No. 16-1251

In the Supreme Court of the United States

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of West Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the Question Presented as follows:

Whether the Court should grant review when West Virginia's own reviewing tribunals applied this Court's well-established precedents in determining that West Virginia's use tax credit, which entitles crediting against its use tax for sales taxes paid to another state, must include sales taxes paid to localities of another state.

STATEMENT REQUIRED BY RULE 29.6

CSX Corporation is the parent company of respondent. No other publicly held corporation has a 10% or greater ownership interest in respondent.

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INTRODUCTION

The Petition for a Writ of Certiorari presents no question worthy of this Court's review. The Petition rests on an asserted "split" among state courts of last resort and "conflict" with this Court's decisions on the proper application of the dormant Commerce Clause for determining whether West Virginia's imposition of use tax on motor fuel without providing a credit for local sales taxes paid in other states on the same motor fuel is in violation of the U.S. Constitution. There are no "conflicts." Nor are there any other grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. This Petition should be denied.

STATEMENT OF THE CASE

The opinions below are adequately identified in the Petition; the jurisdictional grounds are adequately stated in the Petition; and the constitutional and statutory provisions involved are adequately listed in the Petition. Respondent, CSX Transportation, Inc. ("CSXT"), needs only to amend and expand upon Petitioner's Statement of the case as follows:

This matter involves West Virginia's *application* of its own use tax credit, which entitles a taxpayer "to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales taxes lawfully paid to another state for the acquisition of that property or service." W. Va. Code Ann. § 11-15A-10a (West 2014) ("the Credit Statute"). Although the West Virginia State Tax Commissioner ("Tax Commissioner") agreed that the Credit Statute provides a credit against its use tax on motor fuel for

sales taxes paid to other states, it vehemently disagreed that West Virginia must provide an offsetting credit against its use tax on motor fuel for sales taxes paid to localities of another state on the same motor fuel. CSXT appealed the Tax Commissioner's finding to the West Virginia Office of Tax Appeals (the "OTA") because the Tax Commissioner's interpretation runs afoul of the dormant Commerce Clause under the U.S. Constitution.

Since then, CSXT has prevailed on this issue before every West Virginia reviewing tribunal. The OTA, the Circuit Court of Kanawha County, and the Supreme Court of Appeals of West Virginia all have agreed with CSXT that the Tax Commissioner's application of its use tax credit is constitutionally suspect under the U.S. Supreme Court's seminal case on the dormant Commerce Clause, *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, a state taxing scheme violates the dormant Commerce Clause unless each of the following prongs is satisfied: the tax (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State. *Id.* at 279. All these West Virginia reviewing bodies agreed that the Tax Commissioner's interpretation of the Credit Statute as only providing a credit for sales taxes paid to another state—but not the localities of that state—fails the *Complete Auto* test.

In every decision in the proceedings below, the West Virginia reviewing bodies agreed with CSXT that

"simple math" demonstrated the constitutional problem with the Tax Commissioner's position. The West Virginia Supreme Court of Appeals provided the following example:

> If, for example, CSX is required to pay a 5% use tax on all motor fuel it uses in this State and if it is allowed a corresponding sales tax credit for all fuel it has purchased out of state, such sales tax credit serves as an offset to CSX's use tax liability. Thus, in this example, if CSX pays 5% sales tax to State A, it would receive a 5% sales tax credit that completely offsets its use tax liability.
>
> If, however CSX pays 3% sales tax to State A and 2% sales tax to the City of Metropolis in State A, it still is paying 5% out-of-state sales tax but, under the Tax Commissioner's interpretation of the sales tax credit, CSX would pay substantially more use tax than a taxpayer who had not paid sales taxes to another state's subdivision. This is so because CSX is assessed the same 5% use tax, which is offset by the 3% State A sales tax and yields a residual 2% use tax liability. Because, in this scenario, CSX did not receive a sales tax credit for the additional 2% sales tax it paid to the City of Metropolis, however, CSX essentially is paying 7% in total taxes, *i.e.*, 5% use tax (which is partially offset by 3% credit for ales tax paid to State A) + 2% sales tax paid to City of Metropolis (for which Tax Commissioner did not grant it a sales tax credit) = 7%, simply because CSXT transacted business interstate in a jurisdiction that allowed

> its subdivisions to charge a sales tax. Strictly in-state taxpayers would not incur this additional tax liability, nor would out-of-state taxpayers who paid sales taxes assessed only by states and not their subdivisions.

(App. 22a-23a.) Thus, the Supreme Court of Appeals found that the only interpretation of West Virginia's use tax credit that would comport with the dormant Commerce Clause would be one in which credit is provided for sales taxes paid both to other states and to the subdivisions and municipalities of other states. The Supreme Court of Appeals affirmed the rulings of the circuit court and the OTA, both of which had reached the same conclusion.

And to clarify Petitioner's misleading statement and avoid any confusion as to the status of a pending issue before the OTA, CSXT amends and expands the Petitioner's Procedural History section as follows:

> In footnote 5, Petitioner recounts the course of events that led the Commissioner to change its refund methodology, which was part of the Commissioner's original denial of CSXT's refund request which started these proceedings. When the parties appeared before the OTA on CSXT's appeal of the Commissioner's findings, CSXT did contest the revised calculation methodology. However, in addition to finding in CSXT's favor on the constitutional issue, the OTA found in favor of CSXT on this calculation methodology issue, finding that the Commissioner's new refund methodology had no basis in the law. Even following OTA's finding that CSXT's methodology was correct, the parties

nonetheless disagreed about the actual computation of the refund request, with the Commissioner seeking to interject new legal issues into a purely numerical calculation as recently as 2016, almost four years after this ordeal began. This is the issue that remains before the OTA, which the OTA has decided to stay pending the foregoing Petition even though the issues are separate and distinct. Thus, to avoid any misperception of the urgency or importance of the pending Petition, the OTA has not stayed resolution of a refund methodology calculation issue. Instead, all that remains is the resulting numerical calculation itself.

REASONS FOR DENYING THE PETITION

I. The West Virginia Supreme Court of Appeals' Decision Does Not Create or Widen any Split Among State Courts of Last Resort.

The West Virginia Supreme Court of Appeals was correct in holding that the Tax Commissioner's determination of the use tax credit by excluding local taxes paid to other jurisdictions results in a state use tax that is internally inconsistent and is discriminatory against interstate taxpayers. That court's holding is consistent with all existing Dormant Commerce Clause jurisprudence. *See*, *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274

(1977). Indeed, since this Court decided *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, a state is constitutionally required to provide a credit against its own *use* tax for sales or use taxes paid to other jurisdictions. *See* 1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2], 2015 WL 1646564, pp. *1-*2 (3d ed. 2000-15). In fact, under the Credit Statute, West Virginia does offer a use tax credit to taxpayers for the sales taxes paid to other jurisdictions. The issue, therefore, never has been whether West Virginia was required to offer a use tax credit in the first place, but rather whether West Virginia was required to interpret its own use tax credit in a manner that did not violate the dormant Commerce Clause. The answer—as determined by every West Virginia reviewing body in accordance with well settled dormant Commerce Clause jurisprudence—is yes.

Thus, discussions of other state courts' decisions on whether their state tax schemes must offer credits against their use tax are irrelevant. In any event, there is no such "split" on the question of whether the U.S. Constitution requires those states which impose a use tax to provide a credit for out-of-state sales taxes. The elusive split emerges only from the Petitioner's misguided conviction that decisions of state supreme courts in Kentucky and Wyoming—which were decided before this Court's post *Complete Auto* decisions—still would withstand contemporary constitutional scrutiny. Even so, Petitioner cannot seriously require this Court to examine whether sales tax credits are constitutionally mandated because West Virginia obviously has mooted the question by enacting a sales tax credit under the Credit Statute. So it is only the interpretation of the Credit Statute by every one of

West Virginia's own reviewing bodies with which the Tax Commissioner now takes issue. That state law issue plainly does not warrant this Court's review.

II. The Decision Below Does Not Conflict with Any Decisions of This Court, Nor Does this Case Provide an Appropriate Vehicle to Resolve Points of Law That May Have Been Left Open By This Court's Decision In *Wynne*.

Every West Virginia tribunal interpreting the Credit Statute faithfully applied the internal consistency test, pursuant to the well-established dormant Commerce Clause jurisprudence of this Court. In fact, during the course of these proceedings, this Court rendered its instructive decision in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015). Accordingly, the West Virginia reviewing courts enjoyed the benefit of this Court's most recent analysis of the internal consistency test and applied that test.

In *Wynne,* this Court affirmed the Maryland Court of Appeals' holding that Maryland's failure to allow a credit for state income tax paid in other jurisdictions against Maryland's county income tax on the same income violated the dormant Commerce Clause because it failed the internal consistency test. 135 S. Ct. at 1794. This Court stated—echoing the sentiment of the reviewing bodies in this case—that the "existing dormant Commerce Clause cases all but dictate the result reached in this case by Maryland's highest court." *Id*. Using the "simple math" of the internal consistency test and assuming that every State imposed taxes similar to Maryland's with a credit being

limited to *state* taxes paid in other jurisdictions, this Court found that the interstate taxpayer would be subject to double taxation by having to pay an "extra" income tax to his resident state as well as the state in which he earned the income. *Id.* at 1803. This Court explained:

> A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.
>
> Critically—and this dispels a central argument made by petitioner and the principal dissent—the Maryland scheme's discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States. Instead, the internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme

> is inherently discriminatory and operates as a tariff.

(*Id.*) This, the Court found, violates the dormant Commerce Clause.

To isolate the effect of that state's tax scheme, this Court in *Wynne*, as well as every reviewing body below, hypothetically assumed that every State applies its taxing scheme in the same potentially offending manner. *Wynne*, 135 S. Ct. at 1802. So the fact that there was a county income tax in Maryland in addition to its state income tax was *not* the reason that the Maryland tax scheme was unconstitutional. Rather, it is the fact that Maryland only allowed a credit against its state income tax but not its local income tax which produced the discriminatory effect on interstate taxpayers that was the linchpin of the analysis. Similarly here, the Tax Commissioner's argument—namely that the West Virginia taxing scheme, which denies a credit for local sales taxes paid to other states, is constitutionally compliant merely because West Virginia imposes no local use tax on the same fuel—also fails Commerce Clause scrutiny. For that reason, the Tax Commissioner's argument was soundly dismissed by the reviewing courts. After all, just because West Virginia imposes no local sales tax on fuel does not mean the taxing scheme survives constitutional scrutiny under any proper application of the internal consistency test when the effect of the Tax Commissioner's argument is to doubly tax fuel used in West Virginia.

The Tax Commissioner misapplies the internal consistency test by insisting that the Court must assume every state would not have local sales taxes,

like West Virginia. The Tax Commissioner is asking this Court to claim that there can never be the risk of double taxation under his version of the internal consistency test because there would be no taxation at all, since the Tax Commissioner is asking the Court to pretend no other local jurisdiction imposes sales taxes. The absurdity of engaging in this type of suspension of reality for purposes of the internal consistency analysis is not supported by *Wynne* or any other decision of this Court.

Nor does this case provide any type of vehicle to address the well-settled principle that state taxes must be viewed in the aggregate for purposes of the internal consistency test. As this Court stated in *Wynne*, "[f]or Commerce Clause purposes, it is immaterial that Maryland assigns different labels (i.e., "county tax" and "special nonresident tax") to these taxes. In applying the dormant Commerce Clause, they must be considered as one." *Id.* at 1803 n. 8. Indeed, as the Maryland Court of Appeals stated in the opinion affirmed by this Court, "whether the tax is nominally a state or county tax is irrelevant for purposes of analysis under the dormant Commerce Clause because a state may not unreasonably burden interstate commerce through its subdivisions any more than it may at the state level." 64 A.3d 453, 461 (Md. 2013) (citing *Associated Industries of Mo. v. Lohman*, 511 U.S. at 650–51). Contrary to the Petitioner's assertion, there is a wealth of support for the premise that state taxes, regardless of the label affixed, must be viewed as a collection of state and sub-state taxing jurisdictions. *See Gen. Motors Corp. v. City and Cnty. of Denver*, 990 P.2d 59, 69 (Colo. 1999); *Ariz. Dept. of Revenue v. Ariz. Pub. Serv. Co.*, 934 P.2d 796, 799 (Ariz. Ct. App. 1997).

Review to address this non-existent question is unnecessary.

III. The Decision Below Does Not Raise A Question of Exceptional Importance for this Court.

The Petitioner's claim that this case presents significant questions of public importance for this Court to determine is exaggerated and unwarranted. The dispute between the parties is whether the Tax Commissioner's *application* of the Credit Statute in a manner that prohibits crediting of sales taxes paid to other localities of another state is constitutionally suspect. The West Virginia reviewing tribunals concluded unanimously that the Tax Commissioner must interpret the Credit Statute to allow for crediting of local sales taxes paid, not just of state sales taxes paid, to comport with the U.S. Constitution and its dormant Commerce Clause. There is no far-reaching impact of West Virginia decisions on West Virginia's use tax and use tax credit beyond the borders of West Virginia. Thus, the Petitioner's claim that the West Virginia Supreme Court of Appeals' ruling concerning the interpretation of the Credit Statute creates significant uncertainty for other state tax schemes and potential to impact smaller and poorer states and cities is unsupported and the absence of an amicus support from any state or other taxing authorities in support of the petition shows that the decision in this case will not affect other jurisdictions.

Further, there is no uncertainty as to whether states are obligated to provide a sales tax credit for taxes paid out-of-state, and there is no practical import of resolving this question, as "every one of the forty-five

states and the District of Columbia that impose sales and use taxes allows a credit for sales or use taxes paid to other states." 1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[1], 2015 WL 1646564, p. *1 (3d ed. 2000-15). Thus, as in this present Petition, the question is mooted by the enactment by taxing states of credits for sales or use taxes paid to other states. The issues raised by this Petition do not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: June 14, 2017

Respectfully submitted,

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