diesel fuel purchased by railroads was "roughly equivalent" to the motor fuels excise tax imposed on diesel fuel purchased by motor carriers and therefore did not discriminate against railroads in violation of the 4-R Act, even though 100 percent of the revenues from the motor fuels tax were dedicated to uses specifically benefiting motor carriers while sales tax revenues were used for general governmental purposes.

The Tax Foundation is a non-profit research organization founded in 1937 to educate the public about sound tax policy. To this end, it disseminates information on taxes and promotes tax systems that are simple, fair, and conducive to economic growth. The Tax Foundation works to further this mission by educating the legal community on issues relating to tax law, by explaining tax law concepts to lawmakers and the public in an understandable and relevant manner, and by advocating that judicial decisions on tax law promote principled tax policy. This case raises concerns about the validity and effectiveness of federal laws enacted by Congress to protect interstate commerce from discriminatory and unduly

burdensome taxation. The Tax Foundation has a significant interest in the outcome of this case because of the impact it could have on how federal statutes prohibiting state and local tax discrimination are interpreted.[1]

## STATEMENT OF ISSUES

This case raises a number of issues bearing on the ultimate question of whether Alabama's sales tax on diesel fuel discriminates against railroads under the 4-R Act.[2] *Amicus* Tax Foundation's brief addresses only one of these issues, but it is the issue of greatest general significance and therefore the issue of greatest concern to *Amicus*. The issue, as framed by the U.S. Supreme Court in remanding the case to this Court, is "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." *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1144 (2015) (*CSX II*).

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[1] Both parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(e).

[2] These include the scope of the remand to the district court; whether the alleged discrimination is self-imposed; whether the state has provided sufficient justification for exempting motor carriers from the sales tax on their purchases of diesel fuel; and whether the state has provided a sufficient justification for exempting water carriers from tax on their purchases of diesel fuel.

## SUMMARY OF ARGUMENT

The fundamental question is what "rough equivalence" means for purposes of this inquiry. The district court held that "rough equivalence" means "dollar equivalence," and since Alabama's sales tax on the railroads' purchase of diesel fuel was roughly the same in dollar terms as Alabama's excise tax on the motor carriers' purchase imposed on diesel fuel, the taxes satisfied the "rough equivalence" requirement. In so holding the court embraced the view that how the state "'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.'" *CSX Transp., Inc. v. Alabama Dep't of Revenue*, No. 08-655, slip op. at 20 n. 16 (N.D. Ala. Mar. 29, 2017) (quoting *BNSF Ry. Co. v. Tennessee Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015)). As the ensuing discussion demonstrates, the district court's disposition of the "rough equivalence" issue ignores the U.S. Supreme Court's guidance as to the proper approach to the "rough equivalence" inquiry in its opinion remanding the case; it flies in the face of the purposes of the 4-R Act; and it defies common sense. Indeed, affirming the district court's approach would ignore the cardinal rule of interpretation of tax statutes, namely, that substance rather than form is the touchstone of analysis.

## ARGUMENT

### I. IN *CSX II*, THE U.S. SUPREME COURT PROVIDED CONTROLLING GUIDANCE ON THE MEANING AND APPLICATION OF THE "ROUGH EQUIVALENCE" STANDARD IN THE ANALYSIS OF "DISCRIMINATION" UNDER THE 4-R ACT IN ITS REMAND IN THIS CASE.

In *Alabama Department of Revenue v. CSX Transportation, Inc.*, 135 S. Ct. 1136 (2015) (*CSX II*), the U.S. Supreme Court rejected a narrow approach confined to the particular tax imposed on railroads from which its competitors were exempt in considering the question of whether a tax "discriminates against a rail carrier" under the 4-R Act (49 U.S.C. § 11501(b)(4)). The Court instead endorsed a broad approach to this question of discrimination that considered "alternative, roughly equivalent tax[es]" (*CSX II*, 135 S. Ct. at 1143) in the discrimination analysis. The Court explained the rationale for its approach to the discrimination in the following terms:

> A State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers. . . . [A] rail carrier and its competitors can be considered similarly situated for purposes of this provision. But what about the claim that those competitors are subject to *other* taxes that the railroads avoid? We think Alabama 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.

*Id.* (emphasis in original). The Court further observed that "[i]t does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a

rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt." *Id.* (emphasis in original).

The Court then provided guidance on the how courts should undertake the "rough equivalence" inquiry. First, the Court explicitly recognized the difficulty of the task confronting courts in undertaking this inquiry – a difficulty this court had identified in its earlier opinion. Thus, the high Court declared that it was "inclined to agree" with the suggestion "that federal courts are ill qualified to explore the vagaries of state law" (*CSX II*, 135 S. Ct. at 1144) in undertaking the "rough equivalence" inquiry, but it determined that there was no escape from this burden because "Congress assigned this task to the courts by drafting an antidiscrimination command in such sweeping terms." *Id.* Accordingly, the Court continued, if the task of determining "when there are roughly comparable taxes . . . . is so 'Sisyphean,' as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes." *Id.*

Nevertheless – and what is dispositive for the purposes of this appeal – in instructing courts how to discharge the task of determining whether two taxes are "roughly comparable," the U.S. Supreme Court pointed specifically to its "negative Commerce Clause cases" that "endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." *Id*. at 1143. Moreover, in so doing, the Court made explicit reference to *Gregg Dyeing Co. v. Query*, 286

U.S. 472, 479-80 (1932), as illustrating its view that "an alternative, roughly equivalent tax . . . renders a tax disparity nondiscriminatory." *Id*. This is understandable, as *Gregg Dyeing* is one of a long line of cases reflecting the application of the Court's "constitutional doctrine that protects an apparently discriminatory tax from attack when the state can identify a 'complementary' exaction that cures the apparent discrimination," Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Law. 405, 406 (1986) (cited in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341 n.7 (1996)), therefore provides an analytical template for approaching the "rough equivalence" issue raised in this case.

*Gregg Dyeing* involved a challenge to a South Carolina license tax of six cents per gallon upon persons importing gasoline and other petroleum products into South Carolina for use or consumption in the state. The taxpayer, who used gasoline purchased outside the state for operating its South Carolina bleachery, contended that the statute discriminated against interstate commerce by singling out for taxation petroleum products imported from sister states. The South Carolina Supreme Court had disposed of this objection on the ground that the allegedly discriminatory levy was "complementary" to other South Carolina statutes imposing license taxes of six cents per gallon on dealers in petroleum products sold in the state. *Gregg Dyeing Co. v. Query*, 164 S.E. 588, 590 (S.C.

1931) (quoted in *Gregg Dyeing*, 286 U.S. at 476). Taking the provisions collectively, the state court held that the taxes in substance imposed the same six cents per gallon tax upon all consumers of petroleum products in the state, even though the legal incidence of the levies fell variously on "dealers" selling such products in the state and on "importers" using or consuming such products in the state. *Gregg Dyeing*, 286 U.S. at 476-77. Moreover, payment of the license tax imposed on dealers guaranteed immunity from the license tax imposed on importers so that only one tax was imposed on the sale or use of any particular gallon of petroleum in the state.

In the U.S. Supreme Court, the taxpayer launched a frontal assault on the complementary tax theory, arguing that "to stand the test of constitutionality . . . the act must be constitutional 'within its four corners,' that is, considered by itself." *Id.* at 479-80. The Supreme Court rebuffed the attack:

> The question of constitutional validity is not to be determined by *artificial standards*. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the *result, taken in its totality*, is within the State's constitutional power.

*Id*. at 480 (emphasis supplied).

Reading the statutes together, the Court found nothing objectionable in South Carolina's taxing scheme. It saw "no reason . . . to challenge [the state court's] view" that the "burden" of the tax on sales of petroleum products within the state "actually rests upon the consumer, although not placed upon the consumer directly." *Id*. Accordingly, the taxpayer was treated no worse than other in-state consumers of petroleum products who purchase such products from dealers and "are in effect required to pay through the tax on the dealers from whom such consumers buy." *Id*. Nor was the taxpayer treated any worse than manufacturers who produced gasoline in the state and consumed it in their own enterprises because the state court had construed the statute as imposing a tax upon the gasoline that such a company uses as well as that which it sells. In short, the taxpayer had "failed to show that, whatever distinction there existed *in form*, there was any substantial discrimination *in fact*." *Id*. at 482 (emphasis supplied).

## II. THE U.S. SUPREME COURT'S GUIDANCE IN CSX II REQUIRES THAT THE INQUIRY INTO "ROUGH EQUIVALENCE" FOCUS ON THE SUBSTANCE OF THE EXACTIONS AND NOT THEIR FORM.

The clear message from the U.S. Supreme Court's opinion in *CSX II*, and the Commerce Clause authority it invokes, is that the inquiry into "rough equivalence" should be determined by whether there is any "discrimination in fact," and should "not . . . be determined by artificial standards." *Gregg Dyeing*, 286 U.S. at 480. In this respect, the Court is essentially reaffirming the fundamental principle of tax

adjudication that it has long embraced, in cases involving both constitutional and statutory issues, that the substance rather than form of the taxes at issue governs the analysis. *See*, *e.g.*, *PPL Corp. v. Commissioner*, 133 S. Ct. 1897, 1905 (2013) (adverting to "the black-letter principle that 'tax law deals in economic realities, not legal abstractions'"); *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (declaring that Commerce Clause analysis is wedded to "pragmatism" and is contemptuous of "'magic words and labels'" (quoting *Ry. Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959)); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372 (1991) (declaring that Commerce Clause analysis rejects "formalism"); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980) (observing that Commerce Clause analysis looks to "the practical effect of a challenged tax"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that Commerce Clause jurisprudence is grounded in "economic realities"); *Commissioner of Internal Revenue v. Hansen*, 360 U.S. 446, 461, (1959) (noting that "the incidence of taxation depends upon the substance, not the form, of the transaction"); *Commissioner v. Sw. Expl. Co.*, 350 U.S. 308, 315 (1956) (noting that "the tax law deals in economic realities, not legal abstractions").

There is no litmus test for determining whether, as a matter of substance and not form, two taxes are "roughly equivalent." Nevertheless, as noted above, the Court recognized in *CSX II* 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. Moreover, in citing *Gregg Dyeing* in support of that proposition, the Court was clearly signaling that *Gregg Dyeing*, and the "compensatory" or "complementary" tax doctrine (*Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996)) it applied, embodied an appropriate analytical framework for adjudicating the "rough equivalence" issue.

Although the compensatory tax doctrine has been reflected in the U.S. Supreme Court's constitutional jurisprudence for the past 150 years, *see* 1 J. Hellerstein, W. Hellerstein & J. Swain, *State Taxation* ¶ 4.14[3][c] (3d ed. 2017 rev.) (tracing development of doctrine), the Court's contemporary constitutional jurisprudence has "distilled three conditions necessary for a valid compensatory tax." *Fulton*, 516 U.S. at 332.

- First, the state must identify the tax burden for which the facially discriminatory tax allegedly compensates.
- Second, the facially discriminatory tax "must be shown roughly to approximate – but not to exceed" the amount of the tax for which the state is attempting to compensate.
- Third, the taxes "must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other."

*Id.* at 332-33 (citations omitted). *See also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994*); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994).

There is nothing talismanic about the Court's compensatory doctrine. Indeed, the Court itself has recognized that the compensatory tax doctrine was not "a doctrine unto itself, [but] merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." *Oregon Waste*, 511 U.S. at 102. Moreover, it is not the only way in which a determination of "rough equivalence" can be made when a tax that appears to discriminate is offset by another levy that, as a matter of substance, does not discriminate. But it is indisputably an instructive framework for determining "rough equivalence," and it is a framework that the U.S. Supreme Court has endorsed, in general, and in this case, in particular. Accordingly, failure of a tax to satisfy the strictures of the compensatory tax doctrine reveals, at a minimum, that there is a prima facie case that the tax is not the "rough equivalent" of the apparently discriminatory tax for which it allegedly compensates.

As the ensuing discussion demonstrates, Alabama's motor fuels excise fails to qualify as a compensatory tax under the Court's compensatory tax doctrine, and it was plain error of the court below to refuse *even to consider* the application of that doctrine in undertaking its "rough equivalence" analysis. Moreover, wholly apart from the application of the Court's compensatory tax doctrine to the taxes at issue, the district court's analysis cannot withstand scrutiny even under a generic

"rough equivalence" standard that focuses simply on the taxes substance rather than their form.

## III. ALABAMA'S SALES TAX IMPOSED ON RAILROADS' PURCHASE OF DIESEL FUEL IS NOT "ROUGHLY EQUIVALENT" TO THE EXCISE TAX IMPOSED ON MOTOR CARRIERS' PURCHASE OF DIESEL FUEL.

### A. Alabama's Sales Tax Imposed on Railroads' Purchase of Diesel Fuel Is Not "Roughly Equivalent" to the Excise Tax Imposed on Motor Carriers' Purchase of Diesel Fuel Under the Compensatory Tax Doctrine.

Alabama's sales tax on railroads' purchase of diesel fuel cannot be considered "roughly equivalent" to its excise tax imposed on motor carriers' diesel fuel under the compensatory tax doctrine. Even assuming a "dollar equivalence" between the two taxes, thus satisfying the second condition of the compensatory tax doctrine as articulated by the U.S. Supreme Court, the taxes fail to satisfy the first and third conditions of the doctrine: (1) identifying a tax burden for which the facially discriminatory tax compensates and (2) demonstrating that the levies are mutually exclusive proxies for each other.

#### *1. The Sales Tax on Railroads' Purchase of Diesel Fuel Does Not Compensate for the Excise Tax Burden on Motor Carriers' Purchase of Diesel Fuel.*

The sales tax on railroads' purchase of diesel fuel does not compensate for the fuel excise tax burden borne by motor carriers because the taxes are imposed (and the resulting revenues used) for substantially different purposes. The sales tax

imposed on railroads' purchase of diesel fuel is a general revenue measure most of whose proceeds are paid in into the Alabama Education Trust Fund pursuant to Ala. Code § 40-23-35 to support public education. *See also* slip op. at 20 n.16 ("To support its contention of discrimination, CSX presented evidence at trial regarding how the State spends its sales tax revenue (*i.e.*, public education) as opposed to how it spends the fuel-excise tax revenue (*i.e.*, on highway maintenance). *See*, *e.g.*, Trans. 28, 107–08, 346; CSX's Ex. 5 ¶¶ 2, 30."). The railroads enjoy no special benefits from such general fund expenditures. Indeed, insofar as the general fund provides benefits that are enjoyed by railroads and motor carriers alike, railroads are effectively subsidizing motor carriers with the sales taxes they pay on their diesel fuel purchases because the motor carriers are exempt from the sales tax on their diesel fuel purchases.

By contrast, the motor carrier fuel excise tax is imposed exclusively for the construction, repair, maintenance, and operation of public roads and bridges; the payment of principal and interest on highway bonds; and other highway purposes. *See* Agreed Facts, *CSX Transportation, Inc. v. Alabama Department of Revenue*, No. 08- 655 (filed July 11, 2016). The fuel excise tax revenues therefore inure to the peculiar benefit of motor carriers because they fund the infrastructure that is essential to their existence. Consequently, the sales tax on railroad diesel fuel purchases and the excise tax on motor carrier diesel fuel purchases fail to satisfy

the essential requirement of the compensatory tax doctrine that taxes impose equivalent burdens on taxpayers, because the motor fuel excise tax is essentially repaid to the motor carriers in the form of highway infrastructure whereas the railroads do not receive the same benefit and have to fund their own infrastructure from after-tax receipts.

### *2. The Sales Tax on Railroads' Purchases of Diesel Fuel and the Excise Tax on Motor Carriers' Purchase of Diesel Fuel Are Not "Mutually Exclusive 'Prox[ies]' for Each Other."*

For the same reason that the sales tax on railroads' purchases of diesel fuel does not compensate for the fuel excise tax burden borne by motor carriers (*see* III (1) *supra*), the excise tax on motor carriers' purchase of diesel fuel are not "mutually exclusive proxies" for each other. To the contrary, they are discrete taxes imposed on different events with their respective uses for distinct purposes. Indeed, far from being mutually exclusive, a number of states (including California, Illinois, and New York) impose both general sales and use taxes, as well as excise taxes, on motor carriers' purchase of fuel. *See* Cal. Rev. & Tax. Code § 6051 (sales tax), *id.* §§ 60050 *et seq*. (diesel fuel tax); 35 Ill. Comp. Stat. Ann. § 105/3 (use tax), *id.* § 120/2-10 (sales tax), *id.* § 505/2 (diesel fuel use tax); N.Y. Tax Law §§ 282-a to -c (diesel sales and use tax), *id.* § 523 (fuel use tax), *id.* § 1105 (sales tax), *id*. § 1110 (use tax).

### *3. The District Court's Failure to Consider the Application of the Compensatory Tax Doctrine in Its "Rough Equivalence" Inquiry Constitutes Plain Error Requiring Reversal.*

In light of the U.S. Supreme Court's reference to the compensatory tax doctrine as guidance for the "rough equivalence" inquiry on remand from *CSX II* and citation to *Gregg Dyeing*, a leading compensatory tax decision embodying the principle that "an alternative, roughly equivalent tax … renders a tax disparity nondiscriminatory," (*CSX II*, 135 S. Ct. at 143), the district court's wholesale rejection of the doctrine in its analysis of the "rough equivalence" question is inexplicable. The district court's effort to justify its position based on the fact that the Court in *CSX II* did not specifically label the doctrine as "compensatory" (slip op. at 15) and that it "cited *Gregg Dyeing* only once" (*id*. at 16) is unpersuasive at best. But the Achilles' heel of the district court's defense of its position that the compensatory tax doctrine is "not . . . implicated here" (*id*. at 17) was its attempt to dismiss the doctrine on the theory that its analytical framework is useful *only* for comparing in-state and out-of-state interests.

In advancing this argument, the district court declared:

> The Court's negative Commerce Clause jurisprudence … addresses scenarios in which a state unjustifiably attempts to "discriminate against or burden the *interstate flow* of articles of commerce," by means of "differential treatment of *in-state* and *out-of-state* economic interests that benefits the former and burdens the latter." This court does not believe this doctrine is implicated here, where the Alabama tax scheme at issue draws no

> distinction between in-state and out-of-state interests in its exemption of motor carriers from the sales tax rail carriers pay for their dyed fuel.

*Id*. at 16-17 (citation omitted, emphases within quotations added by the court). Based on the foregoing analysis, the district court concluded that "negative Commerce Clause jurisprudence would not provide a useful framework for comparing rail carriers and motor carriers." *Id*. at 17.

What the district court's position utterly ignores is that it was the U.S. Supreme Court itself – *fully aware of the fact that the discrimination issue before it involved a comparison between interstate railroads and interstate motor carriers* – that pointed to the relevance of "[o]ur negative Commerce Clause cases" and to a leading compensatory tax decision (*Gregg Dyeing*) in the inquiry into "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." *CSX II*, 135 S. Ct. at 1143-44. In short, the district court's refusal even to consider negative Commerce Clause jurisprudence (and the compensatory tax doctrine it embraces) as part of its "rough equivalence" analysis flies in the face of the U.S. Supreme Court's opinion in *CSX II*. This constitutes reversible error, and the case should be reversed on this ground alone, if not on other grounds raised on appeal.

### B. Even Taken on Its Own Terms, and Without Regard to Negative Commerce Clause Jurisprudence or the Compensatory Tax Doctrine, the District Court's "Rough Equivalence" Analysis Must Be Rejected

The district court's entire analysis of the "rough equivalence" issue is contained in a single paragraph[3]:

> During [the relevant] period, … motor carriers paid 20–23¢ per gallon and rail carriers paid 23.48¢ for each gallon of fuel purchased in the state. With these averages differing by some quantity between less-than-half-of-one cent and 3.5 cents, the court concludes that the fuel-excise tax motor carriers pay is "roughly equivalent" to the sales tax CSX pays. Accordingly, under the framework the Supreme Court articulated (remanding for consideration of "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to

[3] We hesitate even to mention the district court's suggestion, which it disingenuously characterizes as a "minor departure from this court's 2012 opinion," slip op. at 18, that "the relevant comparison is State taxes, rather than State and local taxes" (*id*.), for fear of dignifying it. As the court observed in its earlier opinion, rejecting the state's argument that local taxes should be excluded from the 4-R Act inquiry:

> The court disagrees because the 4–R Act specifically prohibits "a State, subdivision of a State, or authority acting for a State or subdivision of a State" from imposing discriminatory taxes, 49 U.S.C. § 11501(b), and Alabama's tax scheme explicitly authorizes these localities to impose sales taxes that parallel state sales taxes except the provisions relating to the tax rate. Ala. Code §§ 11–3–11.2, 11–51–200 through 204, 40–12–4.

*CSX Transp., Inc. v. Alabama Dep't of Revenue*, 892 F. Supp. 2d 1300, 1313 n.10 (N.D. Ala. 2012). The court had it right the first time for precisely the reasons it offered. No doubt appreciating the force of its earlier opinion, the court proceeds with its "rough equivalence" analysis by properly considering both state and local levies.

> diesel fuel, and therefore justifies the motor carriers sales-tax exemption"), the State has shown sufficient justification for the disparate sales tax treatment of rail carriers vis-à-vis motor carriers.

Slip op. at 19-20 (citations and footnotes omitted). The district court's narrow focus on the "dollar equivalence" between the diesel fuel taxes imposed on rail carriers and motor carriers as the exclusive factor for determining "rough equivalence" for purposes of the 4-R Act's bar against imposing "another tax that discriminates against a rail carrier" cannot withstand analysis.

### *1. The District Court's Limited Focus on the "Dollar Equivalence" in Determining Whether Diesel Fuel Taxes Imposed on Railroads Are "Roughly Equivalent" to Diesel Fuel Taxes Imposed on Motor Carriers Without Regard to the Use of the Revenues Elevates Form Over Substance in Violation of Fundamental Principles of Sound Tax Analysis.*

As we have already observed (*see supra* pp. 9-10), the U.S. Supreme Court has consistently embraced the fundamental principle that the substance rather than form of the tax under consideration controls the analysis of both statutory and constitutional issues. Accordingly, in approaching the question of whether the diesel fuel taxes imposed on railroads are "roughly equivalent" to the diesel fuel taxes imposed on motor carriers within the meaning of the 4-R Act's bar against "another tax that discriminates against a rail carrier," the analysis should focus on "economic realities," look "to the practical effect of a challenged tax," and reflect

"the substance, not the form" of the taxes under consideration. *See* pp. 9-10 *supra* (citing cases in which the quoted language appears).

Under these criteria, one cannot maintain that diesel fuel taxes imposed on railroads are "roughly equivalent" to the diesel fuel taxes imposed on motor carriers. The "economic reality" is that railroads pay a tax whose revenues are used for general governmental purposes (principally education[4]) whereas motor carriers pay a tax whose revenues are dedicated to uses that are of peculiar benefit to the motor carriers. The "practical effect of the challenged tax" is that the motor carriers are effectively getting the tax back in the form of highway infrastructure. And the "substance" of the "tax" on motor carriers is a user charge for the use of state-provided transportation facilities. The substance and effect of the taxes should not be confused with the "dollar equivalence" of the two taxes, which simply reflects their "form."[5] In short, there can be no "rough equivalence"

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[4] Slip op. at 20 n.16 ("To support its contention of discrimination, CSX presented evidence at trial regarding how the State spends its sales tax revenue (*i.e.*, public education) as opposed to how it spends the fuel-excise tax revenue (*i.e.*, on highway maintenance). *See*, *e.g.*, Trans. 28, 107–08, 346; CSX's Ex. 5 ¶¶ 2, 30.")

[5] Indeed, if "dollar equivalence" alone were the appropriate criterion for determining "rough equivalence," one must wonder how the U.S. Supreme Court could have been "inclined to agree" with this Court that the "task" that "Congress assigned . . . to the courts by drafting an antidiscrimination command in such sweeping terms" will often be "Sisyphean." *CSX II*, 135 S. Ct. at 1144. As the district court's opinion reveals, there is nothing Sisyphean about a "dollar equivalence" analysis, and it cannot fairly be viewed as imposing an onerous burden on "federal courts . . . to explore the vagaries of state tax law" (*id.*), as the

between two taxes when the revenues from one of the taxes are effectively rebated to the taxpayers but the revenues from the other tax are not.

### *2. Controlling Case Law Requires That the Inquiry into Taxes on Railroads and Motor Carriers to Determine the Existence of Discrimination Consider How the Tax Revenues Are Spent.*

As noted at the outset of this brief (*see* p. 3 *supra*), the premise underlying the district court's "rough equivalence" analysis comparing taxes on railroads and motor carriers is that how a state '"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.'" Slip op. at 20 n.16 (quoting *BNSF Ry. Co. v. Tennessee Dep't of Revenue*, 800 F.3d 262, 274 (6th Cir. 2015). Neither the district nor the Sixth Circuit Court of Appeals cites any authority for this proposition. That is hardly surprising, since the proposition is false.

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the U.S. Supreme Court considered a Massachusetts milk "pricing order" that, in substance, placed a tax on wholesale distributors for every local sale of milk, whether the milk was produced inside or outside the state. In addition, the order stipulated that all proceeds of the tax would go into a segregated fund that the state periodically

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U.S. Supreme Court described the burden of the "rough equivalence" inquiry in *CSX II*.

would disperse to in-state milk producers (that is, local dairy farmers).[6] The question in the case was whether the tax discriminated against out-of-state interests in favor of in-state interests in violation of the Commerce Clause.

Under the district court's approach to tax discrimination, the tax in that case would be nondiscriminatory, because wholesale sales of milk were subject to the same tax and how the state "uses the proceeds of its taxation of [milk] is irrelevant to the question of . . . discriminat[ion]." In short, under the "dollar equivalence" approach to tax discrimination that lies at the heart of the district court's decision, the Massachusetts milk tax regime passes the nondiscrimination test with flying colors. The U.S. Supreme Court's decision in *West Lynn Creamery* demonstrates why the district court's analysis cannot survive scrutiny.

In *West Lynn Creamery*, the Court held that the Massachusetts tax regime was discriminatory. In response to the state's contention that the pricing order was a "nondiscriminatory tax" and that the state "is free to use the proceeds of the tax as it chooses" (*West Lynn Creamery*, 512 U.S. at 198), the Court flatly rejected the state's effort artificially to separate the taxing measure from the spending measure. The state's argument, the Court declared,

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[6] Under limited circumstances, portions of the fund would not be paid to producers; such undistributed funds would simply be returned to milk dealers, thus effectively reducing their total tax burden. *West Lynn Creamery*, 412 U.S. at 191 n.8.

> would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the premium payments from the use to which the payments are put*. It is the *entire program* – not just the contributions to the fund or the distributions from that fund – *that* . . . *discriminates* in favor of local producers. The choice of constitutional means – nondiscriminatory tax and local subsidy – cannot guarantee the constitutionality of the program as a whole.

*Id*. at 201 (emphasis supplied). The Court noted that its Commerce Clause jurisprudence, which it would subsequently invoke in *CSX II*, was "not … controlled by the form" (*id*.) of the state legislation; "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects," (*id*.); and "'forbids discrimination whether forthright or ingenious.'" *Id*. (citation omitted). Guided by the principle "'whether the statute under attack, whatever its name may be, will in practical operation work discrimination,'" *id*. (citation omitted), the Court concluded that the nondiscriminatory tax, when considered in conjunction with the "use to which the payments are put," was unconstitutionally discriminatory.

Precisely the same analysis demonstrates that Alabama's diesel fuel tax regime discriminates against railroads.

- Just as the *West Lynn Creamery* Court rejected state's contention that the pricing order was a "nondiscriminatory tax" and that the state "is free to use the proceeds of the tax as it chooses," so this Court must reject the district court's position that the sales tax on diesel fuel purchased by railroads and the excise tax on diesel fuel purchased by motor carriers constitute a "nondiscriminatory tax" and how a state "uses the proceeds of its taxation of

diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against."

- Just as the *West Lynn Creamery* Court rejected the state's effort artificially to separate the taxing measure from the spending measure in determining whether the Massachusetts tax regime was discriminatory, so this court must reject the district court's position that artificially separates the taxes on railroads and motor carriers from the spending of the tax revenues, with railroad fuel tax revenues used for the benefit of the general public and motor carrier fuel tax revenues used for the benefit of the motor carriers.

- Just as the *West Lynn Creamery* Court declared that the state's argument

> would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the premium payments from the use to which the payments are put*. It is the *entire program* – not just the contributions to the fund or the distributions from that fund – *that* . . . *discriminates* in favor of local producers. The choice of constitutional means – nondiscriminatory tax and local subsidy – cannot guarantee the constitutionality of the program as a whole,

so this Court must conclude that the district court's position

> would require us to analyze separately two parts of an integrated regulation, *but we cannot divorce the motor carrier tax payments from the use to which the payments are put*. It is the *entire taxing and spending regime* – not just the taxes or the spending – *that* . . . *discriminates* in favor of motor carriers. The choice of legislative measures – nondiscriminatory tax and motor carrier subsidy – cannot guarantee the nondiscriminatory character of the program as a whole.

- Just as the *West Lynn Creamery* Court's analysis of tax discrimination was "not . . . controlled by the form" of the state legislation, "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects," and "'forbids discrimination, whether forthright or ingenious,'" so this Court's analysis should reflect the same approach to tax discrimination in contrast to the narrow and formalistic approach embraced by the district court and its "dollar equivalence" standard.

- Finally, just as the *West Lynn Creamery* Court was guided by the principle "'whether the statute under attack . . . will in its practical operation work discrimination'" in concluding that the nondiscriminatory tax considered in conjunction with the "use to which the payments are put" was unconstitutionally discriminatory, so this Court should be guided by the principle "'whether the statute under attack . . . will in practical operation work discrimination'" in concluding that the nondiscriminatory taxes on railroads and motor carriers considered in conjunction with the "use to which the payments are put" discriminates against railroads in violation of the 4-R Act.

In short, *West Lynn Creamery* makes it clear that in determining whether a tax is discriminatory one cannot "divorce" the tax "payments from the use to which the payments are put." *West Lynn Creamery*, 521 U.S. at 201. The U.S. Supreme Court has reaffirmed this principle in evaluating the question of discrimination under the compensatory tax doctrine, emphasizing the distinction between "general form[s] of taxation" and "revenues . . . earmarked for particular purposes." *Fulton*, 516 U.S. at 338. Indeed, in inquiring into alleged tax discrimination against railroads in favor of motor carriers under the 4-R Act, courts have inquired into "the use to which the [tax] payments are put" in addressing the discrimination question. *See Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983), *cert. denied*, 465 U.S. 1071 (1984) ("The 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. Those taxes represent the Assembly's judgment as to the portion

of the cost of the highways that the trucks should bear. But the railroads acquire, construct, maintain, and pay taxes on their own roads . . . . This gives the trucks a distinct competitive advantage" (citation omitted)); *see also Burlington N. R.R. Co. v. Triplett*, 682 F. Supp. 443, 446 (D. Minn. 1988) ("While the fuel tax paid by trucks is dedicated to the trucks' roadbeds, the railroads must pay the fuel tax in addition to paying for their tracks. As the Iowa Supreme Court stated, this difference 'gives the trucks a distinct competitive advantage.'")

The conclusion is therefore inescapable that the inquiry into taxes on railroads and motor carriers to determine the existence of discrimination must take account of how the tax revenues are spent. Moreover, once one takes account of how such revenues are spent, the conclusion is equally inescapable that Alabama's tax regime discriminates against railroads.

## IV. CONCLUSION

For all of the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted, this 31st day of May, 2017.

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32**

I hereby certify that the foregoing **Brief of the Tax Foundation as *Amicus Curiae* in Support of Appellant** complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

This 31st day of May, 2017.

*/s/ Walter Hellerstein*
Walter Hellerstein

## CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, a copy of the foregoing brief was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. In addition, seven paper copies were sent by Federal Express to the Clerk of the Court addressed as follows:

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I further certify that I have this day served one copy of the foregoing brief on counsel for each party via Federal Express addressed as follows:

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