

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CSX TRANSPORTATION, INC., :

4 Petitioner :

5 v. : No. 09-520

6 ALABAMA DEPARTMENT OF :

7 REVENUE, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, November 10, 2010

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

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17 Petitioner.

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19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting Petitioner.

22 COREY L. MAZE, ESQ., Washington, D.C.; on behalf of
23 Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-520, CSX
5 Transportation v. The Alabama Department of Revenue.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The pivotal, and in my judgment, incorrect
12 holding of the Eleventh Circuit in the Norfolk Southern
13 case is reproduced in the appendix to this case, because
14 Norfolk Southern is the controlling precedent for our --
15 for our particular dispute. And at page 29A of the
16 appendix to the petition, in there, the court of appeals
17 said that there is nothing in the 4-R Act's plain
18 language that indicates an intent to reach exemptions
19 content from generally applicable sales and use taxes.

20 To our way of thinking, all this case is
21 about: Whether or not the State has free reign to
22 employ exemptions without exposing the effects of those
23 exemptions to a challenge under (b)(4) of the statute.

24 JUSTICE KENNEDY: But in light of our AFC
25 case, it seems to me that what you are arguing is that

1 the statute -- the effect of your argument is that the
2 statute gives more protection in the case of
3 non-property taxes than property taxes, and that's an --
4 an odd reading of the statute, which is directed
5 primarily to the -- to the property tax.

6 MR. PHILLIPS: No, I think, Justice Kennedy,
7 what we are doing is recognizing that Congress was very
8 specific and very explicit about how to treat property
9 taxes and set up an entire quite carefully articulated
10 scheme in dealing with them in (b)(1) and (b)(3), and
11 then said, in general, when you are dealing with areas
12 that are not approved by (b)(1) and (b)(3), then you
13 have to examine whether or not the overall scheme, in
14 fact, discriminates against rail carriers.

15 So, while it is true that there could be
16 circumstances in which you may end up with somewhat more
17 protection as a consequence of (b)(4), I think that's a
18 function of Congress not having limited the (b)(4)
19 exemption to property, and just saying it's -- it's a
20 discrimination against the rail carrier generally that
21 the statute is aimed to prevent or to protect against.

22 JUSTICE KAGAN: But what's the -- what's the
23 possible rationale for that distinction? Why would that
24 distinction make any sense?

25 MR. PHILLIPS: Well, I think because

1 Congress didn't have the full run mine of possibilities
2 in front of it at that point in time. I mean, it
3 probably had some sense of what other taxes were out
4 there that might pose discrimination, but I do think
5 that Congress is very much concerned that the States,
6 once they saw the roadmap laid out for them in (b)(1)
7 through (b)(3), might seek other ways to recoup what
8 they were going to lose in revenues when the 3-year
9 period lapsed, and to be in a position to protect the
10 railroads in the (b)(4) -- through (b)(4) in a situation
11 when there would be future actions taken by the States.

12 JUSTICE SOTOMAYOR: -- in the legislative
13 record?

14 MR. PHILLIPS: Not -- there's very little in
15 the legislative record, Your Honor, because the -- the
16 specific formulation of -- of this (b)(4) catch-all
17 provision comes in very, very late in the 15-year
18 process. Every other lower court that -- every lower
19 court that has looked at it has drawn the inference,
20 which seems to me the only fair inference to draw, when
21 Congress said: Look, this is not just for in lieu
22 taxes.

23 I mean, there was -- there was some debate
24 about that going on between the House and the Senate,
25 and the conference committee makes it clear. This is

1 not just something that's adopted by the States in lieu
2 of a broader property tax. It is intended, then, to
3 have, I think, the language that you would normally give
4 to a term as broad and sweeping as any other tax that
5 discriminates against rail carriers.

6 JUSTICE SCALIA: Mr. Phillips, this is what
7 troubles me about -- about your position: You make a
8 viscerally appealing case on the facts of this case,
9 where you say that your clients, the railroads, are
10 being taxed more than competing carriers, truckers
11 and -- and water carriers.

12 But if all -- if all it says is
13 "discriminates," and you think that that has to be
14 applied without qualification, then even if -- if a
15 state makes an exemption for, you know, widows over 85
16 and doesn't make the same exemption for railroads, the
17 railroads win, right?

18 MR. PHILLIPS: That -- that -- no, I don't
19 believe that's the necessary --

20 JUSTICE SCALIA: Why? How do you limit the
21 term "discrimination"? Just a discrimination in favor
22 of other competing carriers?

23 MR. PHILLIPS: Well, I think it -- it is
24 discrimination that Congress would have intended to
25 prohibit under these circumstances. So I think in the

1 situation where you are talking about a single exemption
2 for some group that does not compete or otherwise do any
3 business with the railroads, we would not have a basis
4 for saying they were similarly situated --

5 JUSTICE SCALIA: Why -- why do you assume
6 that? Congress didn't limit it to that in -- in the
7 property tax exemption.

8 MR. PHILLIPS: Well, it -- it did to some
9 extent, because there was a whole question about how --
10 you know, you had a whole comparative class that
11 Congress defines in the property context. So you make a
12 context between the industrial and commercial property
13 and the railroads' property. So Congress defined the
14 comparison class, but I don't think it's fair --

15 JUSTICE SCALIA: But not -- not just the
16 industrial and -- and commercial competitors with the
17 railroads. The railroads were to be given, you know,
18 the most favored treatment of -- of all the industrial
19 and -- and commercial entities, I -- I think.

20 MR. PHILLIPS: To be sure, Justice Scalia,
21 but it was still as compared to the entirety of the
22 industrial and commercial property base, and it was --
23 and the analysis has traditionally been the averages of
24 the commercial industrial property.

25 So you -- and part of the problem here --

1 it's not a problem, but, you know, one of the reasons
2 why you can't make direct comparisons is that because of
3 ACF Industries, you don't evaluate exemptions under
4 (b)(1) to (b)(3) --

5 JUSTICE KENNEDY: But in this case --
6 correct me if I'm wrong -- off-road users, agricultural
7 users, and construction and timber companies --

8 MR. PHILLIPS: Right.

9 JUSTICE KENNEDY: -- have the same -- have
10 the same tax structure as the railroads.

11 MR. PHILLIPS: Right.

12 JUSTICE KENNEDY: So there is an objective
13 reference, neutral, and it seems to me that that's just
14 quite rational to put the railroads there and not in the
15 category of road -- road users.

16 Now, if -- unless you are arguing the
17 discrimination has to have -- has to have a purposive
18 component. That might give you a different case. I'm
19 not sure you prevail on that, either.

20 MR. PHILLIPS: Well, but -- remember,
21 Justice Kennedy, we don't even get to this issue if what
22 you say is we are going to take all exemptions off the
23 table. And I guess I would go back to Justice Scalia's
24 point, which is that there is a reason why this is a
25 viscerally satisfying case, because we are talking here

1 about a discrimination.

2 You know, when Congress says, we want to --
3 we want to eliminate any tax that discriminates against,
4 the one thing it seems to me, clearly, Congress did not
5 intend to exclude from that was a tax that discriminates
6 against the -- the immediate direct competitors of the
7 railroads in a way that would undoubtedly undermine the
8 stability of the -- the financial stability and success
9 of the railroad.

10 JUSTICE GINSBURG: I thought the concern was
11 that the interstate actors should not be disadvantaged
12 vis-à-vis the home people, the local businesses, and
13 that was what was achieved.

14 But you're -- you are not complaining about
15 discrimination against a railroad in comparison to local
16 businesses. You -- you are complaining about that you
17 are not getting most-favored-nations treatment vis-à-vis
18 other interstate carriers.

19 MR. PHILLIPS: That's -- that's correct,
20 Justice Ginsberg, but I think the premise of your -- of
21 your question is the place where we would probably
22 differ, which is: To be sure, Congress intended to
23 protect interstate carriers against discrimination in
24 favor of local operations. That's clear in (b)(1)
25 through (b)(3) and otherwise pervades the legislative

1 history.

2 But there is also a significant amount of
3 discussion in that same legislative history to encourage
4 intermodal competition; that is, competition between the
5 railroads and others, both intrastate and interstate.
6 And so it seems to me that the statute that's -- that
7 prohibits all discrimination against rail carriers,
8 identified as carriers --

9 JUSTICE KENNEDY: Suppose a -- suppose a tax
10 were structured so that the same tax applied to
11 railroads and -- and -- and motor transport, but because
12 of the way the tax was assessed, the railroads paid far
13 more per mile than -- than the -- than the road
14 transport. Could the railroad then come in and say:
15 Oh, we want to be like the farmers; we are off-road?

16 I mean, I can see you making that
17 argument --

18 MR. PHILLIPS: I can see us making that
19 argument --

20 JUSTICE KENNEDY: -- in case -- in case
21 number two, welcome back. That's going to be your
22 argument.

23 MR. PHILLIPS: Well, I always like to come
24 back, but I don't -- I think the answer to that is --
25 again, I think the -- the Court ought to interpret the

1 term "discrimination" against the clear objectives that
2 Congress intended to fulfill when it protected the
3 railroads this way.

4 And the two protections that are embedded in
5 there is one that Justice Ginsberg identified, which was
6 to protect them against local interests in a way where
7 they had no political influence, and the other one is to
8 protect them against their direct competitors in the
9 intermodal competition realm. And if it's -- if it's a
10 discrimination that doesn't achieve either of those,
11 then it seems to me you either say they are -- are not
12 similarly situated or you would hold -- you would hold
13 that the State has a legitimate reason for doing what
14 it's doing, and that that's just not a discrimination
15 within the meaning of the statute.

16 JUSTICE SCALIA: So -- so 85-year-old widows
17 would be covered? That would be discrimination because,
18 you know, there are only resident 85-year-old widows who
19 are covered, right?

20 MR. PHILLIPS: Well, they would have -- they
21 would be, to be sure, local interests. But I think the
22 problem with this is, and it goes to the core argument
23 that the State makes, which is: How are you supposed to
24 define "local business" for these purposes.

25 And I don't think the -- the answer to that

1 is: I have no way to know that, because Congress didn't
2 purport to define the comparison class for purposes of
3 (b)(4). It seems to me that when Congress said "any
4 other tax" --

5 JUSTICE SCALIA: I agree with that, and that
6 makes me suspect that Congress didn't -- didn't want to
7 forbid exemptions in (b)(4).

8 MR. PHILLIPS: But it seems to me quite -- I
9 mean, the flip side of that argument would be to say, if
10 they imposed the tax of 4 percent on the railroads and
11 2 percent on 85-year-old widows, that would be
12 challengeable under (b)(4), because it's not an
13 exemption, it's a differential, and that the exemption
14 down to zero is -- is attackable under (b)(4).

15 It seems to me the right answer to this is,
16 there is no reason to include your widow as a relative
17 comparison class for purposes of (b)(4) and get out of
18 that problem as opposed to setting this up.

19 To me, the fallacy of this analysis is to
20 try to use exemptions and say that there is something
21 special about exemptions beyond the (b)(1), (b)(3)
22 context where Congress clearly acted, recognizing that
23 it had to protect the States' ability to have exemptions
24 for property taxes.

25 But then Congress goes to non-property taxes

1 and to other taxes not covered by (b)(1) and (b)(3).
2 Then, it seems to me, you have to -- you just should
3 change the analysis. Look at whether or not similarly
4 situated are being treated differently and if there is
5 any kind of State justification for that, and if not, go
6 through the analysis in the way -- and protect the
7 railroads precisely the way that Congress meant for them
8 to be protected.

9 JUSTICE GINSBURG: Mr. Phillips, are you
10 saying that the -- the railroads have to be taxed in the
11 very same way as, say, the -- the trucks? Because one
12 answer to your argument is: Well, they haven't created
13 a non-tax situation for the other interstate carriers;
14 they are just subject to a different tax. The motor
15 carriers have to pay motor fuel tax.

16 So are you saying to the State about that,
17 you have to have the same sales tax, use tax, for
18 everyone; you can't have a motor fuel tax for one and
19 sales tax for the other?

20 MR. PHILLIPS: I think, ultimately, my
21 conclusion would be that you can't have one -- you can't
22 have this kind of a tax on us and not tax the motor
23 carriers the same way. But I do think it's important to
24 recognize two considerations, at least as this case
25 comes to this Court.

1 One is that the State and the trial court
2 conceded that the appropriate comparison class was the
3 motor and water carriers. So the question of who is
4 the -- who is properly in the comparison class has never
5 been adjudicated.

6 And second, it seems to me that the question
7 of what constitutes discrimination is not the issue in
8 this case. The only question in this case is whether
9 there is something special about exemptions that makes
10 them off-limits to the (b)(4) inquiry.

11 So I think, candidly, Justice Ginsburg,
12 while I'm quite certain that Alabama and I would
13 disagree fundamentally about how to approach this, it
14 doesn't seem to me that that's a question that this
15 Court should tarry long over, and instead ought to
16 simply evaluate the very narrow question that was both
17 presented by the holding below and presented in the
18 petition as it came through the Solicitor General's
19 invitation stage, which again, as I say, very narrowly
20 focuses exclusively on exemptions, and of course allow
21 us to have them.

22 JUSTICE GINSBURG: Well, why does the course
23 for the court -- taking account of what you said, that
24 the provision about other taxes came out very late in
25 the day -- they had spent a lot of time talking about

1 the property tax. And the property tax, we know, they
2 wanted to preserve the exemptions.

3 So why not take this latecomer of thought or
4 discussion and say: Well, we'll assume that they want
5 to treat that with regard to exemptions the same way
6 that they treated property tax, which was the big-ticket
7 item.

8 MR. PHILLIPS: Well, I think part of the
9 reason, it may well be because the property tax was a
10 big-ticket item, so you were trying to protect certain
11 State interests, and Congress did it very clearly. I
12 think it is quite a remarkable stretch of -- of
13 construction of the statute for the Court to say, we're
14 going to take this very carefully reticulated scheme,
15 which creates the inference that Congress meant to
16 protect these kinds of exemptions for the States, and
17 say we are going to now incorporate that wholesale, when
18 Congress didn't use language that in any way compares.

19 It didn't include -- it didn't limit it to
20 railroad property. It didn't define a class in any
21 particular way, and instead, it basically said, what we
22 need here is something that will protect the railroads
23 when the States become more innovative and come forward
24 with additional problems.

25 And we would leave it to the courts,

1 unfortunately -- I recognize that is not the most
2 satisfying solution sometimes, but we will leave it to
3 the courts to decide what forms of discrimination we
4 would have intended to preclude, because we are here to
5 protect the railroads.

6 If there are no further questions, I would
7 like to reserve the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Phillips.

10 Ms. Sherry.

11 ORAL ARGUMENT OF MELISSA A. SHERRY,
12 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONER

14 MS. SHERRY: Mr. Chief Justice, and may it
15 please the Court:

16 The only question that the Court needs to
17 resolve today is whether a non-property tax that's
18 imposed on a rail carrier but from which its competitors
19 are exempt can ever be another tax that discriminates
20 against a rail carrier under subsection (b)(4). The
21 answer is yes.

22 A lot of the Court's questions focus on some
23 of the difficulties that are inherent in a
24 discrimination inquiry, but as Mr. Phillips pointed out,
25 those difficulties are just as inherent in a

1 discrimination inquiry under (b)(4), whether we are
2 talking about exemptions or whether we are talking about
3 differential tax rates or whether we are talking about
4 any other type of discrimination claim that can be
5 brought under (b)(4). That is the very nature of
6 (b)(4): It broadly prohibits another tax that
7 discriminates against a rail carrier, and inherent is
8 that is the notion that courts are going to have to
9 decide what it means to discriminate.

10 JUSTICE ALITO: Do you think we have to
11 decide whether the appropriate comparison class is the
12 rail carriers' competitors or some broader class?

13 MS. SHERRY: I don't think the Court has to
14 decide it. As Mr. Phillips pointed out, that was an
15 issue that was conceded below by the State, at least at
16 this stage of the proceedings. And they acknowledged
17 that in note 7 of their brief, so it wasn't something
18 that was addressed by the Eleventh Circuit below.

19 I think, as the Court wants to address it,
20 it should reject the notion that the only comparison
21 class in a (b)(4) case, no matter what the (b)(4) case
22 looks like, is all other commercial and industrial
23 taxpayers. And I think the Court should reject that
24 primarily because that's not what the tax says.

25 If you look at the language of (b)(4), it

1 talks about another tax that discriminates against a
2 rail carrier. Congress easily could have said another
3 tax that discriminates against a rail carrier, as
4 compared to other commercial and industrial taxpayers,
5 and it didn't do that.

6 And Justice Ginsburg, to your question
7 involving whether we should be focusing on interstate
8 versus local businesses and whether that was Congress's
9 focus, of course that was -- that was certainly one of
10 their concerns, but the reason that doesn't work is if
11 you look to even subsections (b)(1) through (3), the
12 comparison that is very clearly spelled out there is not
13 between local businesses and interstate businesses; it's
14 between rail transportation property and other
15 commercial and industrial property.

16 Now, that other commercial and industrial
17 property can be owned by an interstate business like
18 Wal-Mart just as easily as it can be owned by a local
19 coffee shop, and so I think to suggest that the only
20 thing Congress wanted to prohibit was this local
21 interstate type of discrimination is not borne out by
22 the text. If you look at subsection (b)(4), we think
23 the language speaks for itself. It speaks broadly of
24 another tax that discriminates against a rail carrier.

25 Another question that a number of you have

1 asked is why Congress would want to treat property
2 taxes' exemptions differently than non-property tax
3 exemptions, and I think the answer has to come from the
4 text.

5 In ACF, this court concluded that Congress
6 did not want to prohibit property tax exemptions based
7 on the text of the statute and its structure. And when
8 it comes to non-property taxes, the text of the act and
9 the structure of the act simply tell a different story,
10 and that has to be the best indicator of what Congress
11 intended.

12 Again, subsection (b)(4) speaks broadly of
13 another tax that discriminates against a rail carrier.
14 This court has long recognized that taxes can
15 discriminate in a number of different ways, including by
16 granting some taxpayers an exemption and not granting
17 that exemption to other taxpayers. That's the ordinary
18 meaning of "discriminates," and the broad and
19 unqualified language in (b)(4) is easily susceptible to
20 that meaning.

21 JUSTICE KAGAN: Ms. Sherry, there seems to
22 be a question as to what remedy somebody would be
23 entitled to under subsection (c) in the challenge
24 brought against a tax exemption. So what's the
25 government's position on that?

1 MS. SHERRY: The government's position,
2 first with respect to subsection (c), is that it is a
3 broad grant of jurisdiction to the district courts to
4 adjudicate all violations of subsection (b), and that
5 seems clear from the first sentence in that provision.

6 I'd also note that the arguments that were
7 made with respect to subsection (c) in this case were
8 brought up by the government in ACF; and in ACF the
9 government explained why the best reading of subsection
10 (c) is a broad grant of jurisdiction over all violations
11 of subsection (b). That's clearly what Congress
12 intended.

13 While Congress intended to provide a
14 substantive right for rail carriers to come into court
15 and claim discrimination on one of the four -- under one
16 of the four subsections, it also intended to provide a
17 Federal forum. And the reason that it did that was
18 because at the time, rail carriers were having a very
19 hard time bringing claims in the State court. The Tax
20 Injunction Act was out there then, as it is now, and it
21 does provide an -- exception, rather -- for when State
22 court remedies are not plain, speedy, and efficient.

23 JUSTICE GINSBURG: I think Justice Kagan
24 meant to ask, assuming that we say yes, it -- it
25 applies; exemptions don't count -- are included in

1 whether there is discrimination, and the Court finds
2 discrimination between the way the railroad is taxed and
3 the way motor carriers are taxed, what -- what then?
4 What is the remedy?

5 MS. SHERRY: I think in that type of case
6 the remedy would be for the rail carrier to be exempt
7 from the tax, and that's because what subsection (c)
8 provides --

9 JUSTICE GINSBURG: Without -- without
10 putting on -- I mean, the motor carriers do have the
11 tax.

12 MS. SHERRY: Oh, I apologize. I should back
13 up. I am assuming that when you said that the Court
14 found that there was discrimination, the Court had
15 already engaged in inquiry as to whether or not this
16 other tax compensates for or provides a justification
17 for any differential treatment.

18 If the -- the Court were to find
19 discrimination but find that maybe, you know, 50 percent
20 of the tax was compensated by this other tax, it could
21 remedy that situation by only enjoining, and it should
22 remedy the situation by only enjoining, the
23 discriminatory portion of the tax.

24 CHIEF JUSTICE ROBERTS: Well -- well, but in
25 any case when you have discrimination, you can remedy it

1 by reducing the tax, for example, in this case on the
2 railroad or by increasing the tax on the people who are
3 otherwise exempt.

4 MS. SHERRY: And I don't --

5 CHIEF JUSTICE ROBERTS: A decision that I
6 suppose would be left at some point or another up to the
7 State.

8 MS. SHERRY: It would certainly be left up
9 to the State and the State could choose to remedy it
10 in -- in any number of different ways, including the one
11 that Your Honor suggests, but the remedy that is
12 actually provided for in subsection (c) for the Federal
13 court to issue is to enjoin the discriminatory portion
14 of the tax, and the focus is on the tax --

15 CHIEF JUSTICE ROBERTS: But the
16 discriminatory -- the discriminatory portion of the tax may
17 be regarded as the excess that is imposed on the
18 railroad or the deficiency on -- on the others.

19 MS. SHERRY: I -- I think it's better
20 understood as -- as -- as speaking specifically to the
21 tax itself, and not to the tax exemption. And in fact,
22 in the -- at the cert stage when the government
23 suggested a reformulated question presented, it
24 reformulated the question to better focus on the fact
25 that this is a challenge to a discriminatory tax and not

1 to a discriminatory tax exemption.

2 And I think the State in -- in its
3 supplemental brief at the cert stage acknowledged that
4 is the better way and correct way, in fact, to look at
5 these type of challenges and what the appropriate remedy
6 would be.

7 JUSTICE KENNEDY: You present the case to us
8 as if it's either/or: That we must either in
9 disagreement with your position, to say that it doesn't
10 apply to exemptions; or if it applies to exemptions, it
11 must be remanded. Can we say that the exemptions are
12 not covered by the act unless the railroad is a target
13 of an -- an isolated target and it's clear that it's
14 discriminatory?

15 I mean, do we have to have your either/or
16 position?

17 MS. SHERRY: I -- I don't know that the
18 Court has to -- has to go with one or the other, but I
19 think the Court should not hold that it only applies to
20 exemptions to the -- to the extent it's the type of tax
21 where it's generally applicable on its face, but
22 everyone is exempt except for the rail carriers, or
23 everyone is exempt except for the rail carriers and
24 maybe some targeted and isolated group, as - as this
25 Court recognized in ACF.

1 And the reason I think that is so is because
2 that's what the language provides in (b)(4). Certainly
3 Congress was concerned with taxes that would single out
4 a rail carrier, but that wasn't their only concern. And
5 an example that I've thought of but I think helps put
6 that into some perspective is: I think Alabama would
7 concede that if instead of imposing a generally
8 applicable sales tax, it had a separate excise tax on
9 diesel fuel for use in locomotives, and it was a 4
10 percent tax, looks exactly like the one we are looking
11 at, except it is an a separate excise tax, that that
12 would be the type of singled-out tax that could be
13 challenged under (b)(4).

14 And it makes little sense that they -- that
15 a State could basically insert that type of tax into a
16 generally applicable sales tax and that would be
17 immunized from any scrutiny. The adverse economic
18 impact on the rail carriers is the same whether you are
19 looking at a singled-out tax or whether you are looking
20 at a generally applicable --

21 JUSTICE SCALIA: It doesn't make any -- any
22 sense, you are quite right; but -- but Congress thought
23 it made sense in (1) to (3), so why doesn't it make
24 sense in (4)?

25 MS. SHERRY: I think --

1 JUSTICE SCALIA: That's the argument.

2 MS. SHERRY: I think the reason that
3 Congress thought it made sense in (1) through (3) and
4 the reason that this Court in ACF concluded that
5 Congress wanted to permit property tax exemptions is
6 because of the language of (1), (2) -- (1) through (3),
7 and because of the very specific comparison class that
8 is provided there. That is noticeably absent from
9 (b)(4), and in fact wouldn't really work in (b)(4).

10 And what I mean by that is if you look at
11 (b)(1) and you look at (b)(3), it's a comparison between
12 transportation rail property on the one hand and
13 commercial and industrial property on the other; and as
14 we all know, commercial and industrial property is
15 specifically defined to -- may I finish?

16 CHIEF JUSTICE ROBERTS: You can finish the
17 sentence.

18 MS. SHERRY: I don't know if I will get to
19 the point, but suffice it to say --

20 JUSTICE SCALIA: Use a lot of conjunctions.
21 (Laughter.)

22 MS. SHERRY: I'm not surprised.

23 CHIEF JUSTICE ROBERTS: Don't even try.

24 MS. SHERRY: The point is: (B)(4) doesn't
25 talk about property; it talks about discrimination

1 against the rail carrier, and the comparison class is
2 nowhere to be found in that subsection.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 General Maze.

5 ORAL ARGUMENT OF COREY L. MAZE
6 ON BEHALF OF THE RESPONDENTS

7 MR. MAZE: Mr. Chief Justice, and may it
8 please the Court:

9 Justice Kennedy, you hit on the proper
10 definition of a tax that discriminates in this case. A
11 tax that discriminates under (b)(1), (2), and (3) is a
12 tax that singles out railroads as compared to the
13 general mass of taxpayers. So another tax that
14 discriminates is a tax that singles out railroads as
15 compared to the general mass of taxpayers.

16 The pivotal question in this case is the one
17 raised by Justice Kagan and Justice Scalia, and that is:
18 Why in the world would Congress, on the one hand, say
19 you can exempt property taxes under this statute, but
20 you can't -- you -- we are prohibiting sales and use tax
21 exemptions, when for 15 years Congress never had a
22 single hearing, a single study, and never even heard a
23 single complaint from the railroads about discriminatory
24 sales and use taxes?

25 JUSTICE KENNEDY: Well, it may be because

1 the universe of non-property taxes is -- so infinitely
2 large that there's a much greater room for -- a much
3 great danger of discrimination. We know all States have
4 property taxes.

5 MR. MAZE: Right. But again, I think the
6 answer is what Justice Ginsberg was pointing out, that
7 we would say the United States and CSX still has not
8 come up with a good reason. They basically said -- the
9 United States said, you just look at the statute and it
10 tells a different story.

11 There are three good reasons that Congress
12 would have intended, and the Court should read property
13 tax exemptions and non-property tax exemptions to be
14 read the same way, and the first one is the one that
15 Justice Ginsberg was pointing out: The purpose of the
16 statute was to protect out-of-State, interstate
17 businesses from being easy prey in the State
18 legislature. They don't have voting power.

19 But if you put an interstate business in the
20 generally applicable tax scheme, that means they are
21 paying the same tax as the local businesses and local
22 taxpayers. They are protected. If the tax rate goes
23 up, the local businesses, the local taxpayers, will
24 protect them. If too many exemptions occur, the local
25 taxpayers and the local businesses will protect them.

1 JUSTICE ALITO: Well, you are arguing in
2 favor of -- you are arguing in favor of a very
3 idiosyncratic interpretation of the concept of a
4 discriminatory tax, aren't you?

5 In almost any other context, granting tax
6 exemptions to one group but denying them to another
7 group would be viewed as -- if there isn't a good reason
8 for drawing the distinction, as discrimination, wouldn't
9 it?

10 MR. MAZE: Yes. I definitely agree, as an
11 abstract matter, an exemption could be a tax that
12 discriminates. But what Congress has told us in (1)
13 through (3) with regard to property taxes is you can
14 grant an exemption, and Congress didn't want to -- and
15 they also told us --

16 JUSTICE ALITO: And it did so with explicit
17 language by -- in -- what is it -- (a)(4), by referring
18 to property that is subject to a property tax levy.

19 MR. MAZE: Right.

20 JUSTICE ALITO: So what you're saying is
21 that the ordinary interpretation of the concept of a
22 discriminatory tax should not be applied here, because
23 Congress used specific language to take tax exemptions
24 out of the determination of discrimination under other
25 provisions.

1 MR. MAZE: My --

2 JUSTICE ALITO: What sense does that make?

3 MR. MAZE: I'm sorry?

4 JUSTICE ALITO: What sense does that make?

5 The fact that they specifically took it out of some
6 provisions but not out of this provision, you think,
7 leads to the implication that they meant to put it in
8 here, too, where they could have easily used language
9 here to put it in.

10 MR. MAZE: Right. Well, I would say that
11 Congress wasn't even thinking about non-property tax
12 exemptions when they wrote before.

13 But the answer is: Our argument is to say
14 that we understand from the structure of the statute as
15 a whole that Congress didn't intend to preempt the
16 State's ability to issue tax exemptions.

17 JUSTICE SOTOMAYOR: Excuse me. May I pose a
18 hypothetical so that I understand? And I think it
19 follows up on what Justice Alito was saying.

20 Let's assume all taxes are equal between
21 water carriers and railroads, except there is an excise
22 tax: 4 percent on the railroads, 2 percent on the water
23 carriers.

24 MR. MAZE: Right.

25 JUSTICE SOTOMAYOR: Everybody else pays

1 4 percent. On your theory, is that discrimination or
2 not?

3 MR. MAZE: No, because they are paying a
4 generally applicable 4 percent tax. Again, remember, in
5 the property tax --

6 JUSTICE SOTOMAYOR: But this is not an
7 exemption area, so what meaning do you give -- that's
8 what I'm trying to figure out. Are you saying -- what
9 meaning are you giving to discrimination at all, other
10 than -- unless we accept that the class always has to be
11 the commercial class?

12 MR. MAZE: I'm giving the meaning the same
13 meaning that the Court suggested in ACF; that is, (b)(4)
14 is a tax. Another tax that discriminates is one that
15 singles out the railroads.

16 CHIEF JUSTICE ROBERTS: Well, you can single
17 out the railroads through exemptions. I mean, let's say
18 you have a tax of \$1,000 per mile per day for anything
19 that uses a thoroughfare in the State. However, things
20 that use roads, waterways, you know, the long list that
21 in effect leaves only the railroads exposed.

22 You are saying that can't be regarded as a
23 tax that discriminates against the railroads?

24 MR. MAZE: I'm saying that a tax that in
25 effect, in the end, singles out the railroads because

1 they are the only ones that pay it; that would be
2 discrimination.

3 CHIEF JUSTICE ROBERTS: Okay. So what if
4 there's only two that pay it? Only -- and it applies
5 only to railroads and bicycles?

6 MR. MAZE: Well, then again, the tax
7 wouldn't be generally applicable. This is what the
8 Court went over in ACF. In this case, the parties
9 agreed --

10 CHIEF JUSTICE ROBERTS: We can determine
11 that a tax is not generally applicable based on the
12 exemptions. If everybody else is exempt, well, it's not
13 generally applicable. If just bicycles are also exempt,
14 then it is not generally applicable. We have to look at
15 the exemptions to decide whether there is
16 discrimination.

17 MR. MAZE: No. Actually, you are not
18 supposed to look at the exemptions at all. If you think
19 about property taxes, when you have a generally
20 applicable property tax, exemptions are removed from the
21 comparison class. All you are looking at are the
22 businesses that pay the tax. In that case, as long as
23 the businesses that pay the tax are paying the same
24 rate --

25 JUSTICE SOTOMAYOR: So if there's 100

1 businesses, where does the line between singling out the
2 railroad get drawn? When they exempt 98? When they
3 exempt 97? When they exempt 95, or is it at 80? Where
4 do we draw the singling out? If the State says the
5 general tax is 4 percent, but everybody -- but how many
6 are exempted?

7 MR. MAZE: Well, again, I would say that you
8 use the phrase -- see, I know that singling out is not
9 the best answer, but the lower courts have looked at it.
10 We have seen cases where even 80 percent -- as long as
11 20 percent of the businesses in the State are paying it,
12 it's generally applicable.

13 JUSTICE SOTOMAYOR: What sense would there
14 be for Congress to use the word "discriminate" and
15 intend, in the hypothetical I gave you earlier, that
16 railroads will pay 4 percent like everyone else, but
17 their competitors, for no reason other than that the
18 State wants to favor the water carrier, is only paying
19 2 percent? What -- what conceivable reason would
20 Congress want that differential to exist?

21 MR. MAZE: Because Congress understood that
22 exemptions for individual businesses --

23 JUSTICE SOTOMAYOR: I'm not talking about an
24 exemption. I'm talking about a rate difference.

25 MR. MAZE: If you are given a rate

1 difference, a benefit of any kind to an individual
2 business, Congress understood that that is important to
3 the State.

4 Let's say, for example, we had a business
5 who's has had an economic crisis or we want to bring a
6 new business into the State. Congress understood that
7 is important to the State tax policy. The point of the
8 statute was simply to put the railroads on equal
9 footing.

10 Again, if you think back to property taxes,
11 we can treat trucks however we want to. We could exempt
12 them. We can treat them at a different rate. As long
13 as the railroads are paying an equal rate to the general
14 mass, it's not discrimination.

15 JUSTICE ALITO: So it's a commodity that is
16 purchased by only railroads and one other class, and
17 there is a 4 percent sales tax on this commodity, but
18 the other class is exempt from the tax. Now, is that --
19 is that discrimination against the railroad?

20 MR. MAZE: Can you explain the classes
21 again?

22 JUSTICE ALITO: Let's say there is some
23 commodity that is purchased only by railroads and
24 truckers, and there is a 4 percent tax on the commodity,
25 but truckers are exempt from it -- from the tax.

1 Is that discrimination against the railroad,
2 even though it takes the form of -- it's not
3 discrimination against the railroad because it takes the
4 form of a tax exemption?

5 MR. MAZE: No. Again, in that instance,
6 like the Court said in ACF, that would be a case in
7 which the railroads had been singled out, because only
8 two businesses were paying the tax. One has been
9 exempted; then the railroads are only one left paying
10 it.

11 JUSTICE ALITO: Once you say that, your
12 argument that exemptions can't count as discrimination
13 is destroyed, because you are conceding that an
14 exemption can constitute discrimination.

15 MR. MAZE: At that point, as the Court said
16 in ACF, it's not an exemption scheme anymore. At this
17 point, it's just a tax on the railroads. Again, there
18 is no reason in the text or the structure or the history
19 of the act to treat property taxes any differently than
20 sales and use taxes.

21 JUSTICE KENNEDY: Then you need to give us a
22 test, and the test is whether or not the railroad is
23 singled out as a target group for discrimination.

24 MR. MAZE: Yes.

25 JUSTICE KENNEDY: Something like that -- for

1 discrimination, something like that.

2 MR. MAZE: And that's the test that just
3 Judge Posner gave in the ACF case. That's the test that
4 the Court suggested in ACF. That's the test that the
5 Eleventh Circuit used here. You know, one of the
6 problems --

7 CHIEF JUSTICE ROBERTS: I'm sorry. Just so
8 I follow: And that test says what?

9 MR. MAZE: The test is -- as long as it is a
10 generally applicable tax that does not single out or
11 target the railroads, it is not subject to challenge.
12 In fact, the Court --

13 CHIEF JUSTICE ROBERTS: I'm sure I'm just
14 repeating myself here. So that it doesn't single it out
15 if there's one additional business or line of business
16 subject to the tax, no matter how small that exemption
17 is?

18 MR. MAZE: You mean how small the business
19 is that is actually paying the tax?

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. MAZE: That's a question for the
22 Court -- excuse me, choked. That would be a question
23 for the Court, yes.

24 CHIEF JUSTICE ROBERTS: Exactly. So the
25 Court has to decide, even when you are dealing with

1 exemptions, whether or not that discriminates against
2 the railroad?

3 MR. MAZE: Right. But it's the same test.

4 CHIEF JUSTICE ROBERTS: If I'm right, that
5 means you lose the case --

6 MR. MAZE: No.

7 CHIEF JUSTICE ROBERTS: -- at least as the
8 question presented has been addressed, because all we
9 are deciding -- I understand you think we ought to
10 decide more, but all we are deciding is: Can (b)(4)
11 ever come into play when the discrimination arises from
12 an exemption?

13 MR. MAZE: No. The question presented
14 precisely is whether a State's exemptions of rail
15 carrier competitors, but not rail carriers, from a
16 generally applicable sales and use tax. In this case,
17 we've already presumed that the fact has been
18 established that this a generally applicable tax. The
19 Eleventh Circuit has already made that determination.
20 CSX and the United States agree with it. There is no
21 question in this case that it is generally applicable.

22 The only question is: Under the test we
23 have just articulated, does it single out the railroads?
24 No. Everybody agrees it's a generally applicable tax.
25 Thus, as a matter of law, it cannot be another tax that

1 discriminates.

2 JUSTICE SOTOMAYOR: So to answer that
3 question, you are telling us that we have to define what
4 discrimination means?

5 MR. MAZE: I think inherently you have to
6 understand what another tax that discriminates is before
7 you can say whether something is subject to challenge as
8 another tax that discriminates.

9 One of Justice Scalia's points earlier was
10 to Mr. Phillips, there is no limiting principle if you
11 treat property tax exemptions differently than
12 non-property taxes, and not only can they change the
13 comparison class, the railroads do. They will argue
14 against the States' different comparison classes. Take
15 Justice Kennedy's example: If the local farmers are
16 exempt, they would argue that that is discrimination
17 against interstate commerce; again, the phrase Congress
18 used to bind the four together.

19 We've had cases at the same time that
20 Burlington Northern was arguing the diesel fuel cases on
21 an interstate competitor class. They turned around at
22 the same time in Wyoming and argued that a coal
23 transportation tax is discriminatory because it singled
24 them out versus --

25 CHIEF JUSTICE ROBERTS: That's what

1 railroads do.

2 MR. MAZE: Sure.

3 CHIEF JUSTICE ROBERTS: But it still doesn't
4 get to the question that in courts in each particular
5 case will be able to decide, even under your test,
6 whether it singles out railroads.

7 The only question I have is that whether
8 singling out means railroads have to be the only
9 business subject to it, or if it has to be, you know,
10 some theory -- Justice Kennedy was looking for a test.
11 I don't know if we have got a workable one -- to decide
12 when it's really discriminating against the railroad and
13 when it's that the exceptions are just the way
14 taxes normally work.

15 MR. MAZE: And, again, if we adopt a test,
16 which we believe is the right test, the Eleventh Circuit
17 has already done it in this case. This would be a
18 question for another case. Again, there is no more
19 generally applicable tax than Alabama's 4 percent sales
20 and use tax.

21 JUSTICE BREYER: Haven't you just pushed all
22 the difficult questions into the word "generally
23 applicable"? I imagine a fuel tax applies to everybody
24 in the State, but then we exempt everybody who does
25 business in the State with fuel.

1 MR. MAZE: Right.

2 JUSTICE BREYER: Except for railroads.

3 MR. MAZE: Right.

4 JUSTICE BREYER: All right, now. You want
5 to call that not a generally applicable class? Do you
6 want to call it a discrimination against railroads? It
7 seems to me about the same question.

8 MR. MAZE: Right.

9 JUSTICE BREYER: All right. So why isn't
10 the easiest thing to say, since there's so many other
11 questions involved in discrimination: Yes, the clause
12 applies? What counts is a discrimination is an
13 obviously difficult question, and we will send it back
14 for somebody else to wrestle with this, since it's so
15 difficult.

16 MR. MAZE: Here's the problem the State has
17 with that -- and you almost channelled what Mr. Phillips
18 said earlier -- that we leave it to courts to determine
19 discrimination.

20 JUSTICE BREYER: What is the choice?

21 MR. MAZE: Well, this is a State tax. Under
22 the clear statement rule -- we detrimentally rely on
23 these statutes when we determine whether we can tax
24 someone or not. Now, you know, if the courts were to
25 say, you can't prospectively tax because you lose,

1 that's one thing, but we have taxed the railroads for
2 years --

3 JUSTICE BREYER: I realize that, but what
4 they are worried about is somebody that's having passed
5 on the property level --

6 MR. MAZE: Right.

7 JUSTICE BREYER: -- thinks I have a great
8 revenue-raising idea. What we do is tax the New York
9 Central, and then they sit down with a bunch of lawyers
10 and the lawyers say: Oh, great, they come through this
11 State; what we'll do is we'll have a tax that applies to
12 all fuel and then we will exempt everybody except the
13 New York Central. All right. Great.

14 We've now found a replacement of the revenue
15 that they just said in Congress we couldn't have in the
16 first three provisions.

17 MR. MAZE: Right. And, again, that would be
18 the test that we've talked about --

19 JUSTICE BREYER: No, because you're saying
20 that's not generally applicable. They are saying sure
21 it is, read the first line, applies to everybody.

22 You say no, no, no. That's a trick because
23 of the second line. So now what we will do is we'll
24 monkey around with it a little bit. And we will make it
25 tough.

1 All I'm saying is that's precisely the same
2 question in that context as whether it's discriminates
3 or not. I'm not saying it's an easy question. I'm just
4 saying it might be clearer if we said, yes, the thing
5 applies, now go work out the hard question of whether
6 you had have got a discriminatory tax.

7 MR. MAZE: And -- and, again, the problem we
8 would have with that is now you are going to have two
9 different definitions of what another tax that
10 discriminates in (b)(4) for property taxes, which CSX
11 agreed applies to property taxes --

12 JUSTICE BREYER: The property taxes, the
13 language is different.

14 JUSTICE SCALIA: I didn't understand your
15 last answer. What was it?

16 MR. MAZE: CSX argues on page 8 and 9 of the
17 reply brief that with regard to property taxes (b)(4)
18 would apply if the tax singles out the railroads. But
19 now they are arguing another tax that discriminates, the
20 very same phrase means any differential treatment of any
21 kind when it comes to non-property taxes. To agree that
22 the test would be different is not only not clearly
23 required by the statute, it would be illogical, because
24 what happens is, you can have an infinitely broad
25 definition of discriminate. Any treatment that we do

1 differently for non-property taxes is discrimination,
2 which not only does it make note -- the most favored
3 taxpayer, they might as well be considered charities,
4 billion dollar charities. We could -- we could never
5 tax them at all, because we exempt someone from every
6 single tax we levy. For example --

7 JUSTICE BREYER: You are assuming how the
8 Court will decide the word "discriminate."

9 MR. MAZE: Yes.

10 JUSTICE BREYER: I understand what you are
11 saying, and so would every other judge. And of course,
12 it's hard to figure out in these contexts what is real
13 discrimination, but there could be obvious cases. And
14 so why cut out the obvious cases simply because it's
15 hard in a non-obvious case to figure it out?

16 MR. MAZE: Because Congress didn't clearly
17 put in the statute that we want a different definition
18 for discrimination when we have one.

19 JUSTICE BREYER: There is no way -- there is
20 no way with the property -- the property tax is tough.
21 And once you start taking exemptions into account, it's
22 double tough, and there is very little need, is there?
23 Every State in the country has property taxes and every
24 State in the country has property taxes on businesses.

25 MR. MAZE: Right.

1 JUSTICE BREYER: And -- and it might not be
2 so that every State in the country has particular taxes
3 on diesel fuel. And it might be that they don't have
4 taxes on rails, or it might be that they -- you see?
5 So, I -- I -- that's how I am explaining to myself.
6 What do you think?

7 MR. MAZE: I think that if -- well, first of
8 all, every State taxes diesel, at least for truckers,
9 and most do for the trains. But if Congress was
10 thinking about this, they should have told us what
11 discriminate means. And I think that -- honestly, I
12 think we should go across the street and have them tell
13 us. But -- but they are not here and what we are saying
14 is the easiest way to do this and the proper way to do
15 it is simply to read the test to be the same as property
16 for non-property taxes.

17 If the test is single out railroads when you
18 are talking about property taxes, it should be the same.
19 Again, the point would be, we can't tax at all
20 non-property taxes, at all if the definition literally
21 is, any differential treatment. Congress never would
22 have intended to literally prohibit States from
23 taxing --

24 JUSTICE SOTOMAYOR: It's not quite -- it's
25 not quite that. You forget the other part of the test,

1 which is without a reason. Now, the other side hasn't
2 defined what a legitimate reason would be. And that's a
3 separate inquiry. But if there is a -- some form of
4 legitimate reason to treat people differently, I think
5 the other side is saying that's okay.

6 MR. MAZE: I think the other side would tell
7 you that we can't give a justification. Again, (b)(1)
8 (2) and (3) are absolutely --

9 JUSTICE SOTOMAYOR: In their particular
10 facts of their case. I mean, that's what they have to
11 come up and explain to us, what's the -- what's the
12 defining principle of acceptable or unacceptable
13 different treatment, because it can't be -- you're
14 right, logically, it can't be most favored taxpayer
15 status.

16 MR. MAZE: But that is logically what would
17 happen.

18 JUSTICE SOTOMAYOR: Well, so far, yes,
19 unless they can give --

20 MR. MAZE: They haven't articulated a way
21 yet from preventing that from happening.

22 JUSTICE SCALIA: Yes, but I don't understand
23 why you think it is -- it is more articulable on your
24 theory than on theirs. I don't see where solving your
25 predictability problem, you're worried about it, you

1 know, we don't know how to tax anymore. I don't know
2 why it's any more certain if we -- if we say the key is
3 whether it's a generally applicable tax than it is if we
4 say the key is whether it discriminates against
5 railroads. I mean it's the same inquiry. So what do
6 you care? It's just as -- just as unpredictable
7 ex ante. It's exactly the same inquiry, whether it's
8 generally applicable or whether it discriminates against
9 railroads. Isn't -- isn't -- isn't that what you have
10 been saying?

11 MR. MAZE: What I have been saying, yes, a
12 tax doesn't discriminate --

13 JUSTICE SCALIA: So, it's twiddle dum or
14 twiddle dee, maybe we should, you know, dismiss this as
15 improvidently granted, it doesn't make any difference.

16 MR. MAZE: I -- I would have no problem if
17 you dismiss it improvidently granted.

18 (Laughter.)

19 MR. MAZE: I would certainly accept that.
20 And, again, if the test is the same, the Eleventh
21 Circuit has already answered the question.

22 JUSTICE BREYER: No, but it's not quite,
23 because this is the same problem I was raising. You
24 just shoved the difficult questions into generally
25 applicable. But you might think of some new ways of

1 doing it that they don't want. So I would worry about
2 giving you just the decision where the word in the
3 statute is "discriminate," and nowhere does it say
4 "generally applicable." I'd somewhat worry about
5 whether this statute shoves the same problems into two
6 words that aren't there as to rather leaving those
7 problems for resolution under the one word that is
8 there.

9 MR. MAZE: The -- the statute actually does
10 use the word "generally applicable." If you turn to
11 page 25 of the joint appendix --

12 JUSTICE BREYER: I'll believe you, I'll
13 believe you.

14 (Laughter.)

15 MR. MAZE: Well, but it makes a good point
16 in the original version of (b)(3), you could not levy a
17 tax against a leveler property tax at a tax rate higher
18 than the tax rate generally --

19 JUSTICE BREYER: The word -- the word I was
20 looking at was is 4, impose another tax that
21 discriminates against a rail carrier providing
22 transportation, subject to the jurisdiction of the board
23 under this part. Now, I read all the words of 4, and I
24 found the word "discriminates," and I did not find the
25 two words "generally applicable."

1 MR. MAZE: Right. And you will find the
2 word "discriminate" at the beginning of each of these
3 section as well, saying each of these discriminate
4 against interstate commerce, meaning they all
5 discriminate in the same manner.

6 Again, if you think about it, when you have
7 a specific provision or several specific provisions
8 followed by a general, you have to give some independent
9 effect to the specific provision.

10 Here's the problem with CSX's argument, the
11 independent effect that they are giving (b)(1), (2), and
12 (3) for property taxes is that they are narrowing the
13 prohibition on discriminatory property taxes from the
14 infinitely broad anything goes discrimination test for
15 all property taxes, which again is illogical when the
16 only thing Congress talked about for 15 years was
17 discriminatory property taxes. The only --

18 CHIEF JUSTICE ROBERTS: Do you think section
19 11501(c) is relevant to all these disputes, because one
20 thing 11501(c) does is give the State a little bit of a
21 break?

22 MR. MAZE: Right.

23 CHIEF JUSTICE ROBERTS: They recognize that
24 it is hard to have exact equality in terms of ad valorem
25 property assessment. So, what does -- what does it say

1 -- you know, a 5 percent legal room.

2 MR. MAZE: Yes.

3 CHIEF JUSTICE ROBERTS: Couldn't you, if we
4 rule against you, when you get back and other State
5 officials say, look, the one thing we don't have to
6 worry about is being precise. We have got some legal
7 room, so we can exempt the 85-year-old widow, we can,
8 you know, exempt the farm property. We just kind of
9 have to get it close so that if somebody looks at it,
10 and they'll say, well, it doesn't really look like they
11 are discriminating against railroads, why isn't that
12 pertinent and why doesn't it respond to a lot of your
13 concerns?

14 MR. MAZE: Textually that's a problem
15 because the 5 percent in it only applies to assessment
16 ratio problems in (b)(1) and (b)(2), and the rest --

17 CHIEF JUSTICE ROBERTS: No, I know. I'm
18 using that not as saying that this is applicable to
19 (b)(4), but that it gives you an idea that Congress
20 didn't have the precise absolute rule, and you go one,
21 you know, 1 inch over the line and you are in trouble.

22 MR. MAZE: I -- I don't think at that point
23 the courts have any idea what they can do. What -- what
24 how does a State know what is over the line and what's
25 not? I mean, now we know as long as we subject them to

1 our generally applicable tax, which is what all the
2 States did when the 4-R Act passed --

3 JUSTICE SCALIA: But you don't know what
4 "generally applicable" means.

5 MR. MAZE: It simply means that you apply --

6 JUSTICE SCALIA: At least I don't know. How
7 do you know?

8 (Laughter.)

9 MR. MAZE: Because I know that everyone who
10 pays the diesel fuel tax pays 4 percent. It generally
11 applies to everyone. A -- a problem that you have with
12 subsection (c), again, and that the United States and
13 CSX has avoided so far is it is a jurisdictional
14 problem, and it has been raised as by one of our amici.

15 Even if there is a (b)(4) violation, which
16 we obviously don't agree that there is, it says that no
17 relief can be granted unless have you an assessment
18 value problem of plus or 5 minus percent.

19 CHIEF JUSTICE ROBERTS: It clearly -- it
20 clearly applies to (b)(1) through (3) and has got
21 nothing to do with (b)(4) because it can't apply to
22 (b)(4).

23 MR. MAZE: Well, then it says relief can't
24 be granted.

25 CHIEF JUSTICE ROBERTS: (b)(4) is not a --

1 (b)(4), the whole point is if it's not a property tax,
2 you don't have ad valorem assessments, so the details
3 limiting jurisdiction when you do have ad valorem taxes
4 don't apply to this case at all.

5 MR. MAZE: The problem with that is -- that
6 is CSX's argument -- is now you are reading into
7 Congress's intent for the statute and the moment you
8 open up to what Congress's intent for the statute is, we
9 know that Congress didn't intend to make railroads the
10 most favored taxpayers in any way. The railroads
11 actually said that themselves. If you start reading
12 intent into the statute, the intent was simply to put
13 them on equal footing. So you would have to read (b)(4)
14 to say, just like property taxes, and non-property taxes
15 as long as they are subject to a generally applicable
16 tax there is no discrimination, you are not subject to
17 challenge. So again, I don't think that would -- would
18 be an issue.

19 Now one of the problems I see that the Court
20 has is this fear that the States are going to take a
21 generally applicable tax and then all of a sudden start
22 exempting everyone. Let's say, for example the State of
23 Alabama sales and use tax. It's not going to happen for
24 a very simple reason. Our sales and use tax funds our
25 schools. At the moment we start exempting every single

1 business, our schools don't have any money. We are not
2 going to pick on the railroads by exempting, exempting,
3 exempting, exempting. The railroads, quite honestly,
4 can't fund our schools. We are having a hard enough
5 time funding them as it is, and we are not going to just
6 target railroads by exemption. So I see that the Court
7 might have a problem understanding what's the line with
8 exemptions, but it's just never going to happen.

9 JUSTICE SCALIA: How are these any different
10 from property taxes? I mean States could say the same
11 thing about property taxes. Nonetheless it was felt
12 necessary to specify that -- that exemptions don't
13 count.

14 MR. MAZE: Right. But -- but --

15 JUSTICE SCALIA: Before deciding whether or
16 not you are discriminating against the railroads.

17 MR. MAZE: Again, because Congress
18 understood that exemptions are a -- an integral part of
19 the State's tax policy. We need to be able to give
20 exemptions to individual businesses. This is --

21 JUSTICE SOTOMAYOR: I'm having a problem. I
22 thought as you argued in your brief that you were only
23 arguing that States can tax-exempt, but you are asking
24 us to rule more broadly to say that States can treat --
25 impose taxes differently.

1 MR. MAZE: No.

2 JUSTICE SOTOMAYOR: So it doesn't really
3 matter that it's a tax exemption; you are just saying if
4 the tax is a positive imposition or a negative one,
5 taking someone out, it doesn't matter.

6 MR. MAZE: Right, because that's the way it
7 works for property taxes. Let me be very clear what we
8 are asking the Court to hold. On page 335 of ACF, this
9 is what the Court held in that case: A State may grant
10 exemptions from a generally applicable ad valorem
11 property tax without subjecting the taxation of railroad
12 property to challenge under (b)(4). All we are asking
13 the Court to do in this case is substitute three words.
14 Ad valorem property is out; sales and use tax is in.

15 There is nothing in the language, the
16 structure or history of the Act that would suggest, much
17 less clearly and manifestly mandate, which is necessary
18 under the clear statement rule, that that rule should be
19 any different. Again, it would be illogical because it
20 would be illogical to think that Congress spent 15 years
21 worried about one problem and that problem is, is the
22 States were discriminating in property taxes.

23 But there is one clear, easy way to see that
24 the railroads didn't really believe that this was a
25 clear statement against generally applicable sales and

1 use taxes.

2 The point was made earlier, the railroads
3 will sue us all of the time to save money. It's very
4 telling that the railroads didn't sue any State, despite
5 we have been taxing this way since the 1930s, until the
6 late 80s or early 90s under this theory, because even
7 they when they read this statute, understood it to mean
8 only if we are singled out or targeted. That's the way
9 they litigated (b)(4) for the first decade. It's only
10 when they couldn't win those cases any more that they
11 changed what they believed it meant.

12 But the fact that this was able -- again
13 sales and use taxes is their most expensive tax. And as
14 they say in the -- in the Norfolk Southern opinion, the
15 third largest expenditure of the railroads is diesel
16 fuel. If the third largest expenditure of the railroads
17 is out there to be taken away -- the taxes, they
18 certainly would have sued us within the first 10 years
19 if this statute clearly said we couldn't do it. But
20 nobody believed that is what the statute said, because
21 Congress never said it in the entire 15-year history.
22 The statute itself when you read it doesn't say it.

23 Just as the Court said in ACF, this statute
24 is at best vague on the point of tax exemptions. And in
25 that case, under the clear statement rule, you have to

1 defer to the State. Congress needs to tell us
2 specifically what we can and can't do.

3 JUSTICE KENNEDY: What -- what authority do
4 you have for the proposition that the clear statement
5 rule applies to the exercise of the congressional power
6 under the Commerce Clause? Is that --

7 MR. MAZE: A --

8 JUSTICE KENNEDY: -- some general rule that
9 we've always had?

10 MR. MAZE: ACF actually applied the clear
11 statement rule, not only said it applied, it said it
12 compelled the ruling in this case. The -- I'm sorry,
13 I've got the page number? In ACF, you said it was --
14 sorry -- I drew a blank all of a sudden.

15 Regardless, it's in ACF, the Court said
16 that -- I'm sorry, it's page 345 of ACF. The Court
17 said -- "absent unambiguous evidence" was one of the
18 quotes, and then at the end it said, you have to show
19 Congress's clear and manifest purpose; and the Court
20 said because you can't see a clear and manifest purpose,
21 because there is no unambiguous evidence -- again,
22 because the statute doesn't talk about tax exemptions at
23 all.

24 JUSTICE BREYER: Yes, but in all these years
25 where they never challenged it, did all these other

1 States not only tax their diesel fuel, but at the same
2 time exempt the diesel fuel tax from all their
3 competitors.

4 MR. MAZE: Absolutely. We have been doing
5 it since the 1930s. As you'll see in --

6 JUSTICE BREYER: What's the rationale, that
7 the trucks don't have to say it but the railroads do?

8 MR. MAZE: Because Federal law makes us do
9 it. Federal law taxes diesel fuel differently on road,
10 and they makes us -- die -- fuel off-road. And because
11 they're taxed differently at the Federal level, the
12 States have had to adopt it. In fact the
13 Hayden-Cartwright Act up until the 1980s forced us to do
14 so.

15 So we have been doing this since the 1930s.
16 Congress obviously knew we were doing it when we wrote
17 the "four R" Act. And yet nobody ever complained.
18 Congress knew exactly --

19 CHIEF JUSTICE ROBERTS: Thank you counsel.

20 MR. MAZE: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Phillips, you
22 have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

24 ON BEHALF OF THE PETITIONER

25 MR. PHILLIPS: Thank you, Mr. Chief Justice.

1 Just a -- a few quick points. First of all,
2 with respect to the reason why the States didn't
3 challenge these tax exemptions earlier; for some of us
4 it's relatively easy to remember what the price of fuel
5 oil was back in the 1970s, it was somewhere in the sort
6 of 10 to 30 cents a gallon range. Therefore exemptions
7 of that amount of tax, 1 percent exemption of that
8 amount of tax is not a whole lot of money. Today the
9 rates are \$4 a gallon, and an exemption under those
10 circumstances, particularly when you have a fixed rate
11 for your major competitor, gives you a more than
12 substantial incentive to bring an action under these
13 circumstances.

14 The notion that somehow the -- the State has
15 gone down this path because of Federal law has not been
16 true for at least 15 years. That statute was repealed
17 and Alabama could have modified its tax however it
18 wanted to and chose not to do so.

19 Justice Alito, your hypothetical I think is
20 almost exactly this case, because as my friend
21 indicated, diesel fuel is by far the biggest expense
22 that the railroads have. It's also a very significant
23 expense for the motor carriers, and it is a pretty
24 trivial expense for everybody else in the -- in the
25 State of Alabama.

1 JUSTICE SCALIA: Mr. Phillips, do you agree
2 that -- that, generally applicable produces the same --
3 requires the same inquiry as discriminates?

4 MR. PHILLIPS: Well, you're ultimately going
5 to have to come down to the same issue, and the problem
6 is, and I -- the reason why I -- I find it hard to
7 accept Justice Kennedy's formulation, which is simply
8 singling out the railroads, because in ACF the Court
9 sort of said well, we will hold that out as a
10 possibility. If you're doing -- you know, it would be
11 one thing if you are just singling them out.

12 But it seems to me that in a statute like
13 (b)(4), where you -- where you are more broadly, and you
14 don't have the (b)(1) to (b)(3) baggage to deal with
15 property taxes, the idea that you would then limit
16 (b)(4) solely to the situation of singling out is -- is
17 simply not a fair way to characterize it.

18 JUSTICE SOTOMAYOR: So give me a definition
19 of discriminate. Give me your working -- it can't -- as
20 I started to ask your adversary, it can't be most
21 favored taxpayer status. True?

22 MR. PHILLIPS: Right. It has to be that --
23 the traditional and common understanding of discriminate
24 is that you treat similarly situated individuals
25 differently without -- with an adequate justification.

1 JUSTICE SOTOMAYOR: So what constitutes an
2 adequate justification?

3 MR. PHILLIPS: Well, it depends on the --
4 it's going to depend on the tax, and I don't know the
5 answer in this context, because as Justice Alito's
6 question reveals --

7 JUSTICE SOTOMAYOR: Well --

8 MR. PHILLIPS: -- it could be that the vast
9 majority of diesel fuel is --

10 JUSTICE SOTOMAYOR: Stop.

11 You are going to grant an exemption; you are
12 going to treat someone differently because you are
13 favoring them for a reason. People don't -- States
14 don't do these willy-nilly. Either some enterprises or
15 some individuals, like the 85-year-old widow, you are
16 sympathetic to her. You want to encourage your water
17 transport, because it's an industry that is nascent in
18 your State and you want it to grow, so it's a
19 pro-competition reason. Are those legitimate? And if
20 those are --

21 MR. PHILLIPS: I -- the first one I think
22 without question.

23 JUSTICE SOTOMAYOR: -- what isn't?

24 MR. PHILLIPS: I think the second one has
25 more of a problem, because I don't think Congress

1 intended to allow to you favor direct competitors of the
2 railroads when the ultimate effect of that may be to
3 undermine the -- the financial stability of the
4 railroads.

5 JUSTICE SOTOMAYOR: Give me a working
6 principle. What does -- how do you define legitimate
7 and illegitimate, assuming --

8 MR. PHILLIPS: I would define.

9 JUSTICE SOTOMAYOR: The government reason is
10 always going to be premised on wanting to favor someone
11 for a reason.

12 MR. PHILLIPS: Right. I think ultimately
13 the way to analyze this is case is what was Congress's
14 ultimate objective. And if the state is putting forward
15 a legitimate reason that is fully consistent with
16 Congress's overall objective, then there is no problem.

17 JUSTICE SOTOMAYOR: That is the problem
18 because there were two objectives. One was to promote
19 equality with local businesses and the other to promote
20 equality --

21 MR. PHILLIPS: Competition among carriers.

22 JUSTICE SOTOMAYOR: Right.

23 MR. PHILLIPS: Which suggests to me that
24 there are two ways to worry about discrimination. Have
25 you singled out other carriers for more favorable

1 treatment? There I think if the answer is per se, if
2 you do that you lose. And if you are not in that world
3 and you are talking about some other classes, then it
4 seems to me it depends on how far you want to go in
5 terms of how much of an exemption you want to play.

6 But the important part of this is still and
7 I think the questions to Mr. Maze reflected is that you
8 should undertake the inquiry to determine whether there
9 is discrimination even if the State happens to use the
10 guise of exemptions as opposed to rate differentials or
11 anything else.

12 There is nothing special about exemptions
13 that takes it off the table. It proposes the Federalism
14 concerns and that ACF spoke to this issue. ACF said you
15 should not extend the statute beyond its evident reach
16 reflecting the (b)(1), (b)(3) and (b)(4) relationship
17 without a clear statement. That's not what we have in
18 this case, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Phillips, counsel. Case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

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24
25

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