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 APPEALS
OF WEST VIRGINIA

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Tax Commissioner's petition demonstrated that state courts of last resort are split on an issue of first impression that this Court has explicitly reserved in several prior cases: Whether this Court's dormant commerce clause jurisprudence requires a State to credit a sales tax paid to another State against its own use tax. Pet. 14–22. CSX acknowledges the existence of this split in authority, but claims that the state court decisions that reject its preferred reading of the U.S. Constitution would not "withstand contemporary constitutional scrutiny." BIO 6; see also *id.* at 10–11.

That is a reason to grant certiorari, not deny it. It is this Court's role to answer unresolved questions from its prior cases when those ambiguities create confusion in the lower courts. The parties' agreement that state courts of last resort are split on a constitutional question is itself sufficient reason for this Court to review the decision of the Supreme Court of Appeals of West Virginia.

But even if this Court were to choose to continue to reserve judgment on this first question, CSX fails to persuasively explain why certiorari should not be granted on the second question presented. As the petition explained, the Supreme Court of Appeals failed to apply the internal consistency test mandated by this Court's dormant commerce clause cases in favor of an economic reality test that this Court has repeatedly rejected. Pet. 22–29. The contrast between the correct and incorrect legal standards is apparent from the very examples that CSX quotes at length in its brief in opposition. BIO 3, 8–9. Certiorari is warranted to resolve the conflict between this Court's

cases and the improper test applied by the court below.

Ultimately, CSX's opposition fails to provide a persuasive response to the petition's arguments in favor of certiorari. To the extent the Court harbors any doubt on this score, however, it should adopt the same approach it took in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015), and call for the views of the U.S. Solicitor General on the important questions presented by the petition.

ARGUMENT

CSX raises three principal arguments in opposition to certiorari. *First*, CSX argues that the first question presented by the petition—whether the dormant commerce clause requires States to provide credits against use taxes for out-of-state sales taxes—is somehow moot because West Virginia elects to provide a credit for sales taxes imposed by some jurisdictions (other States) but not others (counties and municipalities). *Second*, CSX argues that the decision below is correct under this Court's precedents. *Third*, CSX argues that the two questions presented by the petition are not of great public importance. For the reasons explained below, none of these arguments is persuasive. The petition should be granted.

I. CSX Acknowledges The Split In Authority On Whether The Dormant Commerce Clause Requires Credits For Out-Of-State Sales Taxes And Provides No Reasoned Basis For This Court To Avoid Resolving It.

As the Tax Commissioner explained in the petition (at 15–18), this Court has reserved for eighty years the question whether, and in what circumstances, a State is constitutionally obligated to provide a credit for out-of-state sales taxes against its own use taxes. That uncertainty has led to a split among lower courts on this question. See *id.* at 18–22.

CSX now admits, as it must, that state courts of last resort in Kentucky and Wyoming have held that the dormant commerce clause does not require States with fairly apportioned use taxes to also provide a credit for out-of-state sales taxes. BIO 6; see also Pet. 18–20. CSX also acknowledges that courts in Colorado and Arizona, as well as the decision below, have reached the opposite conclusion. BIO 10–11. In the face of this acknowledged split, CSX makes various attempts to evade this Court's review. None withstands scrutiny.

A. CSX first suggests that this case does not actually raise the first question presented by the petition. Specifically, CSX claims that West Virginia has "mooted" the question by providing a credit for certain sales taxes imposed by other jurisdictions. BIO 6. Presumably, CSX is arguing that because West Virginia has elected to provide a credit against its use tax for sales taxes imposed by other *States*, it cannot argue that it is free under the U.S. Constitution to

decline to provide a credit for sales taxes imposed by *counties and municipalities*.

That does not follow. If this Court rules that the dormant commerce clause does not require States to provide credits against fairly-apportioned use taxes, as West Virginia contends, then the lower court judgment would have to be reversed and the tax policy at issue would stand. States would be permitted in their discretion to provide credits (or not) pursuant to their own views of sound public policy. See U.S. Const. amend. X (reserving to the States "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States . . .").[1]

Exercising this reserved power, a State may elect to provide no credits, to provide credits against all sales taxes imposed by all out-of-state jurisdictions, or to be selective in what credits are available. Here, West Virginia has chosen the third option—it provides credits for sales taxes imposed by other States, but not for taxes imposed by other States' counties and cities. By electing to provide some offsetting credits for taxpayers, the Tax Commissioner has not waived his right to argue that additional credits are not constitutionally required.[2]

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[1] For example, outside the motor-fuel context, West Virginia allows taxpayers who are subject to payment of municipal use taxes on other items of tangible personal property to claim a credit against municipal use tax for sales taxes paid to another municipality. See W. Va. Code § 8-13C-5a.

[2] Moreover, CSX has never before suggested that West Virginia's provision of some offsetting credits moots the question of whether credits are constitutionally required. Rather, both CSX

B. CSX also suggests that this case is somehow not an appropriate vehicle to resolve the split among state courts of last resort because West Virginia's position that it would not credit sales taxes imposed by other States' counties and municipalities merely represents the Tax Commissioner's "application" of a state crediting statute. BIO 1–2, 11–12. That too is incorrect.

It is immaterial whether the State's position followed directly from unambiguous statutory text or from an administrative interpretation of statutory text. CSX cannot and does not argue that the Supreme Court of Appeals' decision rested only on an unreviewable interpretation of state law. To the contrary, CSX acknowledges that its position in this case—and the holdings adopted by the reviewing courts below—is that the "Tax Commissioner's interpretation runs afoul of the dormant Commerce Clause under the U.S. Constitution." BIO 2; see also App. 3a, 6a, 32a. The posture in which this case arises simply does not preclude this Court's review.

C. Finally, CSX argues that this Court should not intercede to resolve the acknowledged split because it believes the decisions in Kentucky and Wyoming would not "withstand contemporary constitutional scrutiny." BIO 6. But any uncertainty as to the proper resolution of the constitutional question presented is precisely the reason why this Court *should* grant certiorari to resolve the split. See Sup. Ct. R. 10.

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and the Tax Commissioner briefed the merits of this constitutional question before the Supreme Court of Appeals. Br. of Pet'r 19–23; Br. of Resp. 15–20; Reply of Pet'r 11–15.

In any event, CSX errs in asserting that its preferred resolution of the constitutional question follows as a matter of inexorable logic from this Court's decisions in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995). BIO 5–7. Neither decision reached the first question presented by the petition. At most, the Court in *Jefferson Lines* assumed that credits were one way in which a use tax State could prevent double taxation and satisfy the dormant commerce clause. 514 U.S. at 193–95. But the Court did not consider, much less decide, whether a State could satisfy the dormant commerce clause by other means. CSX simply fails to recognize that West Virginia, by apportioning its motor-fuel use tax based on mileage to capture only intrastate activity, has satisfied its constitutional obligations without providing an offsetting credit. See Pet. 15–18.

The Hellerstein treatise that CSX cites as its principal authority acknowledges that this question is unsettled. BIO 6 (citing 1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2][a] & n.633, 2015 WL 1646564, *1–2 (3d ed. 2000-15)). In that treatise, Professor Hellerstein admits that the Court "ha[s] found it unnecessary to rule on the issue" of whether credits are constitutionally required. *Id.* at *1. He also notes that both the Kentucky and Wyoming decisions remain the controlling decisions in those jurisdictions, although he describes them as "bad law" and "wrongly decided." *Id.* at *3 n.633, *4. He rests this conclusion, however, not on any square holding of this Court, but on "strong statements" from *Jefferson Lines* that he says "*should* lay to rest any doubt that credits for use

taxes are constitutionally required." *Id.* at *3 (emphasis added).

State courts should not have to read such tea leaves in order to discern important principles of constitutional law. Rather, this Court should grant the petition to decide the question that it has reserved for eighty years. When the Court does so, it should make clear, as the petition explains and as this Court's past cases suggest, that credits are merely one means by which States can properly apportion their use taxes. Pet. 15–18.

II. CSX'S BRIEF IN OPPOSITION ILLUSTRATES HOW THE SUPREME COURT OF APPEALS' DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT BY REQUIRING A STATE TO PROVIDE CREDITS AGAINST COUNTY AND MUNICIPAL TAXES THAT THE STATE DOES NOT ITSELF IMPOSE.

In the event the Court opts not to resolve the first question presented by the petition, the Tax Commissioner has also shown that this case presents a second question worthy of this Court's consideration: Whether the dormant commerce clause requires a State that does not impose county or municipal use taxes to provide a credit for sales taxes paid to other States' counties and municipalities. See Pet. 13–14.

CSX argues that this question does not merit review because, it claims, the decision below is "consistent with all existing Dormant Commerce Clause jurisprudence." BIO 5. Specifically, CSX argues that the decision below properly applied this Court's "internal consistency" test, as set forth in

cases like *Complete Auto*, *Jefferson Lines*, and *Wynne*.

But CSX is mistaken. Instead, as the petition demonstrated, the Supreme Court of Appeals did not apply an internal consistency test, but instead applied an economic reality test that this Court has repeatedly rejected. Pet. 26–29. In doing so, the Supreme Court of Appeals reached the absurd conclusion that the U.S. Constitution requires a State to provide a credit to offset taxes that the State does not itself impose.

As the petition explained, this Court's case law requires an examination of the structure of a State's tax scheme to determine whether it inherently discriminates in favor of purely intrastate transactions. Pet. 23–25. CSX correctly recognizes that, under the "internal consistency" test, this Court must "isolate the effect of th[e] [S]tate's tax scheme" by assuming that each State imposes the same tax structure. BIO 9. Thus, a tax scheme will be deemed invalid only if an interstate transaction would be taxed more heavily than an intrastate transaction under fifty hypothetical uniform tax regimes. This approach ensures that state statutes will not be invalidated merely because of the "economic reality" that other States elect to charge different tax rates. Pet. 24–25.

The two "simple math" problems that CSX quotes at length in its brief illustrate both the correct and incorrect approaches. First, CSX provides an excerpt of an example supplied by this Court in *Wynne*. See BIO 8–9. As further explained in the petition, this Court assumed that all fifty States had a tax scheme

with the same exact three-part income tax structure. The Court then analyzed whether, under this assumption, a taxpayer (Bob) who lived in Maryland but earned income in another State would pay more than a taxpayer (April) who earned all of her income in-state. The court concluded that Maryland's income-tax scheme was invalid because, under this hypothetical construct, "Bob will pay more income tax than April solely because he earns income interstate." BIO 8 (internal citation omitted).

This approach differs markedly from the approach adopted by the Supreme Court of Appeals. BIO 3–4. While CSX describes this example as another "simple math" problem (*ibid.*), the court's analysis in that case was markedly different. Unlike in *Wynne*, where this Court assumed that Maryland's tax structure applied in all fifty States, the Supreme Court of Appeals analyzed whether a taxpayer would be better off paying taxes in West Virginia or in a fictional "State A" and "City of Metropolis," with its own hypothetical sales tax rates that are different from West Virginia's. See *id.* Accordingly, the Supreme Court of Appeals did not apply an "internal consistency" approach by assuming that all fifty States adopted West Virginia's tax structure. Rather, it applied an approach that this Court has explicitly rejected, namely, whether a taxpayer would as a matter of "economic reality" be disadvantaged by the varied and differing tax rates of 49 other state regimes. Pet. 23–25.

Had the Supreme Court of Appeals properly assumed that all fifty States had the same tax scheme adopted by *West Virginia*, it would have easily concluded that fuel users faced the same tax burden

wherever they used their fuel. See Pet. 25–29. That is to say, each taxpayer would pay a State use tax, receive a credit for sales taxes paid to any other State, and pay no county or city use taxes. *Ibid.*

CSX attempts to avoid this conclusion by placing a limitation on the internal consistency test that this Court has never adopted, namely, that a court need only assume that the "potentially offending" provisions of a state tax code apply in all fifty States. BIO 9. Under CSX's invented test, a court would assume that no State supplies a county or municipal *credit*, but would remain free to assume that other States impose county or municipal taxes. But that simply assumes the problem without recognizing that a State could provide a solution elsewhere in its own tax code that renders the tax non-discriminatory.

In CSX's own words, the Tax Commissioner is "asking this Court to claim that there can never be the risk of double taxation" by "asking th[is] Court to pretend no other local jurisdiction imposes sales taxes." BIO 10. Precisely right. That is what the internal consistency test requires this Court to do—to operate from the premise that each State has the same laws in place as the State imposing the tax and then to determine whether the tax scheme *as a whole* is intrinsically discriminatory. As the petition explained, *Wynne* itself supports the conclusion that a State may cure any constitutional defect in declining to provide a credit by simply eliminating the underlying tax. See Pet. 31. That is effectively what West Virginia has done here by forbidding its cities and counties from imposing use taxes on motor fuels.

To the extent that there is any ambiguity in *Wynne* on this point, this case provides the perfect vehicle to provide additional guidance to the States. For all of these reasons, certiorari would be appropriate for this Court to resolve the second question presented by the petition.

III. THE QUESTIONS PRESENTED ARE OF GREAT PUBLIC IMPORTANCE.

As a last resort, CSX argues that the questions presented by the petition are not sufficiently important to merit this Court's review. But CSX provides no compelling evidence in support of this conclusion. Rather, as the petition explained, this Court's reversal of the Supreme Court of Appeals would provide much needed guidance to States and the lower courts, reduce compliance burdens, and provide jurisdictions with more flexibility to adopt different tax schemes and explore alternative sources of revenue. Pet. 33–36.

In response, CSX claims that "there is no uncertainty as to whether states are obligated to provide a sales tax credit for taxes paid out-of-state," because 45 States currently provide such a credit. BIO 11–12. But as leading scholars have noted, the fact that most States have defaulted to providing some form of credit most likely reflects the legal uncertainty surrounding whether credits are constitutionally mandated, due to the unresolved dicta in cases like *Jefferson Lines*. See Pet. 17–18, 34; John E. Nowak and Ronald D. Rotunda, *Sales & Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. Davis L. Rev. 273, 287 (1987). If this Court were to reach the correct

conclusion that the dormant commerce clause does not require credits in all cases, more States would be likely to adopt other forms of apportionment. Moreover, CSX's statistic does not account for States that, like West Virginia, may opt to provide credits for sales taxes paid to other States, but not to other States' counties and municipalities.

Finally, to the extent there is any doubt that this case is sufficiently important to warrant this Court's attention, the Court should call for the views of the U.S. Solicitor General. In *Wynne*, this Court took that approach in response to Maryland's petition for certiorari, and the United States filed a brief supporting certiorari and arguing that Maryland's tax structure was constitutional. See *Wynne*, 134 S. Ct. 982 (Jan. 13, 2014). The same approach may be warranted here in light of the unique but related questions posed by the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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