

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAWSON, ET UX.,)
)
 Petitioners,)
)
 v.) No. 17-419
)
 DALE W. STEAGER, WEST VIRGINIA)
)
 STATE TAX COMMISSIONER,)
)
 Respondent.)

Pages: 1 through 74

Place: Washington, D.C.

Date: December 3, 2018

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -

JAMES DAWSON, ET UX.,)
 Petitioners,)
 v.) No. 17-419

DALE W. STEAGER, WEST VIRGINIA)
 STATE TAX COMMISSIONER,)
 Respondent.)

- - - - -

Washington, D.C.

Monday, December 3, 2018

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

1 APPEARANCES:

2

3 LAWRENCE D. ROSENBERG, ESQ., Washington, D.C.; on
4 behalf of the Petitioners.

5 MICHAEL R. HUSTON, Assistant to the Solicitor General,
6 Department of Justice, Washington, D.C.; for
7 the United States, as amicus curiae, supporting
8 the Petitioners.

9 LINDSAY S. SEE, West Virginia Solicitor General,
10 Charleston, West Virginia, on behalf of the
11 Respondent.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	LAWRENCE D. ROSENBERG, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	MICHAEL R. HUSTON, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	21
9	ORAL ARGUMENT OF:	
10	LINDSAY S. SEE, ESQ.	
11	On behalf of the Respondent	32
12	REBUTTAL ARGUMENT OF:	
13	LAWRENCE D. ROSENBERG, ESQ.	
14	On behalf of the Petitioners	69
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-419,
5 Dawson versus Steager.

6 Mr. Rosenberg.

7 ORAL ARGUMENT OF LAWRENCE D. ROSENBERG
8 ON BEHALF OF THE PETITIONERS

9 MR. ROSENBERG: Mr. Chief Justice, and
10 may it please the Court:

11 The State's exemption violates Section
12 111 and this Court's precedents because it
13 facially discriminates based on the source of
14 the compensation, as only retirement benefits
15 from state retirement plans are exempted, and
16 the State cannot show any significant
17 differences between retired employees of the
18 U.S. Marshals Service and the exempted state
19 retirees because the State concedes that their
20 job duties are the same.

21 This Court should reverse.

22 JUSTICE SOTOMAYOR: What do we do with
23 the fact that the job duties of marshals
24 overlap with the two categories of the state?
25 They overlap with the people paying less tax

1 and with other law enforcement agents who pay
2 more tax.

3 So how do we go about identifying --

4 MR. ROSENBERG: So --

5 JUSTICE SOTOMAYOR: -- who they're
6 most similar to?

7 MR. ROSENBERG: -- two responses,
8 Justice Sotomayor. The first is the inquiry
9 isn't who they're most similar to. Under
10 Davis, so long as the plaintiffs here, the U.S.
11 Marshals, are similar to the exempted state
12 employees, that's enough.

13 That's because Section 111 provides an
14 individual right against discrimination for
15 federal employees. And so, if there is a close
16 case, for example, if there really were
17 identical state employees, some who were
18 exempted and some who weren't, that case would
19 go to the federal employee because the -- there
20 would still be discrimination because some
21 state employees that are similarly situated are
22 treated more favorably than the federal
23 employees.

24 JUSTICE KAVANAUGH: But what if there
25 are two groups of state employees, let's say

1 group 1 and group 2, and they're similarly
2 situated to each other --

3 MR. ROSENBERG: Uh-huh.

4 JUSTICE KAVANAUGH: -- and then a
5 group of federal -- federal employees who are
6 similarly situated to both group 1 and group 2?

7 In that situation, does the State have
8 to treat the federal employees the same as the
9 most favored group, if group 1 has a favorable
10 tax treatment, or does the State in that
11 example have discretion since the federal
12 employees are similarly situated to both group
13 1, who gets the favorable, and group 2, who
14 does not?

15 MR. ROSENBERG: Justice Kavanaugh, the
16 State has to treat the federal employees the
17 same as the favored state employees. The State
18 has discretion to treat its own employees
19 differently for various reasons, including
20 arbitrary reasons, but once it does so through
21 state taxation, the State has to treat the
22 federal employees as well as the favored state
23 employees.

24 JUSTICE ALITO: I -- I don't follow --

25 CHIEF JUSTICE ROBERTS: What if --

1 JUSTICE ALITO: -- why that is so. If
2 the -- if you have two categories of state
3 employees and they're very similar and they're
4 treated differently, and then you have a
5 category of federal employees who are similar
6 to both of those categories of state employees,
7 wouldn't you have to determine which group of
8 state employees are most -- are more similar to
9 the federal employees? Otherwise, it -- I
10 don't see how it's discrimination.

11 MR. ROSENBERG: So, Justice Alito, I
12 don't think you have to determine that because,
13 again, it's an individual right against
14 discrimination. If this Court looks to the
15 precedents like the ICC and railroad precedents
16 from the 1930s, looks at Alabama versus CSX,
17 when you're actually trying to figure out who
18 you're comparing it to, you look at -- at who
19 -- the language of the statute, the purpose of
20 the statute, the context of the statute.

21 And here, again, it --

22 JUSTICE KAGAN: But an
23 antidiscrimination provision doesn't
24 necessarily require a most favored nation
25 clause. And as I understand your answers to

1 Justices Kavanaugh and Alito, you're saying
2 there's a most favored nation requirement.

3 MR. ROSENBERG: Justice Kagan, two
4 responses. One, typically, you don't have a
5 most favored nation requirement, as you note.
6 Two, I'm not sure it's most favored here. It's
7 only that where the State has drawn sort of an
8 arbitrary distinction and it's got effectively
9 identically situated state employees, one that
10 gets the exemption, one that doesn't, and the
11 federal employee is similar to both, that this
12 sort of comes in where the -- the tie here goes
13 to the federal government.

14 CHIEF JUSTICE ROBERTS: Have any --

15 JUSTICE GINSBURG: Can we get away
16 from the academic two -- two classes and
17 compare the two state groups? I take it that
18 police officers, firefighters, and others are
19 exempt. A few are not exempt.

20 Within the state category, the state's
21 two category, which one is the larger -- which
22 is -- one is more like the federal marshals?

23 MR. ROSENBERG: Justice Ginsburg, the
24 larger group, as far as we can tell and the
25 record reflects, is the state law enforcement

1 personnel who are exempt. It includes all
2 state troopers, it includes all deputy
3 sheriffs, for example.

4 If we're actually comparing
5 Mr. Dawson, he's plainly most like a deputy
6 sheriff. Under West Virginia law, sheriffs and
7 deputy sheriffs have the same authority. The
8 only non-exempt individual that the State has
9 tried to compare Mr. Dawson to is, in its brief
10 in this Court, it tried to compare him to
11 sheriffs. But sheriffs and deputy sheriffs
12 have the same job duties, have the same
13 authority under West Virginia law.

14 Mr. Dawson, in fact, was a deputy
15 sheriff in West Virginia before he became a
16 deputy United States Marshal.

17 CHIEF JUSTICE ROBERTS: Well, but
18 there -- he -- he was different things. He's
19 not just somebody who was working in the
20 Marshals Service. He was for a while. And
21 then maybe you have an argument with respect to
22 the other state. But he was also the U.S.
23 Marshal --

24 MR. ROSENBERG: Right.

25 CHIEF JUSTICE ROBERTS: -- and that is

1 not like a cop on the beat. I would suspect
2 he's not accompanying fugitives when they move
3 from one -- I mean prisoners when they move
4 from one place to another. His job is, you
5 know, more policy, administrative. Does some
6 of his retirement money come from his time as
7 U.S. Marshal?

8 MR. ROSENBERG: I believe some of it
9 does, but some also from when he was a deputy.

10 CHIEF JUSTICE ROBERTS: Well, what do
11 you do in that situation? I mean, we have
12 different comparators on the state side, but he
13 himself embodies, at least arguably, two
14 entirely different types of job.

15 MR. ROSENBERG: He embodies multiple
16 jobs, but his basic duties as a law enforcement
17 officer didn't change. He had the same
18 responsibilities as a law enforcement officer.
19 Whether he was doing the same thing on a daily
20 basis I don't think is the proper inquiry.

21 CHIEF JUSTICE ROBERTS: I don't think
22 that's right. His responsibilities didn't
23 include tracking down fugitives or the other
24 things that somebody, you know, at the -- at
25 the sort of operational level of the service

1 does.

2 MR. ROSENBERG: What --

3 CHIEF JUSTICE ROBERTS: I mean, would
4 you say the Attorney General would qualify in
5 this situation? He has law enforcement duties.

6 MR. ROSENBERG: Probably not, but --
7 but that -- that's a different circumstance.
8 On pages -- in the JA, pages 176 --

9 CHIEF JUSTICE ROBERTS: Well, how
10 different? I mean, a marshal is appointed by
11 the President, right?

12 MR. ROSENBERG: Yes.

13 CHIEF JUSTICE ROBERTS: And -- and
14 confirmed by the Senate, right?

15 MR. ROSENBERG: That's true.

16 CHIEF JUSTICE ROBERTS: Well, that
17 seems to me a little bit different than --
18 than, as I said, the -- you know, someone
19 who's, day one, starting at the bottom level at
20 the Marshals Service.

21 MR. ROSENBERG: Well, he did work for
22 quite a while as a deputy United States
23 Marshal.

24 CHIEF JUSTICE ROBERTS: Well, yeah,
25 but I'm wondering whether or not we should be

1 parsing out if part of his retirement seems
2 similar and part not.

3 MR. ROSENBERG: Well, I think it's all
4 similar because, as a United States Marshal,
5 even presidentially appointed, he still had the
6 same law enforcement authority as the covered
7 state employees.

8 And this is the problem with the
9 State's test. The -- the inquiry shouldn't be
10 is he identical to certain state employees; is
11 -- it's whether he's similar enough that
12 discriminatory tax treatment is justified.

13 And the State can't justify
14 discriminatory tax treatment just based on
15 whether he has some additional administrative
16 responsibilities, but his basic law enforcement
17 function is the same.

18 And the -- perhaps the most important
19 point, Mr. Chief Justice, is that the State has
20 repeatedly conceded throughout the litigation
21 that the job duties are the same.

22 CHIEF JUSTICE ROBERTS: Is the head of
23 the Marshals Service covered? In other words,
24 not one of the state marshals but the -- the
25 head of the Marshals Service?

1 MR. ROSENBERG: The U.S. Marshals
2 Service?

3 CHIEF JUSTICE ROBERTS: Yes.

4 MR. ROSENBERG: I -- I believe so.

5 CHIEF JUSTICE ROBERTS: So his -- his
6 duties are the same as somebody who's on his
7 first day?

8 MR. ROSENBERG: Oh, you mean the head
9 of the Marshals Service nationally?

10 CHIEF JUSTICE ROBERTS: Yeah.

11 MR. ROSENBERG: Well, I don't know
12 that that person's in West Virginia, but I
13 think there'd be an argument that he was --

14 CHIEF JUSTICE ROBERTS: Well, he lives
15 somewhere.

16 MR. ROSENBERG: Yeah. I mean, I think
17 there may be an argument that he is. I think
18 that's a different case. It would depend on
19 the actual facts of the job duties. I -- I
20 think, in this case, whether it was deputy U.S.
21 Marshal, U.S. Marshal, or when he was a deputy
22 sheriff, pages JA 176 and 177 show that
23 Mr. Dawson had the same job duties.

24 The State's never contested that.
25 And, indeed, as a U.S. Marshal, Mr. Chief

1 Justice, Mr. Dawson testified at those pages
2 that there were two critical similarities among
3 others. One was that he was entrusted to
4 enforce West Virginia law as a U.S. Marshal.

5 And the second was that, for fugitive
6 task forces, he could deputize the very same
7 state troopers and deputy sheriffs who are
8 exempted under the West Virginia plan. So --

9 JUSTICE SOTOMAYOR: Could I go back to
10 the two categories?

11 MR. ROSENBERG: Yes.

12 JUSTICE SOTOMAYOR: Let's assume
13 they're identical.

14 MR. ROSENBERG: Uh-huh.

15 JUSTICE SOTOMAYOR: All right? And I
16 know that you're arguing that they're not, and
17 this may be an issue, if we get to it, to
18 remand, okay? But assuming they were, and if
19 the difference was as articulated by
20 Respondents here, one paid more than the other
21 to the pension plan, so they -- the State
22 wanted to be more generous to those who paid
23 more, as I think is the case here.

24 Why is that any different in kind to
25 our suggestions in Davis and in other places

1 that, if a scheme relied on the benefits paid
2 out, anybody who made less than \$15,000 a year
3 in retirement benefits was exempt, but someone
4 who made more wasn't, why is that different in
5 kind to this situation?

6 MR. ROSENBERG: Several responses,
7 Justice Sotomayor.

8 First, it's different in kind here
9 because it's not the line the State drew. The
10 State didn't draw a line based on benefits.
11 They could have. They could have done a
12 facially neutral scheme that perhaps exempted a
13 certain contribution rate or a certain benefit
14 payout, but that's not what they did here.

15 JUSTICE KAGAN: What difference does
16 that make? I mean, let's assume a situation
17 where the State says state employees who are in
18 one of these four plans, and let's further
19 assume that everybody in those four plans
20 receives a lesser benefit or, alternatively,
21 contributes a greater percentage of their
22 salary to the plan.

23 So, you know, it's -- it's -- it's --
24 the State has just decided, look, this is a
25 convenient way of identifying these people,

1 but, in fact, all the people in these plans
2 have that characteristic, which makes them
3 different from the federal employees, that they
4 contribute more or that they receive less in
5 other benefits.

6 MR. ROSENBERG: Because that's still
7 facially discriminatory, Justice Kagan. If the
8 State had actually done a neutral criterion and
9 set benefit levels, even if no federal
10 employees then qualified, it would give the
11 federal government the opportunity to redo its
12 benefit plan so that they could potentially
13 qualify under the state exemption.

14 Here, there's no such opportunity, so
15 it's still facially discriminatory. And that's
16 what Section 111 prohibits. The State could
17 have done a number of things here, but it
18 didn't.

19 The things that the State proffers in
20 its brief as the supposedly distinguishing
21 financial characteristics, the State concedes
22 they have to be applied even-handedly to be
23 able to be legitimate differentiators between
24 tax winners and tax losers.

25 But, if you look at the record, pages

1 JA 28 and 29, the chart there, it makes it
2 abundantly clear that none of these are
3 even-handedly applied even within the state.
4 So there are some plans with higher benefits
5 that are exempted. Some not. There are some
6 plans where there's entitlement to Social
7 Security that are exempted. Some not. Some
8 higher benefit rates.

9 JUSTICE KAGAN: Well, I guess my
10 hypothetical was meant to take that off the
11 table.

12 MR. ROSENBERG: Sure.

13 JUSTICE KAGAN: To say assuming that
14 that's not true --

15 MR. ROSENBERG: Right.

16 JUSTICE KAGAN: -- and the State
17 really has categorized precisely as -- as to
18 benefit levels or contribution levels but not
19 in those terms, you're -- you know, not in
20 those terms, and you're saying that in itself
21 is impermissible?

22 MR. ROSENBERG: Right, because it's
23 facially discriminatory. And -- and it doesn't
24 provide any opportunity for any federal
25 employees to ever be part of it. It would be

1 different if it were done as a facially neutral
2 law.

3 In fact, most facially neutral laws,
4 regardless of whether there are a meaningful
5 number of federal employees who qualify or not,
6 would likely pass scrutiny under Section 111.
7 The first and critical problem here is that
8 this is facially discriminatory.

9 The second problem is what I
10 mentioned, that the line the State drew is
11 based on job duties. The job duties are
12 identical. And the financial characteristics
13 the State proffers were not even-handedly
14 applied to the State and plainly weren't
15 involved in the line that the State actually
16 drew.

17 The State also argues that the -- the
18 lower court opinion was correct,
19 notwithstanding Davis, because only a fairly
20 narrow category of State employees are
21 exempted. But this argument was expressly
22 rejected in Davis, and it can't carry the day
23 here.

24 In Jefferson County, for example, this
25 Court looked at a fairly narrow category, state

1 judges versus federal judges, and only upheld
2 that taxation scheme because the federal judges
3 and state judges were treated the same.

4 And, indeed, that exemption was
5 facially neutral because there were people who
6 got the exemption who were state employees and
7 people who didn't who were state employees, and
8 the same, some federal employees got the
9 exemption and some didn't.

10 The State also argues that there has
11 to be undue interference with the federal
12 government. But that also has never been the
13 test. That was rejected in Davis as well.
14 Certainly, if you look at United States versus
15 Mexico in Footnote 11, the Court makes very
16 clear that you could have interference with a
17 government or discrimination, either of which
18 invalidates the scheme under Section 111.

19 Finally, the State argues that we've
20 talked about that you have to compare to the
21 most comparable individual. We've already
22 mentioned that it really isn't that inquiry.

23 The inquiry is one of similarity. Is
24 -- is the state retiree or employee similar
25 enough to the federal retiree or employee that

1 there shouldn't be discrimination?

2 JUSTICE BREYER: Suppose what --
3 suppose that the person who's drafting this
4 bill for the state is trying to -- they think
5 that the police officers and the others really
6 -- they aren't paid very much and it's a
7 particularly dangerous job, and you know those
8 characteristics, so -- so they think they
9 should give them a tax break.

10 And then someone says, well, what
11 about the federal marshals, they do the same
12 thing? And then the person replies: Yes, they
13 do, but they get paid a lot more, you see.

14 And so the feds pay them a lot more
15 than we pay the state people. So that's why
16 we're doing it. Okay? Is that okay or not?

17 MR. ROSENBERG: It -- it's not for
18 three reasons, Justice Breyer. First, it's
19 facially discriminatory. Secondly, the motive
20 itself doesn't matter, as this Court said in
21 Davis. And, third, the State could always
22 extend that benefit to federal employees.

23 For example, in this case, Section
24 12(c)(5), which is the broader exemption that
25 only gets a small -- a smaller exemption, was

1 specifically extended to federal employees two
2 weeks after the Davis decision, but the State
3 didn't extend 12(c)(6), and, therefore, it's
4 facially discriminatory.

5 If I could reserve the rest of my
6 time, Mr. Chief Justice.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Huston.

10 ORAL ARGUMENT OF MICHAEL R. HUSTON
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONERS

13 MR. HUSTON: Mr. Chief Justice, and
14 may it please the Court:

15 We agree with Petitioner that this
16 West Virginia tax exemption here is facially
17 discriminatory. And that, I think, is the
18 critical feature that really gets to the heart
19 of some of the questions that several Justices
20 have posed this morning.

21 It's instructive, I think, to focus on
22 the difference between the tax that the Court
23 struck down in Davis and Barker and the one
24 that the Court upheld in Jefferson County.

25 JUSTICE ALITO: Could you just say

1 what you mean by "facially discriminatory"?

2 MR. HUSTON: Absolutely, Your Honor.
3 A tax is facially discriminatory when it's not
4 open to any federal employees ever, regardless
5 of what job duties they perform or what their
6 benefit level is or what their contribution
7 rate is.

8 And that was true of the statute --
9 the tax statutes in Davis and Barker. It's the
10 opposite of the structure that the Court upheld
11 in Jefferson County.

12 JUSTICE KAGAN: If that's the problem,
13 why were you suggesting that we remand this?
14 It would just seem as though we should decide
15 it if that's the problem.

16 MR. HUSTON: Well, I -- I think that
17 even when a tax is facially discriminatory,
18 Your Honor, there is going to be a second
19 question, which is, is this particular employee
20 actually suffering discrimination?

21 And I think it gets to one of the
22 questions that you were asking my friend in
23 support of Petitioner, which is there can -- if
24 you imagine, for example, that Mr. Dawson was a
25 federally employed teacher, as opposed to a law

1 enforcement officer, this tax exemption is
2 still facially discriminatory. But Mr. Dawson
3 in that hypothetical is not himself suffering
4 discrimination. He's the wrong plaintiff.

5 And I also think that that's --

6 JUSTICE GINSBURG: So what would --
7 what precisely would you say would be open on
8 remand? You're -- you're suggesting not
9 reverse but vacate and remand. Remand so that
10 the West Virginia court could -- could consider
11 what?

12 MR. HUSTON: Well, the West Virginia
13 state court never undertook the analysis of
14 whether Mr. Dawson is materially different from
15 the federal employees -- excuse me, from the
16 state employees who benefit from the exemption.

17 Now, if the Court feels like it has
18 all the information it needs, West Virginia has
19 now come forward in its brief and put forward
20 several purported justifications that it thinks
21 can sustain its law, we agree with Petitioner
22 that we don't think that the record bears out
23 any of those.

24 And if the Court thinks it has enough
25 to decide the case, we're comfortable with --

1 JUSTICE KAGAN: I -- I guess what I
2 don't --

3 CHIEF JUSTICE ROBERTS: Well -- well,
4 it's, I think, related to your point. Where
5 are you on the dialogue I had with Mr.
6 Rosenberg? Does -- are the benefits that, say,
7 your -- your boss, the Attorney General,
8 receives exempt?

9 MR. HUSTON: Your Honor --

10 CHIEF JUSTICE ROBERTS: Think
11 carefully before answering.

12 (Laughter.)

13 MR. HUSTON: The government is much
14 more interested in the courts, lower courts
15 applying the correct legal rule than it is in
16 exactly where a state court draws the line.

17 CHIEF JUSTICE ROBERTS: Well, I'm
18 sure. But I'm more interested in how -- how
19 you're going to carry out that division. In
20 other words, say facially discriminatory, but
21 with respect to what duties, what category of
22 duties?

23 MR. HUSTON: Well, again, I think this
24 -- it depends on how the state has drawn the
25 class. States are entitled to have whatever

1 kind of exemptions they want. They just have
2 to make them available on equal terms to
3 federal employees. And that's exactly the
4 structure of this tax in Jefferson County, and
5 it's the reason why the Court upheld the tax in
6 Jefferson County.

7 All federal judges, all state judges
8 were treated alike. Other persons and other
9 employees, attorneys, were -- were treated
10 alike, whether it was state and federal. And I
11 think that that means that even if the
12 distinctions that the State is drawing are
13 somewhat arbitrary, that is fine as long as the
14 State is making an effort to afford equivalent
15 treatment to state and federal employees alike.

16 JUSTICE KAGAN: But I guess what I --
17 I don't understand about -- about what you
18 think ought to be left open on remand is, if
19 you think that the prime evil of this
20 legislation is that it's not facially neutral,
21 that a federal employee can't be a part of
22 these state plans, so could never be treated in
23 the same way, then all the State justifications
24 like these people get fewer benefits, these
25 people pay more in -- in -- in -- make more of

1 a contribution, all of that, do I understand
2 your position correctly, is just irrelevant?

3 The -- you know, the -- the state
4 court could find that these people get less
5 benefits and that these people, the state
6 employees, make a greater contribution, and --
7 and yet not be able to rule for the State. Is
8 that correct?

9 MR. HUSTON: It's not quite correct,
10 Your Honor, in this respect: The critical
11 question is, is this plaintiff suffering
12 discrimination on the basis of source of pay?

13 And so, to return to your hypothetical
14 from the last -- from the last session, if you
15 imagine that it turns out that the State
16 actually has selected only those plans where
17 the employees, say, contribute less than
18 5 percent to their retirement and it has put in
19 the, you know, disfavored category all
20 employees who contribute more than 5 percent,
21 if Mr. Dawson is in the disfavored class, if it
22 turns out that he lines up with the class of --
23 of workers that West Virginia is not affording
24 the benefit, he has not suffered
25 discrimination.

1 Now, at the time we wrote the --

2 JUSTICE KAGAN: No, but even if he is
3 in the favored class, you're saying he's not --
4 no, I -- I -- okay, I get it. I get it.

5 JUSTICE KAVANAUGH: What if he's --
6 what if he's equivalent to both the favored and
7 the disfavored class? Then what?

8 MR. HUSTON: If -- if there's really
9 no basis at all on which to -- to make a
10 distinction between who the state has selected
11 and -- and who it has disfavored -- now, again,
12 we don't think there are really any cases like
13 that, but in that -- in that sort of unusual
14 situation, I do think Mr. Dawson would be
15 entitled to the exemption.

16 And the reason is that the State would
17 not be able to meet its burden to defend its
18 facially discriminatory law.

19 JUSTICE ALITO: Let me try this out.
20 Let me try this out and see if this is close to
21 what you're saying.

22 Where you have a variety of categories
23 of state employees and some get the benefit in
24 question and some don't get the benefit in
25 question, so the first step would be you

1 compare all the categories of -- the relevant
2 categories of state employees and you identify
3 the characteristics that distinguish the
4 employees in the favored class from the -- from
5 the characteristics of those in the disfavored
6 class. And once you've done that, then you ask
7 whether the federal employees have those
8 characteristics. That would be step two.

9 But the -- the -- I think even when
10 you do that, you will very -- unless this --
11 unless the states get to do just about what any
12 -- whatever they want, you will have situations
13 where the federal employees are pretty similar
14 to the ones in the favored class, but they're
15 not identical.

16 And then you've got a judgment call.
17 And I don't quite know how to resolve that.
18 Now is this -- is this right? Is that -- or am
19 I off base with this?

20 MR. HUSTON: Your Honor, I think you
21 have it exactly right. And I understand that
22 there are going to be, in some cases at the
23 margins, difficult questions, where it -- it's
24 hard to apply the test that the Court set out
25 in Davis.

1 We're much more concerned about the
2 states actually undertaking that effort in good
3 faith. And what we -- the problem that we have
4 with the West Virginia Supreme Court's opinion
5 is that it never even attempted that inquiry.
6 It never attempted to sort out whether these
7 federal employees are more similar to the state
8 employees who get the exemption.

9 JUSTICE SOTOMAYOR: I'm sorry --

10 JUSTICE KAGAN: Could you --

11 JUSTICE SOTOMAYOR: -- can you go back
12 and answer Justice Kagan's earlier question,
13 which is, what are -- what are we remanding
14 for? I -- I do think that there's been a
15 concession that the job duties of federal
16 marshals are similar to the exempted class.

17 So what's left? You -- you said
18 something to her that confused me. I thought
19 you said, if the State had actually
20 differentiated their employees on the basis of
21 the contribution they made or the benefits they
22 received, then the scheme would be okay if the
23 federal marshals didn't -- well, they would
24 never make the contribution, so -- but maybe
25 they have different benefits.

1 MR. HUSTON: Right. That's what the
2 State has argued, Your Honor. They attempted
3 to say that the -- the logic of their
4 exemption, although it's facially
5 discriminatory, actually turns on things like
6 contribution rates or whether the employees
7 contribute to Social Security.

8 If the record supported that argument
9 -- and I think that some of the -- several of
10 those arguments are being made for the first
11 time in this Court. If the record supported
12 that, the State could potentially defend its
13 law on this basis. Now we don't --

14 JUSTICE KAGAN: Well, what -- what
15 could -- what could -- this is going to the
16 exact same thing. What could West Virginia say
17 on a remand and what could the West Virginia
18 court find on a remand in -- in -- in defense
19 of a decision for West Virginia?

20 MR. HUSTON: If --

21 JUSTICE KAGAN: Like, how would that
22 opinion read, a pro West Virginia opinion on
23 remand?

24 MR. HUSTON: If the -- if the West
25 Virginia Supreme Court found that, although the

1 tax that's at issue here is facially
2 discriminatory, the state actually drew the
3 line to track a neutral criterion like
4 contribution rates or something. Everybody who
5 contributes more than 6 percent gets the
6 benefit. Nobody who contributes less than
7 6 percent --

8 JUSTICE KAGAN: Oh, well, that's --
9 that was exactly my hypothetical.

10 MR. HUSTON: Right.

11 JUSTICE KAGAN: And your friend
12 answered it the other way. And I -- I -- I
13 thought that he answered it the other way
14 because he said, even if they drew the line in
15 exactly that way, the problem with this statute
16 is that the federal employees can't get into
17 the state plans.

18 MR. HUSTON: It is facial -- it is
19 still facially discriminatory. It's still
20 facial -- it's still problematic, and states
21 should not draw their laws that way. But, if
22 it turns out that the employee -- Mr. Dawson
23 matches up exactly on that logic that the State
24 has offered with the disfavored employees as a
25 matter of state law, he is the wrong plaintiff.

1 He is not suffering discrimination.

2 CHIEF JUSTICE ROBERTS: Well, but that
3 seems to me that you're looking at the State's
4 purpose, and I thought the whole point was that
5 you look just to the source of income.

6 MR. HUSTON: Well, you certainly do
7 look to the source of income, Mr. Chief
8 Justice, but I think you also look at is --
9 Davis said and -- and cases like Barker said,
10 we're going to look at what is the
11 justification the State has put forward for its
12 law. And if they've actually put forward a
13 neutral justification, that's fine.

14 States have a great deal of
15 flexibility in what they can do with taxation.
16 The one thing they can't do is discriminate and
17 treat -- by treating federal employees worse
18 than their state counterparts.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. See.

23 ORAL ARGUMENT OF LINDSAY S. SEE
24 ON BEHALF OF THE RESPONDENT

25 MS. SEE: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 This Court's decision in Jefferson
3 County demonstrates whatever else is required
4 at the first stage in the intergovernmental tax
5 immunity doctrine, at minimum, the challenging
6 taxpayer must show that he is treated different
7 from similarly-situated state employees. And
8 this Court consistently looks beyond labels, in
9 the words of Jefferson County, beyond the
10 state's name tag, to see how that challenger is
11 actually treated.

12 In this case, Petitioners have not
13 made out their -- that showing because
14 Mr. Dawson is treated the same as
15 similarly-situated state employees. This case
16 is Jefferson County, where the Court used the
17 first step of the analysis.

18 JUSTICE SOTOMAYOR: I'm sorry, the
19 court below didn't say that. The court below
20 said -- I think the court below very explicitly
21 said the two -- exempt category and federal
22 marshals were similar.

23 MS. SEE: The --

24 JUSTICE SOTOMAYOR: And they didn't
25 even look at the comparison at all. They said

1 the purpose was not to discriminate; so, hence,
2 there was no discrimination.

3 MS. SEE: Your Honor, it is true that
4 the state trial court found that federal
5 marshals have similar job duties to those who
6 receive the exemption. The court did not find
7 that they do not also have similar job duties
8 to those who do not receive the exemption.

9 JUSTICE SOTOMAYOR: That's right. It
10 didn't find that, so you can't rely on that?

11 MS. SEE: No, Your Honor.

12 JUSTICE SOTOMAYOR: You have to -- you
13 have to defend its judgment. And I thought it
14 based it on saying, if your purpose is to
15 benefit your state employees, that's not
16 discrimination.

17 MS. SEE: Yeah --

18 JUSTICE SOTOMAYOR: Now that's a hard
19 line for me to accept because discrimination is
20 treating someone differently. Whether it's
21 because you want to benefit someone else or to
22 -- or -- or harm another person, to me, seems
23 irrelevant.

24 MS. SEE: Well, Your Honor, it is true
25 that the West Virginia Supreme Court focused on

1 the first step of the analysis, and, there, the
2 court did undertake a totality of the
3 circumstances review.

4 But it was simply taking this Court at
5 its word in *Davis*, where this Court said that
6 the intergovernmental tax immunity doctrine is
7 coextensive with Section 111 and that that
8 doctrine incorporates the entire history and
9 purpose of that doctrine.

10 And from the time of *McCulloch*, that
11 doctrine prevents discrimination against the
12 federal government. So the West Virginia
13 Supreme Court focused on that particular aspect
14 of the first step inquiry.

15 JUSTICE GINSBURG: The statute
16 prohibits discrimination against an officer or
17 employee because of the source of pay or
18 compensation. The statute doesn't concern are
19 you burdening the federal government. The
20 statute is quite explicit. What it prohibits
21 is discrimination against an employee because
22 of the source of pay or compensation.

23 MS. SEE: Yes, Your Honor, it's
24 discrimination based on source of pay or
25 compensation. And we know that discrimination

1 has to include discrimination that at some
2 level interferes with government functions
3 because, again, that language in Section 111,
4 this Court said, must be interpreted
5 coextensive with the historical constitutional
6 doctrine.

7 JUSTICE ALITO: Well, if that were
8 true, then this would apply only when the
9 discrimination -- the alleged discrimination
10 affects a lot of employees, because other than
11 -- in fact, how many employees would have to be
12 affected before it would have any kind of
13 tangible effect on the finances of the federal
14 government?

15 MS. SEE: No, Your Honor. And that's
16 why we say that this is part of the analysis of
17 the first step, but in most cases, the more
18 common similarly-situated analysis will sort
19 out these cases. That analysis determining who
20 the appropriate class is, that is another way
21 of determining the sorts of discrimination
22 that's at issue here.

23 CHIEF JUSTICE ROBERTS: Well, I think
24 that -- I understand your point is because
25 there's discrimination, it's not necessarily

1 discrimination on the basis of source, if you
2 can find some other basis. And then you'd say
3 it's based on the amount of contributions or
4 whatever.

5 But I understand Davis to talk -- to
6 say you don't get to do that. If you're
7 saying, if you're federal, you don't get it,
8 they're going to assume that it's based on
9 something that's -- that's not permissible.

10 I mean, if your -- if that -- if your
11 basis is something else, you ought to say that.

12 You ought to say where -- where, you
13 know, people who have this percentage
14 contributions or whatever, and if the federal
15 employees don't qualify, they don't qualify.
16 But as soon as you say it's -- you have to have
17 the state retirement plan and not the fed's, I
18 think the idea in Davis was, well, you kind of
19 presume that that's based on discrimination
20 based on, as they say, the source of income.

21 MS. SEE: No, Your Honor, that --
22 that's not the appropriate analysis here,
23 because, in Phillips Chemical, which this Court
24 relied on heavily in Davis, this Court
25 expressly rejected the argument that a fact

1 that on its face a statute targeted in that
2 case specifically targeted those who dealt with
3 the federal government, that that was enough
4 without more to find discrimination.

5 Instead, the Court said the
6 appropriate analysis was to consider whether
7 the challenged taxpayer was, in fact, being
8 treated different from similarly-situated
9 employees. And, of course, in Phillips --

10 JUSTICE SOTOMAYOR: I think you're
11 having the problem I did from the beginning,
12 which is everybody breaks this down into two
13 steps, but it really is one step.

14 It -- it -- because you don't even get
15 to this inquiry unless state and federal
16 employees are being treated different. That
17 seems like a very light load to carry.

18 The question is, are they similarly
19 situated?

20 MS. SEE: Yes, Your Honor, that is the
21 --

22 JUSTICE SOTOMAYOR: And similarly
23 situated in the sense of can you differentiate
24 them on something other than the source of
25 payment?

1 MS. SEE: Correct, Your Honor. And
2 that's very clear under --

3 JUSTICE BREYER: I'm not sure. A
4 reason, I -- I think, it's you can't do this,
5 it seems to me, except in a very crude basis
6 because there -- there's dozens of differences
7 between state employees, federal employees.
8 They categorize them differently. They have
9 slightly different jobs.

10 If you're going to start looking at an
11 individual basis, you just don't know. So why
12 don't we take literally what it says? Is it
13 the source of income? Period.

14 I mean, did it come from the feds?
15 And if it does come from the feds, and they pay
16 less in roughly similar categories, you can't
17 get beyond roughly, that's the end of it. So
18 we don't see whether, in fact, the feds are
19 being paid more.

20 MS. SEE: No, Your Honor --

21 JUSTICE BREYER: We don't see, in
22 fact, whether there's some other thing that --
23 that distinguishes why you wanted to give this
24 break to the state police.

25 MS. SEE: No, Your Honor --

1 JUSTICE BREYER: You have here
2 virtually all the state police. They're in
3 this, so they have the right to it. It's not
4 just the state police. It's also the local
5 police. It's everybody in law enforcement
6 almost. And they can get into it and the feds
7 can't. Why isn't that just the end of it?

8 MS. SEE: Well -- well, Your Honor,
9 respectfully, I would dispute the premise
10 there. It's not true that most state law
11 enforcement officers are eligible for this
12 exemption.

13 JUSTICE BREYER: It's not?

14 MS. SEE: No.

15 JUSTICE BREYER: I had it actually
16 there was federal, there -- sorry, there were
17 the state people, the sheriffs, the head
18 sheriffs, the local policemen, that's where I
19 thought -- and it says -- I thought I read that
20 it said that they were eligible. They're not?

21 MS. SEE: Your Honor, it says that
22 they are eligible if they are part of a
23 specific retirement plan that applies to police
24 or firefighters.

25 JUSTICE BREYER: And who decides?

1 MS. SEE: Well, it's -- it's -- it's
2 the particular retirement plan they're part of.
3 So most --

4 JUSTICE BREYER: Who decides, whether
5 I am a firefighter or a local policeman, who
6 decides which plan I join?

7 MS. SEE: I -- I understand, Your
8 Honor.

9 JUSTICE BREYER: Who?

10 MS. SEE: It's -- it's --

11 JUSTICE BREYER: No, I don't
12 understand.

13 MS. SEE: Oh, I -- I'm sorry.

14 JUSTICE BREYER: I want an answer to
15 the question.

16 (Laughter.)

17 MS. SEE: I understand your question.

18 JUSTICE BREYER: Yeah.

19 MS. SEE: It's their particular
20 locality that decides.

21 JUSTICE BREYER: So the individual
22 policeman can't decide? It has to be a vote or
23 a -- a municipality?

24 MS. SEE: Yes, Your Honor, which is
25 true for many employees. They take the

1 retirement benefits that are available.

2 JUSTICE BREYER: So how many local
3 police are roughly in this program and how many
4 local police aren't?

5 MS. SEE: Your Honor, the State of
6 West Virginia Tax Department does not keep
7 those exact numbers. I wish I could give them
8 to you.

9 JUSTICE BREYER: You can't give them
10 to me at all?

11 MS. SEE: Well, what I can represent
12 to you is that, of the roughly 200 cities that
13 have separate police, only 30 of them have a
14 separate police retirement plan. The rest --

15 CHIEF JUSTICE ROBERTS: Well, but, I
16 mean, you've got to figure how -- how many. I
17 mean, if Charleston is one of the ones that
18 does, I mean, maybe 10 percent of them don't.
19 That statistic really doesn't tell us anything.

20 MS. SEE: Well -- well, Your Honor, it
21 does -- it does bring us back to the situation
22 where there are some employees who have
23 identical job descriptions who receive the
24 exemption and some who don't. That indicates
25 that there's something else that's doing the

1 dividing line in that statute.

2 CHIEF JUSTICE ROBERTS: Well, and to
3 get back -- this is pertinent, I think, to your
4 response to Justice Breyer and to me -- how do
5 you reconcile with your answer this language
6 from Davis?

7 In Davis, it said a tax exemption
8 truly intended to account for differences in
9 retirement benefits would not discriminate on
10 the basis of the source of those benefits, as
11 Michigan's statute does, whether it would
12 discriminate on the basis of the amount of
13 benefits received by individual retirees.

14 MS. SEE: Yes. First --

15 CHIEF JUSTICE ROBERTS: So that's why
16 I -- I mean, I'm concerned about the idea that,
17 yes, it says the source, is it federal or
18 state, but we really think it's something else.
19 And Davis seems to say you can't do that.

20 MS. SEE: Well, Your Honor, first, I
21 would note that that language comes at the
22 second step of the analysis, whether the burden
23 shifts to the state to find significant
24 differences between the state taxpayers.

25 But even so, the question would simply

1 be, what does the tax actually do on the
2 ground? This Court has said in Phillips
3 Chemical and in Jefferson County that the Court
4 looks beyond the particular labels.

5 In City of Detroit, this Court said
6 that's necessary in order to give due regard
7 for state taxing power.

8 JUSTICE ALITO: What are the
9 characteristics --

10 CHIEF JUSTICE ROBERTS: Well, here,
11 Phillips -- Phillips -- I'm sorry.

12 JUSTICE ALITO: No.

13 CHIEF JUSTICE ROBERTS: Phillips
14 Chemical said the same thing. There, it said
15 the argument was that federal land was taxed
16 differently because of its size, value, or
17 number of employees.

18 And what the Court said is the
19 classification erected by Texas law is not
20 based on such factors. And, therefore, it
21 rejected it.

22 MS. SEE: Correct. And that's because
23 Phillips Chemical said it's necessary to look
24 at the way that the actual tax draws the
25 distinction.

1 JUSTICE BREYER: Okay. So what is it?
2 What is it?

3 MS. SEE: Here --

4 JUSTICE BREYER: I mean, what is it
5 that the -- the 20 towns with the police and
6 the state sheriffs and the state deputy
7 sheriffs and all these different -- what is it
8 they do that the federal marshals don't do?

9 MS. SEE: Your Honor, the point of
10 commonality for those who receive the exemption
11 and those who don't is that they are state --
12 they are law enforcement officers who are part
13 of a retirement plan that is open exclusively
14 to law enforcement.

15 JUSTICE ALITO: That -- that can't be
16 --

17 JUSTICE BREYER: That sounds like
18 you're saying we discriminate on the basis of
19 source.

20 MS. SEE: No, Your Honor, because, to
21 -- to succeed at the similarly-situated
22 analysis, the State of West Virginia agrees
23 that if there were a retired federal law
24 enforcement officer who had a retirement plan
25 with similar characteristics, that that would

1 be enough to succeed at this stage.

2 JUSTICE BREYER: Yeah. But what you
3 say is let's look at the state plan here and
4 let's look at the federal plan. So you're
5 saying they're the same people. They do the
6 same thing. Is there discrimination?

7 And you just seem to me to say: No,
8 but the other side says, hey, they get a tax
9 break and we don't. Now that sounds like
10 discrimination. I mean, it may be justified or
11 whatever it is. But the question is, is there
12 discrimination? How do you explain that?

13 MS. SEE: The -- the question is
14 whether there is discrimination based on the
15 source of income. And that means whether the
16 fact that the federal government, as opposed to
17 the state, is signing retirement checks is the
18 dividing line. That's not the dividing line
19 here.

20 JUSTICE ALITO: Could you just
21 explain, what are the unique characteristics of
22 those who get the favorable treatment, the
23 characteristics that distinguish them from the
24 state employees who don't get it? What are the
25 characteristics that they -- they have? And

1 then we can see whether a marshal or a deputy
2 marshal has those characteristics.

3 MS. SEE: All of those characteristics
4 go to the particular retirement plan that
5 they're part of.

6 JUSTICE KAGAN: It's this benefits and
7 contributions?

8 MS. SEE: Benefits and contributions
9 is part of it, yes, Your Honor. Another part
10 of it is that their plans are only available to
11 law enforcement officers. And those sort of
12 plans raise particular funding considerations.

13 Law enforcement is a high-risk
14 profession, which means that it's more likely
15 that members of those plans are going to have
16 more benefits already.

17 JUSTICE ALITO: All right. Well --

18 JUSTICE KAGAN: Well, we can't
19 possibly -- I'm sorry.

20 JUSTICE ALITO: Deputy marshals have a
21 risk too.

22 MS. SEE: There are some deputy
23 marshals who are eligible for the exemption but
24 not all of them. And, yes, and so -- but the
25 distinction is the deputy marshals in West

1 Virginia who receive the exemption are those
2 whose retirements benefits come from a deputy
3 marshal only plan. The deputy marshals don't
4 --

5 JUSTICE ALITO: Why does that matter?

6 MS. SEE: It matters because the state
7 has decided that the particular funding
8 considerations of those plans warrant separate
9 tax treatment. And as long as the State's
10 reason is not based on whether someone is a
11 federal or a state employee, states have
12 incredibly broad --

13 JUSTICE BREYER: Ah, that's the nub of
14 this, it seemed to me, that -- that -- is it
15 the case that if the state never thought of
16 this, it wasn't against the marshals; it just
17 developed a system that meant that they have a
18 lot more money -- less money in their pocket
19 than comparable state.

20 Does that violate the statute? Now I
21 thought the answer to that question is yes, it
22 does violate the statute. Don't look into the
23 state's actual reasons; just look into whether
24 they end up with less money in their pocket and
25 they're just -- maybe you could say a

1 justification, but the justification can't be,
2 well, we have a set of complicated retirement
3 systems that pays the state people even more.

4 MS. SEE: Well, Your Honor, we -- we
5 agree that the State's -- the State's reason is
6 not the deciding line here. The deciding line
7 is what the State actually did.

8 And the way to do that, as Phillips
9 Chemical explains, is to look at the way that
10 the favored tax class is drawn.

11 JUSTICE KAGAN: So if I understand
12 what you -- what you're saying, I think you
13 suggested three characteristics of the members
14 of these plans, and one is that they receive
15 low benefits. Another is that they contribute
16 a very substantial portion of their earnings to
17 the plan. And the third, which I'm not sure I
18 understand, but your third is that the plan
19 itself is made up only of law enforcement
20 officers. Is that correct?

21 MS. SEE: Yes, Your Honor.

22 JUSTICE KAGAN: Now it seems to me
23 that we couldn't possibly do anything --
24 suppose -- even if you were right, that -- that
25 if the State showed all of that, I mean, we're

1 not in a position to rule in your favor here.

2 At the very most, you're entitled to
3 -- or at the very most, what we should do is
4 remand so that the state court could figure out
5 whether, in fact, the members of this state
6 plan, as compared to federal employees, receive
7 lower benefits, make higher contributions, and
8 are similarly in a -- you know, and -- and --
9 and don't share this characteristic of a
10 law-enforcement-only plan?

11 MS. SEE: Well, Your Honor, we agree
12 that if this Court -- if this Court believes
13 that the determination of the case turns on
14 those fact-specific inquiries, particularly on
15 the significant differences test, the West
16 Virginia Supreme Court did not reach them. So
17 State would agree that remand would be
18 appropriate to sort out those factual issues.

19 JUSTICE GINSBURG: But what happens to
20 --

21 JUSTICE KAGAN: So that is very
22 interesting because --

23 JUSTICE GINSBURG: -- the -- this was
24 not raised the first time around. Why should
25 you get a second chance?

1 MS. SEE: Well, Your Honor, it was
2 raised the first time around, both the
3 similarly-situated point and the step two
4 significant differences. At every stage in the
5 state court litigation, the parties argued that
6 these taxpayers were not similarly situated to
7 those who receive the exemption.

8 The West Virginia Supreme Court
9 focused on a separate aspect of the analysis,
10 focused on the doctrine's history and purpose.
11 If this Court rejects the analysis and it does
12 not feel that there's sufficient information in
13 the record to decide the case, then it should
14 allow the State to continue -- to continue its
15 argument back in the state courts on those
16 remaining arguments.

17 JUSTICE KAGAN: What -- what -- what
18 strikes me about the way this argument has
19 gone, it's a little bit unexpected for me, is
20 that you and the SG actually agree.

21 MS. SEE: We do, Your Honor, on most
22 parts.

23 JUSTICE KAGAN: Because you think that
24 the states should be able to prove that the
25 members of this plan are different from federal

1 employees, notwithstanding that the State has
2 made a non-neutral distinction. And, on the
3 contrary, Mr. Rosenberg thinks the fact that
4 the State has made a non-neutral facial
5 distinction is game over.

6 MS. SEE: Well, Your Honor,
7 respectfully, my friend's position for
8 Petitioners would be at odds with what this
9 Court has done before.

10 JUSTICE GORSUCH: Well, but, counsel
11 --

12 MS. SEE: This --

13 JUSTICE GORSUCH: -- I guess I'm
14 struggling with what Justice Kagan is. When we
15 interpret statutes, we usually start and maybe
16 finish with the plain language of them these
17 days. And the statute here says, if it
18 discriminates on the basis of source, game
19 over.

20 I look at the West Virginia statute
21 and it contains none of the subtleties that
22 West Virginia has, after the fact, imagined for
23 its statute. It says only state law
24 enforcement officers, period. It doesn't
25 describe the nature of their contributions or

1 anything else like that.

2 Why shouldn't that be the end of the
3 inquiry under a normal statutory interpretation
4 analysis where we don't bother looking at
5 secret purposes when the plain text is clear?

6 MS. SEE: Because, Your Honor, even
7 under that approach, Mr. Dawson, this
8 Petitioner, is not being treated different from
9 state employees. The fact that there may be
10 another hypothetical federal retiree who could
11 bring a claim, who could bring an argument that
12 his or her retirement plan looks very similar
13 to the retirement plans exempted under West
14 Virginia law, that may be a case for another
15 day.

16 But that still leaves the fact that
17 this Petitioner has not made out a claim that
18 he is being treated differently.

19 JUSTICE SOTOMAYOR: I'm sorry --

20 JUSTICE KAVANAUGH: Is that --

21 JUSTICE SOTOMAYOR: -- there's never
22 going to be an identical federal plan to an
23 identical state plan unless the state chooses
24 to model its plan on -- out of a federal plan.

25 This is an invitation to just throw

1 Davis away. All a state has to say is we're
2 going to favor our retirees because our plan is
3 structured in X way and the federal plan is
4 not. It makes no sense to me, what you're
5 saying.

6 MS. SEE: Well, no, Your Honor,
7 because we're not arguing that the Court needs
8 to look at all of the particular details of the
9 plan, but only what -- what is the broadest
10 point of commonality that sweeps in all of
11 those plans that receive the exemption and
12 those who don't.

13 And the State's position is that point
14 of commonality is that there are plans that are
15 available only to law enforcement officers.

16 That's all that this Court has to do.
17 And this Court may second-guess the wisdom of a
18 state giving a tax exemption based on that
19 criteria, but, respectfully, that's not a
20 decision for this Court and not one that the
21 government requests that it --

22 JUSTICE SOTOMAYOR: So, even if the
23 two plans are identical, merely because the
24 state chooses a police-officer-only plan,
25 that's enough of a difference to do away with

1 Davis?

2 MS. SEE: Yes, Your Honor, to the
3 extent that they are identical in terms of
4 benefits or -- or -- or the way that term of
5 service is concluded. Yes, that may be true
6 because those aren't the distinctions in the
7 statute.

8 JUSTICE SOTOMAYOR: Why isn't that
9 just plain source?

10 MS. SEE: It's not plain source
11 because, as the State agrees, if there were a
12 federal retiree who was also part of a
13 law-enforcement-only retirement plan, then they
14 would pass this first stage.

15 But that does not mean that that --
16 that that statute would automatically be struck
17 down, because the State would still have the
18 opportunity at the second stage of the analysis
19 to show that there are significant differences.

20 JUSTICE ALITO: Well, what would be
21 the argument for giving favorable treatment --
22 suppose we're just talking about categories of
23 state employees, and you have -- you have law
24 enforcement -- you have law enforcement
25 officers who are basically identical, but one

1 is in a law-enforcement-only plan and the other
2 is in a plan that includes other employees.
3 What would be the reason for treating those --
4 those differently?

5 MS. SEE: Well -- well, the reason, we
6 suggest, is because there are special funding
7 considerations when you have a retirement plan
8 that's only available to those in a high-risk
9 profession, such as law enforcement.

10 JUSTICE ALITO: Okay. Well, so now
11 you're saying it's funding considerations, but
12 it's not just the fact that they're -- they're
13 only law enforcement officers.

14 MS. SEE: No, Your Honor, I'm saying
15 that would be the justification for a state to
16 draw a line between law-enforcement-only and
17 something else. But the proper inquiry is to
18 look at the line in the statute and then to
19 take -- take the state statute at its word.

20 In this case, we give an exemption to
21 members of law-enforcement-only plans. If
22 there were a federal retiree who could raise
23 that claim, that person would be similarly
24 situated.

25 JUSTICE KAVANAUGH: In terms of job

1 duties --

2 MS. SEE: Yes, Your Honor.

3 JUSTICE KAVANAUGH: -- in terms of job
4 duties, is there a distinction that you see
5 between the favored state employees and the
6 disfavored state employees in terms of job
7 duties?

8 MS. SEE: Yes, Your Honor. Yes, Your
9 Honor, we believe there is. The example of a
10 sheriff is -- is the strongest example in this
11 record. Mr. Dawson didn't retire as a deputy
12 marshal. He retired as a full marshal. And
13 federal law says that the duties of a marshal
14 and a deputy for that instance are comparable
15 to the duties of a state sheriff, not a state
16 deputy sheriff. And the reality is the vast --

17 JUSTICE KAVANAUGH: And what are the
18 distinctions between the state -- again, just
19 on my question, the distinctions between the
20 state favored class and the disfavored state
21 class? I just want to --

22 MS. SEE: Well -- well, with respect
23 to sheriffs, most sheriffs, in fact, virtually
24 all state sheriffs in West Virginia, do not
25 receive the exemption. Most of them do not

1 because they are part of the general public
2 employees retirement system.

3 JUSTICE KAVANAUGH: How do their job
4 duties differ?

5 MS. SEE: Well, the job -- the job
6 duties are different. There are many other job
7 duties that this Court did not -- I'm sorry,
8 that the state court did not reach. Those
9 particular distinctions were not part of the
10 consideration.

11 So, if this Court believed that the
12 appropriate response is to look at job duties,
13 then, yes, West Virginia agrees that remand
14 would be appropriate to flesh out those
15 differences.

16 CHIEF JUSTICE ROBERTS: Most --

17 JUSTICE ALITO: Suppose a retiree --

18 CHIEF JUSTICE ROBERTS: No, go ahead.

19 JUSTICE ALITO: Suppose a retiree had
20 worked for 20 years as a deputy sheriff, one
21 year as a sheriff, and then retired. What --
22 what would that -- how would that employee be
23 treated?

24 MS. SEE: Well, if the employee had
25 worked -- worked for 20 years as a deputy

1 sheriff, let's assume that their deputy sheriff
2 retirement benefits had vested, they would have
3 the ability to receive those benefits. They
4 would have to stop receiving them while they
5 were a sheriff but could receive them later.

6 That particular employee would be able
7 to exempt the benefits from their time as a
8 deputy sheriff because they came from the
9 deputy sheriff plan, not any benefit --

10 JUSTICE ALITO: Okay. So then why
11 wouldn't the -- why wouldn't the answer be that
12 -- that Mr. Dawson is treated the same way?
13 For part of -- if there's a -- if his duty --
14 if he is similar to deputy sheriffs but not to
15 -- but also, you know, during the time when he
16 was a deputy marshal, why wouldn't the answer
17 be to treat him the same way, to break it down
18 that way?

19 MS. SEE: Because, Your Honor, I was
20 assuming for the purposes of that question that
21 this hypothetical deputy sheriff was part of
22 the deputy sheriffs' retirement system in West
23 Virginia. We don't know --

24 JUSTICE ALITO: Well, I don't know
25 where you're going with that --

1 MS. SEE: -- that's true.

2 JUSTICE ALITO: -- because suppose the
3 state -- the state has a -- all of its
4 employees are in one plan, okay, and the state
5 says those people get this benefit. And now
6 you have a federal employee who comes along,
7 and the state says, well, you don't get that
8 benefit because you weren't in the state plan.

9 I mean, you -- you think that's okay?

10 MS. SEE: We would say that employee,
11 yes, has made out a case that he or she is
12 being treated different than similarly-situated
13 state employees.

14 JUSTICE ALITO: Okay. So then I don't
15 know what you're -- where you're going with the
16 fact that it turns on whether you're in one
17 plan or another plan.

18 MS. SEE: It -- it turns on the
19 particular components of the plan.

20 JUSTICE ALITO: Yeah, the components
21 of the plan, but not the mere fact that you are
22 or are not a -- a member of that plan.

23 MS. SEE: Your Honor, it does depend
24 on whether someone is a member of the plan, but
25 in order to determine if a similarly-situated

1 federal employee is being treated different, we
2 have to look at what describes that plan. What
3 are those characteristics?

4 And if they were a federal employee
5 who could show that his or her retirement plan
6 had similar characteristics, then, yes, we
7 would agree that person's treated different
8 from similarly-situated employees.

9 JUSTICE GINSBURG: But, in fact, there
10 is no such -- we know what the federal
11 retirement plans are, and there's no retirement
12 plan like these four.

13 MS. SEE: Correct, Your Honor. And --
14 and that's --

15 JUSTICE GINSBURG: And you say -- and
16 you say that that's enough and it doesn't
17 matter that the job duties are identical. It
18 doesn't matter that there are many more law
19 enforcement officers covered -- given the
20 exemption than the ones left out in Virginia.
21 None of that matters as long as their -- the
22 source of the benefits of these discrete plans,
23 there is no such federal plan. End of case.
24 That's your position?

25 MS. SEE: Yes, Your Honor, that's what

1 this Court held in Jefferson County. There,
2 the federal taxpayers made an argument that it
3 was impossible for them to ever qualify for the
4 county exemption.

5 This Court said that was not enough to
6 strike that statute.

7 JUSTICE GINSBURG: I thought the Court
8 said in Jefferson County that state judges and
9 federal judges were treated the same.

10 MS. SEE: They did say they were
11 treated the same, and job duties was relevant
12 there because the statute drew distinctions
13 based on individuals who were members of
14 covered professions who did or did not pay
15 other state license fees. So that --

16 JUSTICE BREYER: I began to see this
17 as a different issue than I had initially
18 thought. So don't say I'm right if I'm wrong.
19 Okay?

20 MS. SEE: All right.

21 (Laughter.)

22 JUSTICE BREYER: And if I'm off base,
23 just say it. But the statute says you cannot
24 tax the pay of a -- or compensation of a
25 federal official if the tax -- unless the tax

1 does not discriminate because of the source of
2 the pay or compensation.

3 MS. SEE: Yes.

4 JUSTICE BREYER: Okay. So then we
5 have some money that the marshals get. And
6 they put that money into a federal fund, which
7 is a retirement fund. And the state in its
8 taxation discriminates against them, but not
9 because of their pay or compensation, but,
10 rather, because of the nature of the retirement
11 fund that they put it in.

12 Is that what you're saying?

13 MS. SEE: Yes, if the distinction is
14 based on the type of retirement fund, and,
15 again, the only reason that distinction matters
16 is because that's the distinction in the state
17 tax code.

18 And in Phillips Chemical, this Court
19 said that is the line the Court should look at.
20 How has the state drawn the favored class --

21 JUSTICE BREYER: Okay.

22 JUSTICE SOTOMAYOR: It's a simple --

23 JUSTICE BREYER: So where did I get --
24 I didn't -- for some reason, it's not
25 necessarily your fault, but I -- this is a

1 fairly simple point.

2 Look at the retirement fund, and if
3 that's the basis for the discrimination against
4 the federal employees, that's fine. That isn't
5 their pay or compensation.

6 And -- and that's what we should be
7 looking at?

8 MS. SEE: Your Honor, I would add to
9 that --

10 JUSTICE BREYER: Is that right?

11 MS. SEE: Yes, but I would add to
12 that.

13 JUSTICE BREYER: Then I didn't get
14 that out of the brief too well, but maybe
15 that's my fault. Okay.

16 MS. SEE: Well, if -- if the
17 distinction is that is a federal retirement
18 plan and that is the reason that someone is or
19 is not in the favored class, then that would be
20 discriminatory under the doctrine.

21 But that's not what this West Virginia
22 tax regime is doing, because the reality is
23 there are many state -- state retirees, over
24 98 percent, who are in the disfavored class.
25 And there are many state law enforcement

1 officers, some with identical jobs, who are
2 also in the disfavored class.

3 CHIEF JUSTICE ROBERTS: It seems to me
4 that Davis makes it very clear that that's not
5 a significant consideration. If you have a
6 small retirement benefit, and say this is
7 available for all people who do X, unless
8 you're paid from a federal plan, would that
9 violate Davis or not?

10 You have 99 percent of the state
11 employees are not eligible for it, but it says
12 if you're in this category, a tiny category,
13 you get the benefit, unless you're a federal
14 retiree.

15 MS. SEE: Well, Your Honor, the first
16 question would be whether the particular
17 challenger is, in fact, in that tiny category.

18 CHIEF JUSTICE ROBERTS: Yeah, but that
19 first question was not the one I asked. I
20 asked a different one, which is you argued
21 that, well, it depends on how many of the state
22 employees are eligible or not. And I thought
23 Davis said specifically it doesn't, it depends
24 upon the source.

25 So if it -- if it's five employees in

1 the state, and there's one who's a federal
2 employee, and your plan says these five get it
3 and no federal employee gets it, does that
4 violate Davis or not?

5 MS. SEE: Your Honor, in that case, it
6 probably would. And that's because we're not
7 saying that the sheer small number of employees
8 who would benefit or not matters. It's
9 relevant, though, because this tax regime
10 treats 98 percent of state employees different
11 from --

12 CHIEF JUSTICE ROBERTS: Well, you just
13 said it doesn't matter and then you tell me it
14 matters.

15 MS. SEE: Well, Your Honor, it matters
16 only because it's indication that the actual
17 dividing line in the state tax code is not
18 state versus federal. Something else is the
19 dividing line. Here, the dividing line is the
20 particular plans that they're part of. And
21 also, if this Court remands on the significant
22 differences standpoint, then the state would be
23 able to show that there are vastly different
24 contribution levels.

25 JUSTICE KAVANAUGH: On -- on job

1 duties, if -- if we conclude that that's most
2 significant, were Dawson's job duties similar
3 to the duties of the favored state employees?

4 MS. SEE: They were similar, yes, Your
5 Honor, but that does not end the inquiry
6 because they were just as similar to the
7 disfavored state law enforcement employees.

8 JUSTICE KAVANAUGH: Okay. And your
9 opposing counsel says in that circumstance
10 where you're similar to both the favored and
11 the disfavored state employees, that the state
12 is required to go with the favored state
13 employees as the treatment for the federal
14 employees, if you're following me. Why is your
15 opposing counsel wrong on that point?

16 MS. SEE: Because courts are never
17 required to turn a blind eye to evidence in the
18 record that shows that the comparison class a
19 plaintiff has brought forward is inappropriate.

20 JUSTICE KAVANAUGH: Well, why is it
21 inappropriate? That's the point. They're both
22 appropriate in that circumstance --

23 MS. SEE: Because --

24 JUSTICE KAVANAUGH: -- in the sense
25 that they're similarly situated in both the

1 favored and the disfavored. That's what you
2 just said, I think.

3 MS. SEE: Right, because it doesn't
4 show what -- what the actual dividing line is
5 in that case. We know the dividing line is not
6 between those who have certain job duties or
7 not, because a police officer who lives five
8 miles away from another police officer may have
9 vastly different state tax treatment with
10 identical job duties. That's not how the state
11 tax is drawing the distinction.

12 JUSTICE KAVANAUGH: But I think the
13 only way to be sure in that circumstance that
14 we're describing that you're not discriminating
15 against the federal employees is to be -- to
16 give them the treatment that the favored state
17 employees get.

18 If you give them the treatment that
19 the disfavored state employees get, you're
20 never going to be sure whether that's based on
21 discrimination against the federal government
22 or not. And that's what the statute seems to
23 target, making sure that there's not
24 discrimination against the federal employees.

25 MS. SEE: Your Honor, this Court has

1 never held a most favored taxpayer standard.
2 In fact, in Jefferson County, that was just as
3 true there, because there were many state
4 officers who received the exemption and did
5 not.

6 This Court found that the fact that
7 there were some who were like the federal
8 challengers there in the disfavored class, that
9 was enough to find that similarly-situated
10 taxpayers were, in fact, treated the same. No
11 matter what other issues may exist for another
12 day, for another federal employee, this one is
13 treated the same.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Four minutes, Mr. Rosenberg.

17 REBUTTAL ARGUMENT OF LAWRENCE D.

18 ROSENBERG ON BEHALF OF THE PETITIONERS

19 MR. ROSENBERG: I just have a few
20 points in rebuttal.

21 First of all, in response to the
22 question that Justice Breyer and the Chief
23 Justice posed at the end, this plainly is
24 discrimination based on the source. If you're
25 in the state plans, you get the exemption. No

1 federal plans get the exemption. That is
2 classic discrimination based on source.

3 Secondly, there is no reason for
4 remand. And I do think that the space between
5 me and my brother from the Solicitor General's
6 Office is actually much smaller than it
7 appears. What I think the Solicitor General
8 was saying is that there's no question that, at
9 step one of Davis, this is facially
10 discriminatory. It -- it violates the law.

11 The question is, are U.S. Marshals the
12 right plaintiffs? And before the State had
13 articulated its reasons for arguing that they
14 were, the government said maybe a remand would
15 be appropriate.

16 Here, however, we know what the state
17 has argued. The state has argued these
18 financial considerations that plainly are not
19 the line that the state drew. The record
20 itself, the Joint Appendix establishes that the
21 -- the factors that the state argues were not
22 even-handedly drawn.

23 In this circumstance, there is no
24 reason for a remand. Moreover, many of the
25 financial arguments that the state raised were

1 rejected.

2 JUSTICE SOTOMAYOR: Could you slow
3 down?

4 MR. ROSENBERG: I'm sorry.

5 JUSTICE SOTOMAYOR: You've got a lot
6 of generalities. Give me specifics.

7 MR. ROSENBERG: Sorry. Sorry. Okay.
8 Specifically what I was going to say is, if you
9 talk about the amount of compensation, where
10 the entitlement to Social Security, right, we
11 know that those are not even-handedly applied
12 because we know that some state plans that have
13 higher benefits get the exemption. Some don't.

14 We know that some entitlement to
15 Social Security gets the exemption. Some
16 don't. We know some higher contribution rates
17 get the exemption. Some don't. That's Joint
18 Appendix page 28 and 29. That chart shows that
19 clearly. Right? So we know that they weren't
20 the basis for the line that the state drew and
21 they're not even-handedly applied.

22 Moreover, many of those arguments were
23 raised in the circuit court, and the circuit
24 court rejected them and said Davis precludes
25 them because they're just ultimately an

1 argument about the amount of compensation.

2 And if the state were going to draw
3 the line based on that, it would have drawn the
4 line neutrally based on the line of
5 compensation, not done it the way it did, which
6 was to discriminate based on source.

7 So none of these are legally relevant,
8 and, therefore, a remand is not appropriate.

9 Third, the burden on the State here is
10 rather light. Under Davis, all we're asking
11 for is for the states to draw facially-neutral
12 lines, and that is not a difficult burden.
13 There are no state amici in this case
14 supporting West Virginia, and that suggests
15 that nobody's up in arms, other than West
16 Virginia, about the issues here.

17 Finally, with respect to the record,
18 my friend argues about sheriffs and deputy
19 sheriffs, but, if you look at page 17 of our
20 reply brief, we cite the state's brief at page
21 12, and West Virginia Code Section 7-14D-24.

22 If you were a deputy sheriff or a
23 state trooper, and then became a sheriff,
24 you're still covered.

25 And there's nothing in the record that

1 indicates that most sheriffs weren't previously
2 deputy sheriffs or state troopers. So the --
3 the sheriff distinction that the state makes
4 isn't -- isn't supported here. And the record
5 doesn't justify this notion that counsel
6 mentioned about law-enforcement-only plans.

7 The plans that the State gives the
8 exemption to are law enforcement and
9 firefighter plans. So it's not a
10 law-enforcement-only plan. And -- and that
11 particular distinction has never been raised
12 before and simply doesn't matter.

13 Look, at bottom here, in *McCulloch*
14 versus Maryland, the Court said that, in
15 general, we don't want to be micromanaging all
16 the details of state taxation.

17 Here, the categorical rule of *Davis* is
18 the right rule. It -- it prevents
19 facially-discriminatory tax schemes like West
20 Virginia's. It has a fairly limited inquiry
21 and doesn't burden the states nearly as much.

22 The Court should reverse. No remand
23 on the merits is necessary.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:11 a.m., the case
2 was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25