No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR THE PETITIONERS

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
SUPREME COURT
LITIGATION CLINIC
WVU Law Center
One Law Center Drive
Morgantown, WV 26506

John M. Allan
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309

David E. Cowling
6527 Lakehurst Avenue
Dallas, TX 75230

Lawrence D. Rosenberg
Counsel of Record
Victoria Dorfman
Mark C. Savignac
Chris Pagliarella
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
ldrosenberg@jonesday.com

Meghan Sweeney Bean
JONES DAY
150 W. Jefferson Street
Suite 2100
Detroit, MI 48226

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

INTRODUCTION

The Dawsons' argument relies on three fundamental premises, and the State concedes each of them. First, § 111 provides that a state tax on the pay of a federal employee must not "discriminate against the … employee because of the source of the pay." 4 U.S.C. § 111(a). Second, to determine whether a state tax scheme violates § 111, this Court applies the two-step framework set forth in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Third, under *Davis*, a state tax violates § 111 if (1) it imposes "a heavier tax burden on [federal retirees] than is imposed on [state retirees]," and (2) that inconsistent treatment is not "justified by significant differences between the two classes." State Br. 16 (quoting *Davis*, 489 U.S. at 815-16).

Nonetheless, the State's brief contradicts these fundamental premises at every turn.

First, the State argues that § 111 prohibits only state taxes that unduly interfere with the federal government, and that it does not give federal employees an individual right against discrimination. State Br. 17-18, 22-37. But *Davis* rejected this very argument, *see* 489 U.S. at 814-15, and § 111 expressly prohibits "discriminat[ion] against [federal] employee[s]."

Second, the State argues that there is no § 111 violation so long as the discriminatory tax applies to enough voters to impose a "political check" on excessive taxation. State Br. 32-36. But in *Davis*, the dissent made this precise argument, and the Court rejected it. 489 U.S. at 815 n.4.

Third, the State urges that the *first* step of *Davis* requires Dawson to show that he is more comparable in various respects to the exempt state retirees than to other, non-exempt retirees. State Br. 38-51. But *Davis* places the burden on *the State* to show at step *two* that its inconsistent tax treatment is justified by significant differences between the state and federal classes. 489 U.S. at 815-17.

Finally, the State says that its discriminatory tax scheme is justified by differences between federal retirees and the exempt state retirees in the amount of benefits received, participation in social security, and retirement plan contribution rates. State Br. 51-57. But the State's tax scheme draws no such lines. West Virginia law denies Dawson the exemption solely because he is a federal retiree rather than a member of one of the plans described in § 12(c)(6), which are open only to state workers. W. Va. Code § 11-21-12(c)(6). And as *Davis* explained, "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits" but "on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817.

The State barely tries to show that its tax scheme does not "discriminate against [federal] employee[s] because of the source of the[ir] pay." 4 U.S.C. § 111(a). Instead, its basic argument is that it has a free pass to discriminate because it is not discriminating in favor of *all* state retirees, but only some of them. The argument is irreconcilable with the law and with common sense, and this Court should reject it.

ARGUMENT

I. THE STATE'S TAX SCHEME TREATS FEDERAL RETIREES WORSE THAN STATE RETIREES BECAUSE OF THE SOURCE OF THEIR PAY.

The State concedes that the first step of the *Davis* test simply asks whether the challenged tax scheme imposes "a heavier tax burden on [federal retirees] than is imposed on [state retirees]." State Br. 16 (quoting *Davis*, 489 U.S. at 815-16). Where a state tax scheme does so, the Court proceeds to the second step. *Id.* Despite its concession, however, the State attempts to rewrite the first step to justify the result below. The attempt fails.

A. Section 111 Prohibits Discrimination Against Federal Retirees, Regardless Of Whether The Discrimination Interferes With Government Operations.

The State's principal argument is that § 111 is intended solely to "protect [the federal government's] operations from undue interference" and "is not an individual right [of federal employees] to avoid less-favorable tax treatment." State Br. 23, 24 (internal quotation marks omitted); *see id.* at 17-18, 22-37. In the State's view, § 111 allows states to discriminate against federal employees based on the federal source of their income, so long as the discriminatory taxation is not so exorbitant as to unduly interfere with the operations of the federal government. *See id.* at 23-24.

The State's inadministrable "government operations" theory is contradicted by the text of § 111 and irreconcilable with this Court's precedents.

1. Section 111 says that a state tax on the pay of a federal officer or employee must not "discriminate *against the officer or employee* because of the source of the pay." 4 U.S.C. § 111(a) (emphasis added). The State argues that this language does not give federal employees "an individual right to avoid less-favorable tax treatment." State Br. 24; *see also id.* at 22 ("Individual employees benefit from this immunity, but Section 111 is not defined by reference to them."). Yet the text makes clear that § 111 *is* defined by reference to individual employees and gives each employee a right to be free from discrimination. The statute prohibits "discriminat[ion] against the [federal] officer or employee"—not just discrimination against the federal government (much less "undue interference" with federal operations).

2. The State casts its government interference theory as an interpretation of the first step of *Davis*. *Id.* at 17. But *Davis*—like § 111 itself—is focused on discrimination against federal employees, not interference with federal operations. The State accepts that the first step asks whether the tax scheme "imposes 'a heavier tax burden on [those who deal with the federal government] than is imposed on [those who deal with the state].'" *Id.* at 16 (quoting *Davis*, 489 U.S. at 815-16). The way to answer that question is to compare how the state tax scheme treats federal retirees to how it treats state retirees. The *Davis* test does not ask whether the state tax scheme causes "undue interference" with the federal "government['s] operations." *Id.* at 23 (quoting *Davis*, 489 U.S. at 814).

Indeed, the State's "undue interference" language comes from a passage of *Davis* that *rejected* the State's precise argument. Michigan argued in *Davis* that "the

purpose of the immunity doctrine is to protect governments and not private entities or individuals," and that "so long as the challenged tax does not interfere with the Federal Government's ability to perform its governmental functions, the constitutional doctrine has not been violated." 489 U.S. at 814. This Court disagreed, explaining that "it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine." *Id.*

3. The State's reading is further refuted by this Court's application of the doctrine in § 111 cases.

Davis never so much as hints that Michigan's decision to exempt its own retired employees from the tax applicable to federal and private-sector retirees caused "undue interference" with federal operations, and there is no reason to suppose that it did. The Court did not discuss, for example, whether Michigan's discriminatory taxation of federal retirees made it more difficult for the federal government to hire employees there, or forced the government to pay its Michigan employees a premium to compensate for the state tax. Indeed, the Court did not even say what tax rates Michigan imposed on federal retirees, much less that those rates were exorbitant enough to threaten federal operations. Rather, consistent with the test it announced, the Court considered only whether Michigan imposed a heavier tax burden on federal retirees than on state retirees. 489 U.S. at 815-16.

Similarly, the Court in *Barker v. Kansas* invalidated a tax scheme that discriminated against federal

military retirees. 503 U.S. 594 (1992). On the State's theory, the Court could not have reached that result without first concluding that the tax unduly interfered with the operations of the U.S. military. Yet *Barker* is silent on that point. *Jefferson County v. Acker* also says nothing about interference with federal operations—rather, it upheld the challenged tax scheme because it taxed federal judges just like state judges, rather than taxing pay from federal sources more than pay from state sources (as in *Davis* and this case). 527 U.S. 423, 442-43 (1999).

The State also says that *Davis* and *Barker* cannot foreclose the State's government operations theory of step one because that step was undisputed in those cases. State Br. 20, 26, 30. But the very fact that those cases treat step one as undisputed actually *undermines* the State's theory, because Michigan and Kansas *did* argue that their tax schemes did not interfere with federal operations. *See* Brief for Appellees, *Davis*, 489 U.S. 803 (No. 87-1020), 1988 WL 1025812, at *47 ("[T]here is nothing in the record to demonstrate undue interference with the one government by imposing on it the tax burdens of the other or to demonstrate that the Michigan Income Tax Act is aimed at or threatens the efficient operation of, the federal government." (internal quotation marks and citation omitted)); *id.* at *43-48; Brief for Respondents, *Barker*, 503 U.S. 594 (No. 91-611), 1992 WL 511872, at *37-39. The Court expressed no disagreement with the factual premises of those arguments. Rather, it rejected their legal premise (which the State would now revive) that "so long as the challenged tax does not interfere with the Federal Government's ability to perform its governmental

functions, the constitutional doctrine has not been violated." *Davis*, 489 U.S. at 814.

While it finds no support in the opinion of the Court, the State's focus on the "political process" as a safeguard against discrimination and on the tax scheme's treatment of private-sector retirees could have been pulled straight from the one-Justice dissent in *Davis*. *Compare id.* at 818-21 (Stevens, J., dissenting), *with* State Br. 18, 32-36. The Court directly rejected this mode of analysis, 489 U.S. at 815 n.4, and should decline the State's invitation to resurrect it. *See also* Pet. Br. 29-30.

4. Finding no support in this Court's § 111 precedents, the State relies on cases that did not concern § 111 or discriminatory taxation. State Br. 22-26. Those cases all upheld *nondiscriminatory* taxes. They do not offer a standard for determining whether a tax is discriminatory. Certainly none of them indicates that even a discriminatory tax should be upheld if it does not unduly interfere with federal operations. And several of the cases say (consistent with § 111 and the case law interpreting it) that a discriminatory tax is ipso facto invalid.[1]

---

[1] *See James v. Dravo Contracting Co.*, 302 U.S. 134, 158 (1937) (upholding "nondiscriminatory local taxation"); *Helvering v. Gerhardt*, 304 U.S. 405, 420 (1938) (upholding "nondiscriminatory [federal] tax" on state employees' income); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 495 (1958) (upholding state tax where "[t]here was no discrimination against the Federal Government … or those with whom it does business" *and* "no crippling obstruction of any of the Government's functions"); *United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982) ("state taxes on [federal] contractors are constitutionally invalid if they discriminate against the Federal Government, or

The State places special emphasis on dicta from *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939). State Br. 24, 25. *Graves* overruled cases prohibiting even the nondiscriminatory state taxation of federal employees' pay. *See* 306 U.S. at 486-87. As *Davis* explains, § 111 "codified the result in *Graves*" by consenting to such *nondiscriminatory* taxation. *Davis*, 489 U.S. at 812. But *Graves* does not go beyond upholding nondiscriminatory taxes. It does not say that *discriminatory* taxation is ever permissible. That is why *Davis* draws its two-part test not from *Graves* but from *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960)—which never mentions *Graves*. *See Davis*, 489 U.S. at 815-16. In short, the State's precedents on nondiscriminatory taxation provide no guidance for this case.

5. Finally, the State points to a single sentence from § 111's legislative history. State Br. 25. The same sentence was before the Court in *Davis*. *See* 489 U.S. at 819 n.1 (Stevens, J., dissenting). But "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Id.* at 808 n.3 (opinion of the Court). Section 111 unambiguously protects federal employees from discriminatory taxation,

---

substantially interfere with its activities," but "New Mexico … is not discriminating here"); *South Carolina v. Baker*, 485 U.S. 505, 523, 527 (1988) (upholding "a nondiscriminatory federal tax on the interest earned on state bonds" and explaining that "States … can tax any private parties with whom [the United States] does business … as long as the tax does not discriminate against the United States or those with whom it deals"); *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 848-49 (1989) ("There is no claim … that the tax discriminates").

regardless of whether the discrimination interferes with federal operations.

B. The State's Tax Scheme Is Discriminatory On Its Face.

The State contends that it is not discriminating against federal retirees by denying them the § 12(c)(6) exemption because "no federal retirees … draw benefits from any of the retirement plans Section 12(c)(6) names." State Br. 38. But that *is* the discrimination: The State's tax scheme literally "discriminate[s] against" federal law enforcement retirees—and in favor of the State's own retirees—"because of the source of the pay." 4 U.S.C. § 111(a).

First, the exemption is expressly source-based. Income from the § 12(c)(6) plans receives a full exemption, while income from other retirement plans (including federal plans) is taxed. Pet.App.2a-3a. Thus, the tax scheme discriminates "because of the source of the pay." 4 U.S.C. § 111(a).

Second, this source-based discrimination is "discriminat[ion] against [federal] employee[s]." *Id.* The State does not permit federal employees to participate in the § 12(c)(6) plans. Those plans are *state* sources open to *state* employees only. They are run and funded by the State, and the income they provide is compensation for state employment. An exemption that is restricted to income from state sources that are themselves restricted to state employees is inherently an exemption for state employees only. The State's tax scheme thus

"discriminate[s] against" federal employees "because of the [federal] source of the pay." 4 U.S.C. § 111(a).[2]

Indeed, the exemption struck down in *Davis* operated just like § 12(c)(6): It exempted "benefits received from a public retirement system of or created by an act of this state." 489 U.S. at 806 n.2 (quoting Mich. Comp. Laws § 206.30(1)(f)(i) (Supp. 1988)). The West Virginia and Michigan tax schemes are *identical* in the manner in which they discriminate against federal retirees because of the source of their pay. The only difference is that the Michigan law favored *all* state retirement plans whereas § 12(c)(6) discriminates in favor of only *some* state plans. But that distinction does not change the outcome under § 111.

C. The State Is Not Free To Discriminate In Favor Of Its Retirees Simply Because It Does Not Discriminate In Favor Of All Of Them.

The State claims to have found a loophole in § 111 that gives it a free pass to discriminate so long as it does not discriminate in favor of *all* of its workers—that is, so long as it taxes some of its workers as much as it taxes federal workers. That cannot be right.

On the State's theory, step one of *Davis* requires Dawson to show that he is "similarly situated" to the exempt state retirees and, moreover, that he is *more* similar to them than to all non-exempt state retirees. State Br. 38-42. The State says that Dawson is not

---

[2] Cases upholding tax classifications that are not "arbitrary or invidiously discriminatory," State Br. 39 (quoting *United States v. City of Detroit*, 355 U.S. 466, 473 (1958)), are therefore inapposite.

similar to the exempt retirees because he is not a member of an exempt state plan. *Id.* at 38, 45. It adds that, even if he is similar to them, he is not *more* similar to them than to all state retirees in non-exempt plans—some of whom are identical to the exempt retirees in all other respects. *Id.* at 38, 45-51. The State's argument implies that, because no federal retiree is eligible for either the favored or the disfavored state plans, it might be *impossible* for Dawson—or any other federal retiree—to establish a § 111 claim, even though the State's tax scheme is facially discriminatory. *See id.* at 51 ("Because West Virginia does not treat all state and local law enforcement retirees the same—*even some who held the exact same job*—petitioners have not shown that Mr. Dawson was treated differently than similarly situated state retirees.").

1. *Davis* offers no such loophole. As the State elsewhere acknowledges, step one merely asks whether the tax scheme "imposes 'a heavier tax burden on [federal retirees] than is imposed on [state retirees].'" *Id.* at 16 (quoting *Davis*, 489 U.S. at 815-16). This step is satisfied where, as in both *Davis* and this case, a state's tax laws exempt pay from state retirement plans while taxing the federal plaintiff's retirement pay with no non-source-related basis in state law for the inconsistent treatment.

There is no doubt that "any notion of discrimination assumes a comparison of substantially similar entities." *Id.* at 42 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)). But that comparison is the point of step *two* of *Davis*, which puts the burden on the State to show that "the inconsistent tax treatment is directly related to, and justified by, 'significant

differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383); *see also id.* at 815-17 (rejecting differences suggested by Michigan); *Barker*, 503 U.S. at 598 (addressing Kansas' "six proffered distinctions"). If step one included a "similarly situated" analysis, then step two would be superfluous.

In *Barker*, where federal military retirees challenged a tax scheme that exempted both state and federal civilian retirees, the Court never considered whether the plaintiffs were "similarly situated" to the favored state retirees. *See* 503 U.S. at 596 n.1. On the State's view, the plaintiffs should have lost at step one, because members of the military are not similar to state workers. But the Court, satisfied that Kansas was indeed imposing a heavier tax burden on the federal plaintiffs than on its own retirees, proceeded to step two. *Id.* at 598-600, 605.

In *Jefferson County*, by contrast, the challenged tax scheme was facially neutral. The classes of taxpayer subject to state licensing requirements, and thus entitled to the county tax exemption, were not defined by reference to state or federal sources of income. *See* 527 U.S. at 458-64 (Breyer, J., dissenting) (listing the exempt classes). As a result, state judges were taxed the same as the federal judges, and "federal employees [we]re at least proportionately represented among the" exempt taxpayers. *Id.* at 442-43 & n.12 (opinion of the Court). The Court accordingly upheld the tax, while warning that "[s]hould … County authorities take to exempting state officials while leaving federal officials … subject to the tax, that would indeed present a starkly different case." *Id.* at 443.

The State also seeks support from a Title VII case, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). State Br. 42 & n.3, 49 n.4. But *Burdine* is inapposite, for it did not involve facial discrimination. Rather, it addressed the *McDonnell Douglas* procedure for demonstrating that a discriminatory motive caused an employer's *facially neutral* action. 450 U.S. at 250-56. If *Burdine* had involved facial discrimination like this case—say, if the plaintiff's employer had created a pension plan open only to men and then denied her benefits because she was not a member—then it would have been an open-and-shut case.

2. The State's loophole also relies on its assertion that a § 111 plaintiff has no claim unless the plaintiff is *more* similar to the exempt state retirees than to the non-exempt ones. State Br. 41-42, 48-50. That notion is irreconcilable with this Court's § 111 precedents and with discrimination law in general.

The *Davis* analysis never asks whether the plaintiff is more similar to the exempt state workers than to other, non-exempt state workers. Even at step two, where the State bears the burden, the question is only whether there are significant differences between the federal workers and the *exempt* state workers that justify the inconsistent treatment. *Davis*, 489 U.S. at 816. If the differences between those classes are insignificant, then the State loses. *Id.* at 817; *Phillips Chemical*, 361 U.S. at 386-87. It does not matter whether some *non-exempt* state worker is even *less* different from the plaintiff in some respect.

Consider a comparable hypothetical under Title VII: An employer's official policy gives higher pay to men

with beards longer than four inches. A female worker challenges this facial discrimination. On the State's theory, her inability to show that she is more similar to the favored long-bearded male employees than the short-bearded male employees (who receive no special treatment) would insulate the discriminatory policy from challenge. But no court would hesitate to hold it invalid. The dispositive question is whether the employer is discriminating against the plaintiff *because of her sex*. It is. The policy denies her the pay because she is not a long-bearded man, a clear instance of sex discrimination. The policy *also* denies the pay to short-bearded men, but that is not why it denies the pay *to the plaintiff*, for she is not a short-bearded man. And whether she is more similar to the short-bearded men in *other* ways unconnected to the official criteria is irrelevant to whether this is sex discrimination. Even if she were more similar to the long-bearded men in these other respects, she still would not get the pay, because of her sex. Thus, the employer cannot escape liability for sex discrimination simply because it does not discriminate in favor of *all* men.

The same logic holds here. The state tax scheme denies Dawson the exemption for just one reason: because he is not a member of an exempt state plan. That is a clear instance of source-based discrimination. True, the State also denies the exemption to state retirees in other, non-exempt state plans. But that cannot explain why it denies the exemption to Dawson: His problem is not that he is in the wrong state plan, but that he is a federal retiree and therefore ineligible

for *any* state plan.[3] The State also suggests that Dawson is more like the non-exempt state retirees in *other* ways, and cites the trivial technical details of his federal plan. But these supposed similarities have nothing to do with the line drawn by state law, which makes membership in a favored state plan the sole criterion for the exemption and would thus deny the exemption to members of *any* federal plan, even if that plan's details were identical to those of the exempt state plans.

The State's framework should also be rejected because it would be inadministrable. Answering the metaphysical question of whether a given federal employee is "more similar" to one similar state worker or to another requires a weighing of innumerable attributes of each class. The State's own discussion of the technicalities of the various retirement plans shows that the framework is incoherent. By contrast, the straightforward question of whether the state tax code applies different rules to federal versus state taxpayers is far better suited to judicial determination—and more consistent with the statutory task of determining whether a larger tax burden on a federal employee is "because of the source of the pay." *See also* Pet. Br. 30-32 (discussing the benefits of bright-line rules).

3. The State's argument fails even on its own terms. To support its comparison of Dawson's federal plan (FERS) to one of the non-exempt state plans

[3] The State says that Dawson is like the non-exempt state retirees because they too are not members of the exempt state plans. State Br. 45. But it could just as well be said that he is more like the *exempt* retirees because they too are not members of the *non-exempt* state plans.

(PERS), the State cherry-picks technical details of the plans without discussing whether those details distinguish those plans from the exempt plans or making any attempt to explain *why* those particular details should matter under § 111. State Br. 45-46. They do not matter. Section 12(c)(6) would deny Dawson the exemption regardless of the details of his federal plan, simply because it is a *federal* plan and therefore not one of the exempt state plans. And the details of FERS say nothing about what plan he would be in if he were a state worker; in that counterfactual, he would be ineligible for FERS and its details would be irrelevant. Picking over the details of FERS reveals nothing about whether the State is discriminating against Dawson because of the federal source of his income.

The State also compares Dawson to non-exempt state law enforcement retirees, State Br. 48-49—even though it has already conceded that there are no material differences between Dawson's duties as a U.S. Marshal and "the powers and duties of the state and local law enforcement officers listed in" § 12(c)(6). *Id.* at 48 (quoting Pet.App.22a). This argument, too, fails even on its own terms.

The State first says that Dawson may be more similar to sheriffs (who "typically" do not receive the exemption) than to deputy sheriffs, because federal law gives U.S. Marshals and their deputies "the same powers which a *sheriff* of the State may exercise." *Id.* (quoting 28 U.S.C. § 564). The argument is triply defective. First, West Virginia law empowers deputy sheriffs to "perform and discharge any of the official duties" of a sheriff, W. Va. Code § 6-3-1(a)(4), so a federal officer's authority does not make him *more*

similar to a sheriff than to a deputy sheriff. Second, the State ignores the ways in which sheriffs are *less* similar to federal law enforcement officials than deputy sheriffs are, such as the fact that only sheriffs are elected officials. And third, a sheriff actually *is* eligible to participate in the tax-exempt Deputy Sheriff Retirement System (DSRS) if that sheriff was first a deputy sheriff. W. Va. Code § 7-14D-24. Dawson was previously a deputy sheriff (State Br. 12), so he is more similar to the sheriffs who are eligible for the exemption than to any who are not.

The State also notes that deputy sheriffs hired before DSRS was created in 1998 were given the choice of whether or not to transfer to DSRS and obtain the exemption. State Br. 49. But the point is that they were all *offered* that opportunity, whereas Dawson and other federal employees were not. Even if some state workers fail to take advantage of a discriminatory exemption that is offered to them, it is still a discriminatory exemption. In any case, the State has offered no reason to doubt that Dawson would have transferred to DSRS if he had still been a deputy sheriff in 1998.[4]

II. THE DISCRIMINATORY TAX SCHEME IS NOT JUSTIFIED BY SIGNIFICANT DIFFERENCES BETWEEN THE CLASSES.

The second step of the *Davis* test requires the State to show that its inconsistent taxation of state and

[4] The State's argument about remedies, State Br. 50-51, misconceives the scope of this litigation. The Dawsons are the only plaintiffs in this case, and issues that could be raised by other, hypothetical lawsuits are not before this Court. The remedy that the Dawsons seek is simply to be treated like the state retirees who benefit from source-based discrimination.

federal retirees is justified by significant differences between the classes. 489 U.S. at 815-17. The State cannot do so, because the differences it proposes are irreconcilable with the line actually drawn by § 12(c)(6), inconsistent with the State's tax scheme taken as a whole, and too insignificant to justify discrimination against federal employees.

1. The State contends that its discrimination is justified because its exempt retirees differ from federal retirees in total benefits received, eligibility for social security, and the contribution rates required by their retirement plans. State Br. 53-55. But the State's laws do not determine eligibility for the exemption by reference to those factors. Rather, eligibility turns solely on whether the taxpayer is a member of one of the state plans described by § 12(c)(6). And a state cannot justify a facially discriminatory tax scheme by pointing to differences unrelated to the criteria that it actually uses to determine who is exempt.

In *Phillips Chemical*, Texas attempted to justify its discriminatory taxation of lessees of federal land on the ground that the federal land was different from land leased by Texas itself in terms of "size, value, or number of employees involved." 361 U.S. at 384. The Court rejected the argument because "the classification erected by [Texas law] is not based on such factors" but on the identity of the lessor. *Id.*

Similarly, in *Davis*, Michigan pointed to the difference in the retirement benefits received by state versus federal employees, asserting that state retirees' benefits were "significantly less munificent than those offered by the Federal Government." 489 U.S. at 816.

The Court rejected this rationale as inconsistent with the line actually drawn by Michigan law:

> A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees.

Id. at 817. The same is true here: If the State truly intended to account for differences in retirement benefits, social security eligibility, or contribution rates, then § 12(c)(6) would discriminate by reference to those attributes.

2. A closer look at the whole of the State's tax scheme makes clear that differences in retirement benefits, social security eligibility, and contribution rates do not account for who receives the exemption.

The State argues that the "lower benefits" received by state retirees in the exempt plans justify discrimination against federal retirees. State Br. 54. But many exempt state retirees in fact receive higher benefits than federal retirees—including Dawson.[5] *See Davis*, 489 U.S. at 817 (making the same point). For example, the average monthly benefit for newly retired members of Trooper Plan A, which is covered by § 12(c)(6), was $5,534 in 2010. J.A. 112. Dawson's monthly benefit that year was just $4,852. J.A. 204.

[5] At times, the State compares its exempt retirees to Dawson in particular rather than federal law enforcement retirees as a class. State Br. 54, 56. Under *Davis*, however, the question is whether the State's inconsistent tax treatment is "directly related to, and justified by, 'significant differences between the *two classes*.'" 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383) (emphasis added).

And new retirees in the State's non-exempt PERS plan received only $1,485 on average that year, further confirming that § 12(c)(6) is not about providing a tax exemption to retirees with lower benefits. J.A. 112.

The State's argument that state retirees' ineligibility for social security justifies its discrimination fares no better. State Br. 54. The State neglects to mention that DSRS retirees, who receive the § 12(c)(6) exemption, *are* eligible for social security. J.A. 33, 38; Pet.App.23a n.2. In any event, ineligible state retirees saved money by not paying into social security in the first place, so their ineligibility does not justify giving them a discriminatory exemption on top of those savings.

Finally, the State argues that the exempt state plans' higher contribution rates—for instance, 8.5% for DSRS—justify discriminatory taxation. State Br. 54, 56. The argument is incoherent even in theory: If a higher contribution rate is linked to higher retirement benefits, then those higher benefits compensate the retiree for the higher rate, and giving him the further compensation of a discriminatory exemption is unjustified. And if the higher contribution rate is *not* linked to higher benefits, then from the worker's perspective his pay has been cut. The State suggests that the exemption is justified because it compensates for this lower pay, but *Davis* squarely rejects the notion that a state may give its workers a discriminatory exemption in lieu of giving them a pay raise. 489 U.S. at 815 n.4; *see* Pet. Br. 28.

Even if it made theoretical sense, the State's contribution rate argument would fail on the facts. The State does not extend the exemption to other state

plans with the same or higher rates, which shows that its tax scheme has nothing to do with giving a special exemption to retirees who paid the highest contribution rates. J.A. 63, 93 (giving contribution rates of 10.5% for JRS and 8.5% for EMSRS). The State itself acknowledges that it "must apply financial or structural distinctions [between plans] evenhandedly." State Br. 55 (citing *Davis*, 489 U.S. at 817). And it concedes that a "permissible" distinction would distinguish "the *state* retirees who receive a total tax exemption from the state retirees who do not." *Id.* (citing U.S. Br. 19). The State's own concessions thus demonstrate that its proffered "meaningful" differences were in fact contrived post hoc for this litigation. *See also* U.S. Br. 15.

3. The supposed differences that the State has cherry-picked are not "significant" enough to "justify" its discrimination. *See Davis*, 489 U.S. at 815-17. The State's argument is that the exemption promotes "an internal accounting calculus between the State and its employees." State Br. 56. That may be convenient for the State, but "[t]he State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." *Davis*, 489 U.S. at 816; *see also Phillips Chemical*, 361 U.S. at 383-84. Perhaps the State's "internal accounting calculus" justifies the compensation bundles (salaries, contribution rates, retirement benefits, and taxation) that it gives to *its own* workers. State Br. 56. But it cannot justify tax discrimination against *federal* employees like Dawson, who do not receive compensation from the State. The State has not carried its burden of showing that its "inconsistent tax

treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383).

Nor could it. The three differences that the State points to boil down to how much money goes into its workers' pockets. At the end of the day, the State's argument is simply that the exempt workers have less favorable compensation packages (which include salaries, contribution requirements, social security eligibility, and retirement benefits) than federal workers do. State Br. 56. As discussed above, the assertion is factually suspect. But even if it were accurate, it would not justify sourced-based discrimination. *Davis* recognized that differences in the amount of benefits cannot justify such discrimination. 489 U.S. at 817. The same logic applies equally to other differences in the classes' compensation packages.

After all, § 111 does not authorize states to pursue income equality for federal workers relative to state workers through taxes that discriminate based on the source of the income. Even if federal workers receive more generous compensation, states have no license to expropriate that federal generosity in order to equalize it with state compensation. If more generous compensation packages for federal workers constituted "significant differences between the two classes" that could "justify" a tax scheme that discriminates based on the source of the income rather than the amount of each individual worker's compensation, then the clear prohibition of § 111 would be practically annihilated.

The Dawsons request only what § 111 promises: that the State "treat [them] … as well as it treats those with whom it deals itself." *Phillips Chemical*, 361 U.S. at 385.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
SUPREME COURT LITIGATION CLINIC
WVU Law Center
One Law Center Drive
Morgantown, WV 26506

John M. Allan
JONES DAY
1420 Peachtree St., N.E.
Suite 800
Atlanta, GA 30309

David E. Cowling
6527 Lakehurst Avenue
Dallas, TX 75230

Lawrence D. Rosenberg
Counsel of Record
Victoria Dorfman
Mark C. Savignac
Chris Pagliarella
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
ldrosenberg@jonesday.com

Meghan Sweeney Bean
JONES DAY
150 W. Jefferson Street
Suite 2100
Detroit, MI 48226

Counsel for Petitioners

NOVEMBER 15, 2018