1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - - - - - - - - - - - - - - x
3 ALABAMA DEPARTMENT OF :
4 REVENUE, ET AL., :
5 Petitioners : No. 13-553
6 v. :
7 CSX TRANSPORTATION, INC. :
8 - - - - - - - - - - - - - - - - - - x
9 Washington, D.C.
10 Tuesday, December 9, 2014
11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:13 a.m.
15 APPEARANCES:
16 ANDREW L. BRASHER, ESQ., solicitor General, Montgomery,
17 Ala.; on behalf of Petitioners.
18 ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae, supporting neither
21 party.
22 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
23 Respondent.
24
25

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

2 (11:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Case No. 13-553, the Alabama Department of

5 Revenue v. CSX Transportation.

6 General Brasher.

7 ORAL ARGUMENT OF ANDREW L. BRASHER

8 ON BEHALF OF THE PETITIONERS

9 MR. BRASHER: Thank you, Mr. Chief Justice,

10 and may it please the Court:

11 The 4-R Act does not make railroads the most

12 favored taxpayers. It instead balances the needs of

13 carriers, shippers and the general public. Our position

14 in this case does balance those interests and CSX's

15 position does not. On the comparison class issue, we

16 think the rules is this, and that's that courts should

17 compare the taxation of railroads to the taxation of the

18 mass of other businesses in the State with a focus on

19 whether a State is targeting or singling out railroads

20 for a tax that the general mass of other businesses do

21 not have to pay.

22 JUSTICE SCALIA: Well, is said that -- it

23 said that in -- in (b)(1), and it doesn't say that in

24 (b)(4).

25 MR. BRASHER: Right. I -- but I think --

1 JUSTICE SCALIA: Another tax that
2 discriminates is all it says, whereas in (1) it said "as
3 R value" -- "then the ratio that the assessed value of
4 other commercial and industrial property in the same
5 assessment jurisdiction."
6 MR. BRASHER: Well --
7 JUSTICE SCALIA: They're so specific there
8 and -- and in (4) they just say another tax that
9 discriminates against the rail carrier.
10 MR. BRASHER: But I think the question is
11 whether there's any reason to read (b)(4) to require a
12 comparison class that is different than the one in
13 (b) -- (b)(1), (b)(2), and (b)(3).
14 JUSTICE SCALIA: Yeah. There's a good
15 reason that they didn't spell out a specific comparison
16 class.
17 MR. BRASHER: Well, I don't think that --
18 that is a sufficient reason because I think that the
19 comparison class that is spelled out in (b)(1), (b)(2),
20 and (b)(3), if you apply it in (b)(4), it ensures that
21 railroads are being treated fairly by tying them to a
22 broad enough mass of politically influential taxpayers
23 to keep their rates fair. And the competitor class here
24 that -- that CSX has proposed makes very little sense in
25 the text of the statute.

1 I mean, it also, it doesn't really make
2 sense in light of what this Court said in CSX 1 where
3 the Court said that, at the very least, we should be
4 looking at similarly situated taxpayers.
5 JUSTICE KAGAN: But, General, I think on --
6 on this question, CSX 1, I think your reasoning flies
7 straight into the face of it, because CSX 1 talks about
8 the notion that (1) through (3) is very different from
9 (4) and that you can't -- this is just along the lines
10 of what Justice Scalia says -- that you can't draw
11 anything about the meaning of (4) from (1) through (3)
12 given that they clearly -- they use different language,
13 they're directed towards different things.
14 MR. BRASHER: Well, I think -- I think the
15 question here is -- is whether you should be looking at
16 general businesses or whether you should be looking at
17 CSX's handpicked class of competitors. And we made the
18 textual argument that that's the only thing that the
19 text provides for. But I also think --
20 JUSTICE GINSBURG: Well, why -- why do you
21 say handpicked? I -- I -- they're in the business of
22 transporting goods, motor carriers are and railroads
23 are.
24 MR. BRASHER: Well, because in this
25 particular situation, CSX is comparing itself to motor

1 carriers and water carriers, but is not comparing itself
2 to, for example, airlines or pipelines, which also
3 compete with respect to CSX in transportation.
4 But I think -- I think there's no reason to
5 necessarily presume that competitors are similarly
6 situated, especially for the purpose of State taxation.
7 I mean, Amazon and Walmart are competitors, but for
8 State taxation, they are not similarly situated.
9 CHIEF JUSTICE ROBERTS: Well, if they're not
10 similarly situated, then railroad loses.
11 MR. BRASHER: That's right. And I think --
12 I think for the purposes of this tax --
13 CHIEF JUSTICE ROBERTS: But that's a
14 different question than saying what class they should be
15 compared to.
16 MR. BRASHER: I don't think so. Because I
17 think -- I think the question is -- is -- at the very
18 least, the question is what the comparison class should
19 be, and I think that CSX tells us at the very least,
20 they should be similarly situated to.
21 JUSTICE KAGAN: But, you see, when you say
22 "similarly situated," and I think that's right, but that
23 seems to go to your second argument, which is, look,
24 they're not similarly situated because there's another
25 tax that falls upon motor carriers that doesn't fall

1 upon railroads, and that seems to me completely fair
2 and -- but -- but not on the first question.
3 MR. BRASHER: Well, let me -- let me explain
4 briefly on how I think it does go to the first question,
5 which is that we're talking about a sales and use tax,
6 which is a tax on a transaction. It's a tax on a
7 transaction for the purchase of tangible property. And
8 so the comparison class here should at least include the
9 many businesses that also pay that tax from the items
10 that they buy for their business. And railroads are no
11 more similarly situated to their competitors than they
12 are to every other business in the State that is also
13 paying the tax when it buys items that it needs for its
14 business.
15 JUSTICE SOTOMAYOR: But the problem is that,
16 generally, one thinks of sales and use taxes as flip
17 sides of each other. But here, the basis of a
18 comparison is not quite similar. Because in one it
19 measures what you buy, whether you use the gas in State
20 or out of State, and the other meant -- measures only
21 what you use in Alabama. So there is a dissimilarity in
22 the comparison that's not the norm.
23 MR. BRASHER: Right. So -- so if you put
24 the comparison class issue aside and you look at the
25 comparison of the -- of the tax the railroads pay and

1 the tax the truckers pay, I think that they are
2 comparable in the sense that -- that those are the taxes
3 that they pay on diesel fuel. And they're comparable
4 really in two ways. As a practical matter, they are the
5 taxes that -- that both of these entities are paying on
6 diesel.
7 JUSTICE SOTOMAYOR: The circuit below said
8 that was fortuitous and that at some point that could
9 change.
10 MR. BRASHER: Well, I'm saying that as a
11 practical matter, they're -- they're the taxes that are
12 paid by these entities on diesel. And as a legal
13 matter, the exemption that Alabama is providing to the
14 truckers is because they are paying the other tax on the
15 same gallon of diesel.
16 JUSTICE ALITO: On the -- on the comparator
17 issue, suppose that railroads and trucks used exactly
18 the same fuel all the time, no difference whatsoever,
19 and suppose that Alabama taxed the fuel purchased by the
20 railroads but not by the trucks. Would there be a
21 violation then?
22 MR. BRASHER: Our position would be that,
23 no, there would not be a violation on the comparison
24 class issue as long as the general mass of businesses
25 are still paying the same tax rate. And the -- and the

1 reason I say that is because if you link the railroad's
2 taxation to the general mass of other businesses in the
3 State, then they're not paying an unfair tax rate.
4 JUSTICE ALITO: Do you think that result is
5 consistent with the purpose of this statute?
6 MR. BRASHER: Yes. And -- and the reason I
7 say that is because the 4-R Act was an omnibus bill. It
8 did many things. It, for example, appropriated almost
9 $2 billion for -- for subsidies to the railroad
10 industry. But with this particular provision, what
11 Congress was getting at was it was trying to prevent
12 States from singling out or targeting railroads for
13 taxes, which, quite frankly, States have been doing for
14 years. And so that was the harm that Congress was
15 trying to prevent and that is a harm that would be
16 prevented if you used the general class --
17 CHIEF JUSTICE ROBERTS: No, but they wanted
18 to prop up -- they wanted to support the rail industry
19 in a number of ways. And it seems odd to say in a -- in
20 a situation where they were giving them this much money,
21 they still wanted to expose them to unfair competition
22 by States that want to give other modes of
23 transportation a tax benefit, but not to them.
24 MR. BRASHER: Well --
25 CHIEF JUSTICE ROBERTS: And their --

1 that's -- their economic viability depends upon how
2 they're faring with respect to their competitors, not
3 how they're, you know, faring with respect to, you know,
4 an agricultural conglomerate in the State.
5 MR. BRASHER: Well, ultimately, railroads
6 are competing against other railroads. But I think
7 that --
8 CHIEF JUSTICE ROBERTS: Well, no. They
9 compete against trucks, too.
10 MR. BRASHER: Well -- well, I think -- I
11 think there's some -- to a certain extent that they do
12 compete, but to a certain extent they're also
13 complementary forms of transportation. If there were
14 only trucks, they would be fine without railroads, but
15 the railroads couldn't exist without truckers.
16 JUSTICE KENNEDY: You really -- you want --
17 you -- you want us to write an opinion to say railroads
18 generally do not compete with trucking companies?
19 That -- you want that to be the opening line of our
20 opinion?
21 MR. BRASHER: No. No. I -- I think the
22 opening line of your opinion should be that courts
23 should compare the taxation of railroads to the taxation
24 of the general mass of other businesses with a focus on
25 whether a State is singling those businesses for a tax

1 that railroads --

2 JUSTICE BREYER: Well, then fine. Why don't

3 you have a kerosene tax? Everybody pays 8 percent

4 except for railroads. They have to pay 20 percent.

5 Okay? Now, it turns out that the only people who use

6 kerosene besides railroads are ice-cream wagons. Okay?

7 Isn't the comparison -- nobody else uses it. So

8 wouldn't you in that situation compare the railroads to

9 the ice-cream wagons? That's not the general. That

10 just happens that the State thought of a way of getting

11 the railroads.

12 So -- well, I would say, I guess that last

13 thing is to think, we know you're clever, State tax

14 authorities, and you'll figure out a million ways to do

15 this, but if whatever way you figure out discriminates

16 against the railroads, you lose. So why have a -- a

17 general class, a competitor class or some other class

18 that (4) is a catchall?

19 MR. BRASHER: Well, the why is because I

20 think the goal should be here to create some kind of

21 balance that actually gives enough ex ante guidance --

22 JUSTICE BREYER: Well, what about my case,

23 then, when you say balance, et cetera? Who wins?

24 MR. BRASHER: Well, I think -- I think

25 ultimately, the railroads would probably win that case.

1 JUSTICE BREYER: Because we look at all the
2 tax, all the things, everybody pays 8 percent. That's
3 what it says.
4 MR. BRASHER: Oh, no. I'm sorry. But if --
5 JUDGE BREYER: But railroads.
6 MR. BRASHER: If there was a special tax on
7 kerosene and --
8 JUSTICE BREYER: Yeah.
9 MR. BRASHER: -- and the only two entities
10 that -- I mean, that -- that's -- for example, there's
11 a -- there's a case --
12 JUSTICE BREYER: All right. So now we're
13 comparing the two entities that use kerosene. We're
14 not comparing --
15 JUSTICE SCALIA: Mr. Brasher, what -- what's
16 an ice cream wagon anyway?
17 (Laughter.)
18 JUSTICE BREYER: It's -- it's a wagon that
19 uses kerosene to deliver ice cream.
20 MR. BRASHER: But I think -- I think the
21 main point here is that there are lots of businesses in
22 Alabama that are paying the sales tax on the items that
23 they need for their business, and there are also lots of
24 businesses that are paying the sales tax on the diesel
25 fuel when they need diesel fuel for their businesses.

1 So manufacturers, mining companies, construction
2 companies, timber companies, those businesses are the
3 kinds of businesses that the railroads should be
4 compared to because that prevents them from being
5 treated unfairly.
6 JUSTICE ALITO: On the question of diesel
7 fuel, I -- I got the impression -- this just an
8 informational question -- but I got the impression from
9 briefs that diesel fuel is diesel fuel except some of it
10 is dyed. But is that -- is that true? Is it not the
11 case that the dyed diesel fuel has a higher sulfur
12 content than the clear diesel fuel and therefore costs
13 less?
14 MR. BRASHER: It's my understanding that
15 they are chemically the same. That -- that the law is
16 that the only difference between clear diesel fuel and
17 dyed diesel fuel is that dyed diesel fuel is diesel fuel
18 that has been indelibly dyed. So it's my understanding
19 that they are chemically the same.
20 It could be that the United States
21 government regulates those uses differently through some
22 kind of environmental regulation, but I'm not that I'm
23 aware of that.
24 But I think -- I think what the -- setting
25 the comparison class issue aside, what the district

1 court did here is exactly what this Court told it to do
2 when the Court remanded in -- in CSX 1, and that's it
3 looked at our justifications, it found that they had
4 nothing to do with railroads, and it also found that the
5 railroads weren't practically disadvantaged by the kind
6 of treatment that they were getting and they weren't
7 practically disadvantaged with respect to truckers,
8 because the truckers are paying a higher tax on the
9 years at issue here. And the railroads could pay that
10 tax ultimately if they wanted to, but they don't want to
11 because they realize that they're actually paying a
12 lower tax rate on their diesel.
13 JUSTICE KAGAN: General, one of the things
14 that Mr. Phillips talks about is he -- he makes the
15 point that this is a very hard inquiry to carry out and
16 that the experience of courts, when they try to do this
17 in commerce cases, shows that. So what's your answer to
18 that?
19 MR. BRASHER: Well, the -- the inquiry that
20 we're asking the Court to perform is not difficult at
21 all, and the district court performed it in one
22 paragraph of its decision, which is you simply compare
23 the taxes that we are imposing on diesel fuel for the
24 truckers versus the taxes that the railroads are paying
25 on the same item.

1 And this is inherent in CSX's complaint in
2 this case where CSX is asking the courts to compare its
3 taxes that it is paying on diesel fuel to the taxes that
4 its competitors are paying on diesel fuel. And so it's
5 inconsistent for CSX to be arguing that that's the
6 comparison and inquiry the courts should make, but at
7 the same time, courts can't make that inquiry.
8 And once again, as -- as a purely legal
9 matter, the tax exemption that we're talking about here
10 is the in the same part of the code that imposes the tax
11 that the truckers have to pay. And the exemption reads,
12 it says if you pay the tax on clear diesel -- if you pay
13 the fuels tax that Alabama imposes, then you don't pay
14 any other tax imposed by State law. And so, as a purely
15 legal matter --
16 JUSTICE SOTOMAYOR: You're -- you -- are you
17 representing on the behalf of the State that the
18 railroads could pay the motor vehicle tax --
19 MR. BRASHER: Yes.
20 JUSTICE SOTOMAYOR: -- if they chose?
21 MR. BRASHER: Yes. And that was our
22 position in this Court in 2009 and it's -- it's a clear
23 reading of Alabama law because the reason the truckers
24 are getting the exemption is because they're paying the
25 other tax.

1 JUSTICE SOTOMAYOR: They use the same type
2 of diesel?
3 MR. BRASHER: The truckers use clear diesel,
4 which is chemically identified -- identical to the dyed
5 diesel that the railroads use.
6 JUSTICE SOTOMAYOR: Can they use --
7 MR. BRASHER: Oh, I'm sorry.
8 JUSTICE SOTOMAYOR: -- according to -- in
9 Federal law, can the railroads use the undyed --
10 MR. BRASHER: As far as I'm aware, there is
11 no prohibition under Federal law. There is certainly no
12 prohibition on State law with respect to the railroads
13 using clear diesel.
14 JUSTICE ALITO: But the truckers can't use
15 the dyed fuel.
16 MR. BRASHER: That's correct.
17 JUSTICE ALITO: Why -- why is that?
18 MR. BRASHER: Well, it's because -- it's
19 because the tax on the clear diesel is higher than the
20 tax on the dyed diesel.
21 JUSTICE ALITO: So that would be why they
22 might not want to, but why --
23 MR. BRASHER: No. No. I think that's why
24 States and the Federal government are telling them that
25 they can't use the dyed diesel. Because we want them

1 to --

2 JUSTICE ALITO: It's not for environmental

3 reasons? Are you sure about that?

4 MR. BRASHER: I don't think so. I mean,

5 it's certainly the way this -- certainly the way this

6 started is -- is we started with a taxing scheme that

7 required truckers to pay what -- what at the time, at

8 least, was much, much higher than railroads were paying.

9 And so we wanted to prevent truckers from using the dyed

10 diesel.

11 The whole reason why we have clear diesel

12 and dyed diesel to begin with is -- is so that we could

13 support this taxing scheme where we're imposing a

14 per-gallon tax on the truckers.

15 JUSTICE SOTOMAYOR: Now, talk about the

16 water carriers.

17 MR. BRASHER: Right.

18 JUSTICE SOTOMAYOR: Are you going to suggest

19 that if they stop at a dock and eat a meal, they can't

20 be charged a sales tax?

21 MR. BRASHER: Well, I think the district

22 court said two things about water carriers and neither

23 one makes sense, which is that the railroads didn't show

24 any practical disadvantage with respect to water

25 carriers because the only evidence in the record with

1 respect to water carriers is that they make up 1 percent
2 of the market for shipping goods from one part of
3 Alabama to another.
4 And -- and to go back to the complementary
5 point that I was making earlier, the district court
6 also, quite rightly, refused to simply assume that
7 treating water carriers with this minor preference was
8 going to harm railroad's bottom line, and this is why:
9 Is that, for all we know, a perfectly reasonable
10 assumption would be if our tax pretreatment for water
11 carriers actually increase the amount of water commerce
12 coming into Alabama, that would also increase the amount
13 of commerce that railroads are from moving from docks to
14 get to somewhere else in Alabama.
15 So in light of the fact that there was
16 essentially no evidence at all about water carriers to
17 show that railroads actually suffered some practical
18 disadvantage, I think the district court's reasoning --
19 JUSTICE SOTOMAYOR: Well, there is a
20 practical disadvantage; they paid a tax that the water
21 carriers haven't --
22 MR. BRASHER: Well --
23 JUSTICE SOTOMAYOR: -- and it makes the
24 water carriers more competitive against them.
25 MR. BRASHER: Well, and my point, I think

1 the district court was right to say, well, they're only
2 1 percent of the market for moving goods from one part
3 of the --
4 JUSTICE KENNEDY: Well, but under your
5 argument then, you could give tax exemptions to many
6 businesses and then those businesses would grow and give
7 more goods to the railroads. So that's just simply --
8 that can't work.
9 MR. BRASHER: Well, I think -- I think -- my
10 point being is that if the only evidence is what the
11 railroads put into the record here, the district court
12 doesn't have to assume that they're going to be
13 practically disadvantaged. CSX's position in this case
14 would mean that if the State offered a tax exemption or
15 tax incentive to a single competitor of a railroad, to a
16 single company that just operates in a single city of
17 the State, that CSX and every other railroad operating
18 in the State would get exactly the same preference. And
19 we could be offering that preference to a single company
20 that costs the State $10,000, but to offer the same
21 preference to the railroads would cost $40 million.
22 JUSTICE ALITO: Well, why doesn't Alabama
23 tax the fuel purchased by the water -- water carriers?
24 It's kind of curious. Is it -- is it just a remnant of
25 an old understanding of the extent of -- of the State's

1 power?

2 MR. BRASHER: Yes. I -- I think it's for

3 historical reasons with respect to the taxation of

4 interstate commerce by water. The provision at issue

5 here actually taxes Alabama's own citizens when

6 they're -- when they're moving goods by water commerce

7 from one part of the State to the other. So we're

8 taxing that -- those transportation. We're only not

9 taxing it when someone moves goods from Alabama to some

10 other State.

11 And that's another reason why I think the

12 water carriers are largely irrelevant, because the

13 railroads here aren't even asking for the same tax

14 treatment that we give to water carriers in that -- in

15 the sense that they don't want to pay taxes at all.

16 They don't want some kind of different treatment based

17 on whether they're moving goods from one part of the

18 State to the other.

19 CHIEF JUSTICE ROBERTS: You -- you tax the

20 water carriers when they move within Alabama?

21 MR. BRASHER: We tax intrastate shipments.

22 So the exemption at issue here is only for the movement

23 of goods in interstate commerce.

24 CHIEF JUSTICE ROBERTS: How is that -- how

25 is that consistent with the statute admitting Alabama to

1 the Union, which says the water -- the first time -- the
2 water will remain -- forever remain public highways
3 without any tax, duty, impost or toll?
4 MR. BRASHER: Well, fortunately, we haven't
5 had that litigation, but --
6 (Laughter.)
7 MR. BRASHER: -- but I think -- but I
8 think -- to go -- to go to your point, Justice Alito, I
9 mean, the historical treatment of water carriers is
10 there's been historical preferences for water shipments
11 by interstate commerce in this country ever since it was
12 a country. And so that's the reason why we have this
13 preference in our tax code.
14 JUSTICE BREYER: You think that when we send
15 it back, if we did and you won, that suppose you win on
16 the ground that there is no fixed group, it depends on
17 the case who you compare them with. So here, compare
18 them with the trucks.
19 Now, you'll say, as you do say, that we have
20 a very good reason for treating them differently. The
21 trucks have to pay this extra tax for the fuel, and
22 railroads don't. My guess is, and this is what I want
23 to know, that they'll come back and say, but the reason
24 that they pay that extra tax is to support highways, and
25 railroads don't use highways. And then you'll have to

1 figure out whether that is discrimination or isn't
2 discrimination, because indeed they do pay a higher tax.
3 But it is to go to highways, and does that count or not?
4 Now, my question, I don't think you can
5 answer that -- if you want to, try. I'm really just
6 interested, is that likely to be the shape of the
7 argument or not?
8 MR. BRASHER: Well, I think the district
9 court already addressed that. So you have a district
10 court opinion in this case which found in our favor
11 applying the competitive comparison class, and like I
12 said, put the comparison class to one side doing
13 effectively what the court told it to do in CSX 1. So
14 the district court already addressed that and decided
15 that when the State is -- is using tax revenue for
16 general public purposes, it really is irrelevant how the
17 State is raising that revenue. We could have a yearly
18 appropriation for highway maintenance and it would be
19 the same thing as having a dedicated source of funding
20 for highway maintenance. And it's not as if the
21 truckers are paying for all of Alabama's highway
22 maintenance. We're also taxing other people in the
23 State to add money to that to build highways. And so
24 ultimately, I think the district court was right that
25 that's just a red herring --

1 JUSTICE SCALIA: And the trucker tax is not
2 directed to highways exclusively? It goes into a
3 general fund?
4 MR. BRASHER: No, the -- the fuel tax that
5 the truckers are paying is set aside for highway
6 construction, highway maintenance. But my point is that
7 it's -- it's not as if the truckers are the only ones
8 paying for the highways to be built in Alabama; it's not
9 as if the truckers are the only ones using the highways.
10 We'd have to find some funds to build highways
11 regardless of how we get them.
12 And also, CSX's own expert, when testifying
13 in this case, agreed that railroads also benefit from
14 roads, railroads also benefit from schools, and these
15 are the kind of indirect benefits that the State has to
16 provide as part of a general public purposes of the
17 State.
18 But I think the real problem with CSX's
19 proposed rule in this case is that it provides zero ex
20 ante guidance to State policymakers about how to
21 structure a tax system in a way that doesn't
22 discriminate against railroads, but does actually
23 require them to pay their fair share. And I think
24 that's what the Court should focus on.
25 And the Eleventh Circuit's opinion in this

1 case in Footnote 5 of the opinion, the Eleventh Circuit
2 recognized that even if we were requiring truckers to
3 pay four times as much as we were requiring the
4 railroads to pay, the Eleventh Circuit would still find
5 that we are discriminating against railroads in that
6 circumstance.
7 I would like to reserve the remainder of my
8 time for rebuttal.
9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Goldenberg.
11 ORAL ARGUMENT OF ELAINE J. GOLDENBERG
12 ON BEHALF OF THE UNITED STATES,
13 AS AMICUS CURIAE, SUPPORTING NEITHER PARTY
14 MS. GOLDENBERG: Mr. Chief Justice, and may
15 it please the Court:
16 We disagree with Petitioners as to the
17 comparison class issue and agree with Petitioners as to
18 the issue of the alternative and comparable tax on the
19 motor carriers. I'd like to start with the comparison
20 class issue if I could, although I'd like to devote time
21 to both of those issues.
22 With respect to the comparison class issue,
23 I do think, as Justice Scalia's question indicated, that
24 the omission of a specific comparison class in (b)(4) is
25 extremely telling here when there is such a specific

1 comparison class set forth in (b)(1) through (3). And I
2 also think it's very important that I think there is a
3 very good rational reason why Congress would have wanted
4 to leave the comparison class issue open with respect to
5 (b)(4) and not limit the comparison class in that arena
6 to other commercial and industrial entities. And the
7 reason is this: With respect to property taxes, I think
8 Congress can rest assured that virtually all commercial
9 and industrial entities are going to have real property
10 and that if you're grouping the railroads with those
11 entities and you're doing something unduly burdensome,
12 those entities are going to speak up, they're going to
13 use their political power, they're going to complain in
14 some way. And so it's protective of the railroads to
15 have that kind of comparison class.
16 With respect to other kinds of taxation,
17 non-property taxation, I don't think you can say that
18 the same thing is true. And specifically with respect
19 to diesel fuel, I think, and I'm just hypothesizing
20 here, but it is very likely that there are many
21 commercial and industrial taxpayers who either don't use
22 diesel fuel at all or use very little diesel fuel in
23 their businesses, such that a tax on diesel fuel that
24 applies to them is a very small burden for them. And if
25 you are going to count on the fact that they're going to

1 speak up if there is a very burdensome diesel fuel tax
2 that's laid on them and on railroads, I don't think that
3 that holds true. And that's a situation in which, if
4 it's really railroads and their competitors who are
5 using the diesel fuel, then the competitors are the
6 comparison class that you ought to be looking to.
7 JUSTICE KAGAN: Ms. Goldenberg, could I ask,
8 you know, in one set of cases maybe a railroad is saying
9 we're being singled out. In another set of cases a
10 railroad comes in and says no, we're not being singled
11 out but our competitors are being treated better than we
12 are. Are there any other kinds of cases out there or is
13 it mostly just, you know, as compared to the general
14 taxpayer and as compared to competitors? Is there any
15 other way to -- to shape a complaint in this field?
16 MS. GOLDENBERG: As far as I'm aware, there
17 is not. And I'm not aware of cases that fall into any
18 other category besides those. And I think the reason is
19 that railroads don't make claims that people who aren't
20 their competitors -- a small group of people who aren't
21 their competitors are being treated differently than
22 they are. Because I think in situations like that it's
23 very easy for the State to come in and say, here is a
24 reasonable distinction between those other people and
25 you, the railroad.

1 So, for instance, you had a church or a
2 school that was being exempted from a tax that a
3 railroad paid, it would be extremely easy for the State
4 to say, well, churches and schools have socially
5 beneficial or charitable purposes, they're not involved
6 in business like railroads, railroads don't compete with
7 them and so it doesn't harm railroad's financial
8 stability to have them exempted.
9 So in some ways the comparison class of
10 competitors is sort of a proxy for the kinds of reasons
11 that the State is going to be able to give in order to
12 distinguish between the allegedly favored and less
13 favored groups.
14 I'd also like to point out that I think
15 there are very serious problems with the singled out or
16 targeted requirement that the State is espousing here.
17 And that is that either -- depending on how you apply
18 it, it's going to be highly manipulatable by the State
19 or it's going to have major administrability problems,
20 and let me explain why.
21 If you have a true singled-out requirement,
22 so you find that railroads can't win a discrimination
23 claim under (b)(4) unless they are the only ones who are
24 subject to a tax, then I think it's extremely easy for
25 the State to evade any (b)(4) liability whatsoever

1 simply by grouping together with the railroads some
2 other entity or set of entities on whom the tax burden
3 doesn't fall very heavily or a set of entities that's
4 not very quickly powerful and won't speak up, and in
5 virtually every case the State will be able to escape
6 from (b)(4) liability and sort of vitiate that
7 provision.
8 If you don't have a true singled-out
9 requirement, if you have a more kind of amorphous
10 targeting requirement, then I think you have very
11 problematic line-drawing issues. Because it's unclear
12 whether, if you've got five other entities grouped with
13 the railroad or ten other entities or 20 other entities,
14 whether that can -- constitutes targeting and where you
15 actually draw the line.
16 And so I think that just applying the
17 definition of discriminates that this Court laid out in
18 its decision last time this case was here is actually
19 much easier to apply, much easier to administer than any
20 kind of targeted or singled-out requirement.
21 JUSTICE ALITO: Could I ask you about the
22 second point? What is your response to CSX's argument
23 that this is really a very, very difficult comparison to
24 make? And so here you have -- you have a formula that
25 will be beneficial to one side or the other depending on

1 the price of diesel fuel if, in fact, diesel fuel is
2 diesel fuel. But in one case, the tax is on the
3 purchase of the fuel, in the other case, the tax is on
4 the use of the fuel. They're used for different
5 purposes. And, you know, it's easy for -- for us to
6 say, well, okay, go back and, you know, do it, District
7 Court or court of appeals, but how would you do -- how
8 would you resolve those issues?
9 MS. GOLDENBERG: I think --
10 JUSTICE ALITO: Why is it a manageable
11 comparison to make?
12 MS. GOLDENBERG: I think with respect to
13 both of them there are -- I can explain why I think the
14 taxes are comparable despite the arguments that have
15 been raised.
16 But I just want to back up and, for a
17 second, make a larger point which is, I think what the
18 lower court has done here and what courts of appeals
19 have done generally, is just sort of throw up their
20 hands and say under no possible circumstances could we
21 ever compare taxes, could we ever look beyond the face
22 of the challenged tax. And that can't possibly be
23 correct.
24 This Court, in its dormant commerce class
25 cases, in its cases about discrimination against the

1 Federal government and those with whom it deals, does
2 just that. And there is no reason why the rule should
3 be narrower here.
4 JUSTICE KAGAN: Although I do think that
5 might make one of Mr. Phillips' point is that maybe
6 those cases don't fill one with confidence.
7 MS. GOLDENBERG: Well, I think there is a
8 long history, particularly in the dormant commerce
9 clause area, of the Court looking to alternative and
10 comparable taxes. I think the Court has taken a very
11 narrow view of what constitutes a substantially
12 equivalent taxable item or event, for instance, and I
13 don't disagree that that view could apply in this area.
14 JUSTICE ALITO: Well, you say it's doable,
15 so can you address --
16 MS. GOLDENBERG: Yes.
17 JUSTICE ALITO: -- any of the points that I
18 mentioned? Does it matter that one -- that the -- the
19 revenue from one is dedicated to a single purpose rather
20 than going into the -- into the general pot? Does it
21 matter that one is a tax on purchase and the other is a
22 tax on use?
23 MS. GOLDENBERG: I'm happy to talk about
24 each of those. With respect to the first one, the
25 purpose for which the tax revenue is being used, I don't

1 think that that plays into the analysis under (b)(4)
2 about whether there is a discrimination in imposing the
3 tax. There may be, perhaps, in some dimension,
4 discrimination in how the State uses its tax revenues,
5 but that's not what the statute is about. This statute
6 is about the tax burden that's imposed --
7 JUSTICE BREYER: Well, wait a minute, wait a
8 minute. Why? The obvious case which is right here is
9 that the railroads say, you're taxing us at a higher
10 rate. The State's response is, true, but we do it
11 because the trucks pay even more for their diesel fuel.
12 There's a higher tax. Their response is, but the reason
13 that they do that is because they use highways and we
14 want to pay for those.
15 Now, in terms of just pure logic, that is a
16 point; isn't it? And so that -- that's what I think is
17 one example of what Justice Alito was driving at. And
18 why -- why do you not have to take that into account,
19 and if you do, how?
20 MS. GOLDENBERG: Well, I don't think you
21 have to take it into account. What I'm suggesting is I
22 don't think the analysis should go beyond the imposition
23 of --
24 JUSTICE BREYER: Because?
25 MS. GOLDENBERG: -- the tax and the tax

1 burden because of the language of (b)(4) and also
2 because otherwise you would end up in a very bizarre
3 situation where you could have a unitary tax that fell
4 on motor carriers and railroads equally. There's one
5 tax provision that says motor carriers and railroads,
6 you both pay "X" cents per gallon on your fuel and a
7 railroad could nevertheless come in and claim
8 discrimination under (b)(4) if the State took that tax
9 revenue and used it to build roads. That seems like an
10 awfully strange result.
11 It would also mean that you could have the
12 same tax structure in different states that would be
13 discriminatory in one state and not discriminatory in
14 another, depending on how the state spent its revenues.
15 I also agree with what my friend from
16 Alabama said with respect to the evidence in the record
17 here about how the -- the motor carriers aren't being in
18 some way kind of especially or uniquely benefitted by
19 the roads, using money to build roads benefits the
20 general public and it also benefits railroads.
21 Railroads use trucks to bring freight to and from their
22 trains and they are part of the system of the state
23 where everybody needs these roads. And it may be that
24 motor carriers benefit a little bit more than other
25 people, but it is for the general welfare. That's what

1 a tax is.

2 JUSTICE BREYER: What about the second part,

3 that it -- does it make a difference taxes on use as

4 opposed to taxes on sales?

5 MS. GOLDENBERG: I don't think it makes a

6 difference that one is on use and one is on sale. For

7 one thing, I do think that as a practical matter those

8 categories kind of blur together here. Motor carriers

9 pay at the pump, which they, I think, experience as a

10 tax on sales. Then later, under the International Fuel

11 Tax Agreement, the State takes the money and sort of

12 sends it around in this clearinghouse system to other

13 states where the fuel may have been used. But it's not

14 something that I think the motor carrier necessarily

15 experiences as different than a sales tax.

16 And on the other side of the equation, the

17 railroads do pay -- they're complaining about sales and

18 use taxes. My understanding is that railroads generally

19 purchase their fuel, their diesel fuel, wholesale. The

20 definition of "retail sale" in the Alabama tax law says

21 that when you buy wholesale, what counts as a retail

22 sale is the withdrawal, use or consumption of the item.

23 So I think the --

24 JUSTICE SCALIA: What about water carriers?

25 Are you going to say anything about that.

1 MS. GOLDENBERG: Certainly. In our view,
2 the water carriers issue should be remanded to the court
3 of appeals in the first instance because it hasn't
4 addressed the district court's reasons why there is no
5 discrimination. We are dubious that the district
6 court's reasons are correct, but in any event, we'd urge
7 the Court not to simply decide the water carriers issue
8 without deciding the alternative and comparable tax
9 issue because, in that case, we think the state could
10 just change the statute with respect to water carriers
11 and all the motor carrier-related issues would remain.
12 JUSTICE GINSBURG: Do you think that -- that
13 the ruling, the district court's ruling on the
14 comparability of the taxes is also dubious?
15 MS. GOLDENBERG: The district court's ruling
16 on --
17 JUSTICE GINSBURG: The district court found
18 that these were complementary or --
19 MS. GOLDENBERG: No. We agree that the
20 district court analyzed the comparability of the taxes
21 correctly and did so with the agreement of the parties
22 as to how they should be compared.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Phillips.
25 ORAL ARGUMENT OF CARTER G. PHILLIPS

1 ON BEHALF OF THE RESPONDENT

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

3 and may it please the Court:

4 Let me begin by debunking a -- a statement

5 that gets repeated often in this litigation which is

6 that somehow the railroads are here seeking a

7 most-favored nation opportunity.

8 The truth is Alabama -- in Alabama, we pay

9 $10 million a year in sales taxes. We pay taxes every

10 time we buy gasoline or -- or fuel that we use on road.

11 We do that all the time. We have no quarrel with that,

12 we don't have any objection to that.

13 What we do --

14 JUSTICE SOTOMAYOR: Why do you bother? If

15 you're going to be taxed at $10 million, why don't you

16 buy it in the adjoining state before you cross the

17 Alabama lines?

18 MR. PHILLIPS: Well, I mean, there -- there

19 are ways of doing business, but we also are entitled to

20 the protections under the 4-R Act which is designed,

21 candidly, to ensure that our financial stability which

22 means that we ought to always be in a position where we

23 can approach all of our business decisions in the most

24 efficient way and hopefully put ourselves in a position

25 in order to compete against the motor carriers and

1 the -- and the water carriers.

2 And that's precisely what the comparison

3 class takes you to, which is, it's all well and good to

4 say that, you know, the statute addresses targeting.

5 And that's fine, and that's clearly right because that's

6 what Congress undeniably saw primarily in the count of

7 (b)(1) to (b)(3) range, and that's why it identified

8 this specific class that it was worried about for

9 targeting.

10 But when it gets to the point of talking

11 about every other form of discrimination, another tax

12 that discriminates, in that context it only makes sense

13 to think about this in the context of your competitors,

14 because Congress's other purpose in this was to ensure

15 that there would be financial stability, that the

16 railroads would, once again, be able to operate on their

17 own.

18 And, obviously, to the extent that you've

19 authorized the states to choose, for whatever reason, to

20 benefit motor and water carriers routinely to the

21 detriment of the railroads, that completely undermines

22 it.

23 So it seems to me, and -- and my colleague

24 from the Solicitor General's Office has done an

25 excellent job of sort of going through the various

1 points on the comparison class, I'm happy to answer any
2 questions on that further, but I'm more inclined to deal
3 with the justifications.
4 On the justifications --
5 CHIEF JUSTICE ROBERTS: Well, just on the
6 comparison class, can't you let the water carriers go?
7 I mean, it's a very tiny percentage that's at issue.
8 It's governed by the admission to the Union. They
9 sometimes touch down in Alabama, they sometimes don't.
10 And I don't want to have the case up here a third time.
11 MR. PHILLIPS: I -- I won't take that last
12 comment personally, Mr. Chief Justice.
13 The -- I mean, they have 1 percent of the
14 market; we have 6 percent of the market. That's --
15 that's -- that's still an important competitor of ours.
16 They stipulated -- it's in their stipulation, these are
17 a major competitor, we compete in a major way on the
18 basis of the fuel that we use.
19 We're talking about a statute at the time
20 that was designed to ensure against the nonsurvival of
21 the railroad industry. I think the idea -- first of
22 all, Congress knows how to incorporate a de minimus
23 exception. It did it in the -- in the component dealing
24 with (b)(1), (b)(3) as it gets applied. It didn't do it
25 in (b)(4). And so, therefore, as much as I would

1 prefer -- and actually, I can get you out of coming back
2 here, because if you say that the water carriers are --
3 are, in fact, within the class to be evaluated, there is
4 no justification put forward. The Eleventh Circuit is
5 100 percent correct about that.
6 CHIEF JUSTICE ROBERTS: So if there's one
7 water carrier, you win? Or if there's one odd method of
8 transportation, you win?
9 MR. PHILLIPS: I -- I --
10 CHIEF JUSTICE ROBERTS: That sounds like
11 most-favored nation to me.
12 MR. PHILLIPS: No, but that's not -- that's
13 not the way the case comes here. The case comes here
14 with a stipulation that water carriers are a major
15 competitor of ours. It's not that there's only one of
16 them. It's that there is a significant amount of
17 traffic that flows.
18 We have 6 percent --
19 JUSTICE SOTOMAYOR: The district court --
20 MR. PHILLIPS: -- they have 1 percent.
21 JUSTICE SOTOMAYOR: The district court
22 appeared in its opinion -- and I -- and I may be wrong
23 -- to say that you, in fact, had not proven that they
24 were really competitors. It seemed to say you had not
25 shown the competitive impact.

1 MR. PHILLIPS: Right.

2 JUSTICE SOTOMAYOR: And that's what I took

3 it to be saying, that you hadn't shown that they really

4 do take resources away from you.

5 MR. PHILLIPS: Well, first of all, that's

6 inconsistent with the stipulation. But, two, the

7 district court got it a 100 percent wrong. Even as

8 Judge Cox, in his dissenting opinion, said in the

9 Eleventh Circuit, which is that we satisfy our -- our

10 obligation to demonstrate the prima facie case by

11 showing that the water carriers are flatly exempt on the

12 face of the statute. That's facial discrimination. It

13 becomes the state's burden at that point to justify it.

14 And if the state had wanted to come in and

15 say, oh, sure we can justify it because they're not

16 really competitors in some sense, that would be fine.

17 But that's not their stipulation. Their stipulation is

18 that this is a major competitor of ours and on -- on a

19 subject matter, fuel, that is a major portion of the way

20 in which we compete against each other.

21 So I think, Your Honor, the easiest way not

22 to have to see me again -- at least representing CSX in

23 this context -- is to say water carriers count, it's

24 their stipulation, we shouldn't have had to get to this

25 issue in any event because I don't think it was in the

1 cert petition, and there's really no reason to go ahead
2 and try to sort out the thorny issues that Justice Alito
3 was talking about as to how you're going to try, from
4 here on, to apply the comparability standard in this
5 particular case.
6 Alabama wants to do it in a very
7 simpleminded way, how much are you paying today and how
8 much are they paying today, and if it's close enough,
9 that's good enough for government work.
10 The problem with that is, is that all of the
11 case law that deals with comparability -- and this
12 Court's decisions have run about as far away from
13 notions of comparability as you can since it first
14 adopted the rule to deal with this straight, strict,
15 sales tax and use tax, which really are the mirror image
16 of each other. Ever since then, every other tax has
17 been analyzed under those standards. The Court has
18 said, no, no, that's not the way we're going to do --
19 we're not going to get into that comparability analysis.
20 And I -- I would most -- most particularly
21 point you in the direction of Professor Hellerstein --
22 Hellerstein's brief where he describes -- he says, look,
23 if it's true comparability, that's one thing. But we're
24 talking here about taxes that are -- the taxes that are
25 not mutually exclusive proxies for each other. They're

1 imposed on different activities at different rates and
2 for different purposes. And how we're going to ask a
3 district court to say these are sufficiently similar --
4 JUSTICE SOTOMAYOR: I'm -- I'm just not
5 moved by the purpose part for the following reason. I
6 think your brother was absolutely correct that how the
7 state uses its tax revenues is a personal decision by
8 it. It could have put all of the money into the
9 treasury and said, but we're going to calculate what we
10 spend on highways according to this formula, because we
11 want to do it. That's exactly what they've done here.
12 They could say we're going to beautify the
13 route for railroads, and we're going to give them X
14 amount of money to do that from our state treasury, and
15 we're calculating it a little bit from the fuel they
16 bought.
17 MR. PHILLIPS: But, Justice Sotomayor, I
18 think it's a more -- it should be a more nuanced
19 analysis than that. And -- and I -- and I disagree with
20 my friend from the Solicitor General's office on -- on
21 this particular point. Because when -- when you're
22 talking about the use that's put to it, there's no
23 question -- we -- we couldn't bring a claim that says,
24 we're -- we're taxed exactly the same in all ways, you
25 know. It's two sales taxes, one's called a sales tax

1 against railroads and the other is called a sales tax
2 against motor carriers, and -- and come back in and say,
3 but you're going to use that money for their benefit and
4 not for our benefit. That -- we couldn't make that
5 claim, that -- no doubt about that, and we've never made
6 a claim like that.
7 But it is -- the situation is reversed.
8 They have created an exemption for motor carriers. It
9 is now their burden to justify, in all respects
10 consistent with the overall purposes of the statute,
11 that exemption. And there, it seems to me, it is fair
12 game for us to say, wait a second, what are you going to
13 use that money for. You're using that money to benefit
14 the -- the -- the motor carriers. Now, we pay money to
15 that, and we benefit that -- we benefit from that, too,
16 when we actually use the highways. Highways. But what
17 this money is designed for and what the motor carriers
18 want is more taxes like that because that way they
19 improve the quality of the roads, and it helps them to
20 be a better competitor against us.
21 It seems to me, in a situation where you're
22 trying to justify discrimination against us designed to
23 eliminate the possibility of undermining our ability to
24 compete, whether or not that the State uses that money
25 for to undermine our ability to compete, should still be

1 fair game under (b)(4). And that's why I would urge the
2 Court to read Professor Hellerstein's brief and analyze
3 the complexities that are embedded in the regime the
4 State asks you to go to. If you don't want to go that
5 far, then I'd ask you to simply say that water carriers
6 is enough on a basis to say this is unconstitutional and
7 affirm the Eleventh Circuit.
8 CHIEF JUSTICE ROBERTS: Now, just to get
9 back to them, it's 1 percent and 6 percent of what?
10 MR. PHILLIPS: Of the interstate business.
11 CHIEF JUSTICE ROBERTS: Interstate business.
12 JUSTICE BREYER: Did -- did the court of
13 appeals deal with your point you just made about the --
14 a special purpose of the extra tax that the truckers
15 pay?
16 MR. PHILLIPS: Not in -- not in precisely
17 those terms.
18 JUSTICE BREYER: What I'm trying to figure
19 out is -- is how are they supposed to conduct this
20 comparison analysis?
21 MR. PHILLIPS: Well, that -- no, but that is
22 exactly --
23 JUSTICE BREYER: What they did is they
24 didn't do it.
25 MR. PHILLIPS: No, no. But that's exactly

1 what the Eleventh Circuit said --

2 JUSTICE BREYER: Right.

3 MR. PHILLIPS: -- is that once you open that

4 box and get into the business, all other kinds of things

5 that Professor Hellerstein tells you you have to look

6 at, the inquiry becomes limitless and that the

7 carrier --

8 JUSTICE BREYER: Well, fine. But suppose

9 that the -- suppose the reason that the truckers have to

10 pay this extra tax is not to go into a fund that

11 benefits them. Suppose, indeed, it's to go into a fund

12 that benefits railroads. I mean, so -- so doesn't --

13 you have to -- you have to say whether or not -- you

14 wouldn't say that no matter what the purpose of this

15 extra tax is don't consider it, would you?

16 MR. PHILLIPS: Well, what I would say is,

17 when you know that the taxes are not mutually exclusive

18 proxies, I mean, the question is -- I don't think this

19 Court is going to have any -- any ability to sort of sit

20 down here and try to come up with a set of standards of

21 comparability.

22 What I would ask the Court to look at is in

23 this case what do we know? That these are taxed on --

24 these are imposed on different activities, the privilege

25 of using the roads as opposed to a sales tax, at

1 different rates, 15 cents versus 4 percent which, in the
2 last four years, we know have -- have been to the
3 disadvantage of the railroads, and in this case, for
4 different purposes.
5 The fact that there may be another case in
6 which they decide to make them for the same purpose,
7 that would still not modify the core of what the
8 comparability analysis requires, this -- which remains
9 enormously complicated and not -- and, to my mind at
10 least, not worth the candle.
11 JUSTICE BREYER: Of course it isn't. You
12 won. And -- and the -- the -- and what --
13 MR. PHILLIPS: Well, even if I --
14 JUSTICE BREYER: What's worry -- what's
15 worrying me is --
16 MR. PHILLIPS: For an academic I would
17 say the same thing.
18 JUSTICE BREYER: -- you know, but it's
19 not -- it's -- State taxes are so complex and -- and
20 that they didn't even have a -- they didn't really have
21 a chance -- they could have, but they didn't, go into
22 the what is this extra tax the truckers pay, is it
23 comparable, and that's a good reason for having them pay
24 less sales tax, or does it really have nothing to do
25 with the price of anything and, therefore, it's a bad

1 reason and, therefore, you win. They didn't consider
2 that. That's what's worrying me. And if I send it
3 back, if I -- if we do that, not only do we have to do
4 it, they have to go through all this again.
5 MR. PHILLIPS: Well --
6 JUSTICE BREYER: We're going to have to tell
7 them just what to do, which that sounds worse to me,
8 and -- and, moreover, it may come back here again.
9 MR. PHILLIPS: We can -- we can -- I
10 understand all that. But -- but it seems to me, Justice
11 Breyer, everything you just said there should lead to
12 the conclusion that the right answer here is to affirm
13 and -- and to do so because they had the opportunity to
14 put in evidence. They -- they followed a simpleminded
15 approach, as of day one, there is -- this is the amount
16 of money that's being paid, that's close enough for me,
17 we're done, as opposed to the true comparability
18 analysis that would be required.
19 JUSTICE SOTOMAYOR: How do we do that? How
20 do we do that with -- with the water carriers? I -- I
21 do see your point with respect to the motor vehicle
22 drivers because there the entire argument was around
23 comparability and was it comparable. And the court
24 said -- but it basically said we're not going to get
25 into it. If they call it something else, we won't do

1 it.

2 MR. PHILLIPS: But --

3 JUSTICE SOTOMAYOR: It didn't quite say what

4 you said.

5 MR. PHILLIPS: No, but I -- I think, one,

6 the Court can certainly recognize that what I said is

7 precisely part of the problem that comes out of the

8 comparability analysis. Once you get into evaluating

9 different purposes --

10 JUSTICE SOTOMAYOR: Now -- now you want a

11 really broad rule that says you've got to -- you've got

12 to use the same label on every tax, States. You've got

13 to treat competitors with the same label all of the

14 time.

15 MR. PHILLIPS: Well, it's the same tax. I

16 mean, I -- I don't know.

17 JUSTICE SOTOMAYOR: Well --

18 MR. PHILLIPS: At the end of the day, that

19 is the rule I'm hoping for.

20 JUSTICE SOTOMAYOR: If they -- if they had

21 done a mirror excise tax, you would have been happy?

22 MR. PHILLIPS: I -- yes, I would not have a

23 complaint on that score. On the other -- but just to be

24 clear, Justice Sotomayor --

25 JUSTICE SOTOMAYOR: But that's a still

1 comparability issue.

2 MR. PHILLIPS: Right.

3 JUSTICE SOTOMAYOR: We've always said --

4 MR. PHILLIPS: But it's a single compare --

5 comparability issue. The problem here is if you go down

6 the road of sufficient justification, it is an

7 extraordinarily complicated comparability issue. And I

8 would hope the Court wouldn't want to go down that road

9 more than because I won this case, but more

10 fundamentally, the Court doesn't have to go down that

11 road because there is a major competitor and there was

12 never a justification given for that reason.

13 JUSTICE SOTOMAYOR: All right. On the water

14 carriers it never addressed the -- the court below never

15 addressed -- the Eleventh Circuit never addressed the

16 reasons that were given.

17 MR. PHILLIPS: Well, that's because the

18 reasons they were given were completely -- well, the --

19 the concurring -- the concurring Judge Cox did. He said

20 those reasons don't justify it because all he said was

21 you -- and -- and if you look at the district court's

22 rationale, it -- it won't get you home either because,

23 again, first it said it's our burden to demonstrate that

24 there's -- that there's been an injury. That's not our

25 burden. We satisfied our burden, and the Eleventh

1 Circuit said that when we -- when we came forward.
2 Then -- so it was there -- therefore, with
3 an exemption, their burden to show why. The only thing
4 they came up with was -- or what the only thing the
5 district court bought was, well, we hadn't proved --
6 once again putting the burden on us -- that this would
7 be constitutional in all circumstances. That's not
8 enough to justify allowing an exemption like that to
9 remain in place.
10 And -- and essentially the court of appeals
11 basically said there is no rational justification for
12 it. There's none -- not been one put forward. It --
13 it's a relic of 50 years ago, and that's not a
14 sufficient -- I would hope that's not a sufficient
15 justification in the meaning of the Court's prior
16 opinion.
17 If there are no other further questions,
18 I'll let you make --
19 JUSTICE GINSBURG: Yes. So what do you do
20 with -- the -- the district judge did make the
21 comparison between the motor carrier tax, and -- and
22 you -- you say that -- that comparison was inadequate
23 because?
24 MR. PHILLIPS: Because it didn't -- it
25 didn't take into account the rest of the analysis. It

1 didn't deal with the purpose; it didn't deal with the
2 nature of the tax. All it said was that a particular
3 arbitrary point in time, the amounts in -- the amounts
4 weren't all that different.
5 JUSTICE GINSBURG: But it also said that if
6 you don't engage in that kind of comparison, then you're
7 going to end up with the railroad becoming the most
8 favored taxpayer.
9 MR. PHILLIPS: But that's just a conclusion,
10 and it's not -- it's not true. Because it is always
11 available to the State to put our competitors in the
12 same position we are in. And if for some reason that's
13 not possible, then that might well be a sufficient
14 justification for some differential tax.
15 But it is all -- in this context, it is
16 clearly possible. There's no problem, you know,
17 removing the exemption for the -- for the sales tax that
18 the water carriers pay. There is no problem imposing a
19 4 percent sales tax on the clear fuel that the motor
20 carriers pay. If they do that, we're done.
21 JUSTICE KAGAN: Is --
22 CHIEF JUSTICE ROBERTS: I might have -- I
23 might have missed it, but why isn't it a sufficient
24 justification for different treatment of the water
25 carriers that the statute admitting Alabama to the union

1 said they couldn't tax traffic on the river?
2 MR. PHILLIPS: Well, I think because the --
3 the chain -- because the Constitution has changed.
4 First of all, I don't know what --
5 CHIEF JUSTICE ROBERTS: The Constitution
6 might have changed, but the statute didn't.
7 MR. PHILLIPS: But I don't know that that's
8 a tax on the river because that could just be a tax
9 that's designed to deal with, like, a toll road. So I
10 don't know what that language actually refers to. This
11 is just a tax on gasoline that's being used to allow you
12 to get on the river.
13 So I don't -- I don't know -- I mean, this
14 is -- given that this wasn't the subject of any scrutiny
15 by anyone, nor put forward in any serious way, I
16 don't -- I mean, that -- I don't think it's a legitimate
17 justification.
18 But -- but in any event, it's still
19 available to Alabama. Well, I -- I suppose you could
20 say Alabama would take the risk if it -- if it removes
21 the exemption that somebody would bring suit against
22 them, but I don't think that's a very serious challenge.
23 JUSTICE KENNEDY: So suppose the State taxed
24 railroads at 4 percent, but then gave them a -- a credit
25 against what they paid on the highway tax. Would you be

1 back in the same position you are now?
2 MR. PHILLIPS: Gave an exemption to the --
3 I'm sorry?
4 JUSTICE KENNEDY: That they gave -- they
5 gave a deduction for the sales tax against what they've
6 paid in highway taxes.
7 MR. PHILLIPS: So you're talking about the
8 railroads and what we pay a highway tax?
9 JUSTICE KENNEDY: No, so the -- the
10 truckers.
11 MR. PHILLIPS: I just want to make sure I
12 understand.
13 JUSTICE KENNEDY: I -- I -- I misstated.
14 They taxed the truckers the same as they tax you, 4
15 percent.
16 MR. PHILLIPS: Right.
17 JUSTICE KENNEDY: But then they give the
18 truckers a deduction for whatever they paid in the
19 highway tax.
20 MR. PHILLIPS: Well, no. Then I think we'd
21 be right back to the same -- same boat.
22 JUSTICE KAGAN: As -- as I understand the
23 court of appeals' judgment as to the truckers, the court
24 of appeals just said it's too complicated, forget it,
25 we're not even going to look at Alabama's argument.

1 Now you're here and you're saying, well,
2 Alabama's argument is too simple. There's a whole raft
3 of other things to -- to include in the analysis of
4 whether that tax on the truckers is, in fact,
5 comparable.
6 But the decision that we have before us just
7 threw up its hands and refused to look at the whole
8 alternative tax issue. That seems, to me, a problem for
9 you, isn't it?
10 MR. PHILLIPS: Well, in the first place,
11 it's not a problem for me if you decide on the water
12 carriers. But even on its own terms, it seems to me
13 this Court has previously recognized in Snead, in a
14 similar anti-discrimination provision, that it is simply
15 not appropriate to do the kind of simple analysis
16 Alabama proposes here and just say, at the end of the
17 day, electricity is going to be better off in-state than
18 out-of-state or out-of-state than in-state so don't
19 worry about it, we're good.
20 JUSTICE KAGAN: Well, doesn't it have to be
21 appropriate as going in that Alabama can say, here's the
22 tax that we impose on truckers? They're really being
23 treated in the exact same way just under two different
24 provisions of the tax code, and then it's up to you to
25 say why that's wrong.

1 MR. PHILLIPS: Right, but -- and -- and we
2 did say why that's wrong.
3 JUSTICE KAGAN: But that's not what the
4 court of appeals said. The court of appeals did not
5 say, oh, you know, CSX has convinced us that these are
6 not comparable taxes. Instead, what the court of
7 appeals said is we're not even going to look at whether
8 they are comparable taxes.
9 MR. PHILLIPS: Right. And -- and I
10 realize -- I recognize a bit of a disconnect there. But
11 the reason why they said they weren't going to get
12 engaged in that inquiry is because the very items I've
13 identified, the nature of the tax, the purpose of the
14 tax, the incidence of the tax, are very -- are all
15 complicated issues and you can go through the rest of
16 the Hellerstein criteria -- very complicated issues, and
17 if the State is only going to come in here and try to
18 defend itself on the basis that at one point in time the
19 money is pretty close, that's not going to get it done.
20 And so then the question is -- and this is
21 where I think the Eleventh Circuit said, look, this is
22 clearly not enough -- we're not going to go down this
23 path and so that's the ruling.
24 Now, if the Court wants to quarrel with
25 that, at some point, I don't think this is the right

1 case in which to do that. First of all, this issue
2 wasn't presented in the cert petition. And second of
3 all, it's -- it's completely unnecessary to resolve this
4 particular case properly. You can affirm on at least
5 two alternative reasons without having to go down the
6 path of figuring out exactly whether comparability is
7 worth a candle.
8 If there are no further questions now, I'll
9 let you get your lunch.
10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 General Brasher, you have five minutes.
12 REBUTTAL ARGUMENT OF ANDREW L. BRASHER
13 ON BEHALF OF THE PETITIONERS
14 MR. BRASHER: Thank you, Mr. Chief Justice:
15 Let me just make a few quick points. One is
16 that if you adopt the position that the State's
17 justifications matter, it's no more difficult to analyze
18 a justification that has to do with another tax of any
19 other justification. As a matter of fact, it's a lot
20 easier because you can just use math as opposed to
21 evaluating some other justification.
22 And the justification with respect to the
23 truckers is that we are obligated under a series of
24 interstate agreements, international agreements and
25 Federal law, to impose a per-gallon tax on the truckers.

1 And then once you impose that tax on the truckers, the
2 question arises should you also impose an additional
3 sales tax on the same transaction as the purchase of
4 diesel fuel. And it makes perfect sense for the State
5 to say, as a policy matter, that we're not going to
6 double tax the same transaction.
7 It was surprising to hear my friend talk
8 about how he would be fine if the State tried to treat
9 railroads in a way that was the same as truckers,
10 because that's exactly what the State of Tennessee did
11 and it found itself in a real quandary that this Court
12 needs to prevent. Which is the railroads were arguing
13 that Tennessee was discriminating against them because
14 the railroads weren't treated like truckers. They won
15 that litigation. And then -- so Tennessee turned around
16 and tried to craft a statute that treated railroads
17 exactly the same way as truckers. And then the railroad
18 sued again saying that they were being targeted or
19 singled out for a tax that no one else had to pay.
20 And I think that is a necessary implication
21 of the rule that my friend on the other side is adopting
22 which is that it is -- it is discrimination to treat
23 railroads unlike anyone that they particularly say that
24 they compete with and it's also discrimination to try to
25 avoid that discrimination.

1 And the other point I would make is that
2 we're not talking in this case about a tax on diesel
3 fuel. We're talking about a sales tax. When CSX sends
4 us a check for their taxes, there is one line and it
5 says sales tax. This is how much we pay to the State
6 basis on sales tax. And everybody else, all the other
7 businesses in the State that have to pay the sales tax
8 on the items that they need for their businesses, are
9 sending us the same check that says this is what we have
10 to pay on sales tax.
11 And with respect to diesel specifically,
12 manufacturing companies, timber companies, construction
13 companies, when they send us a check, they -- they say
14 sales tax and that includes everything else that they
15 have to pay on the sales tax and the diesel fuel. And
16 that money that we're using, that we're collecting by
17 the sales tax, goes to -- primarily for education, which
18 is something that the railroads benefit from just like
19 everyone else in the State.
20 But ultimately what we're asking the Court
21 to do is adopt a rule that if we are using the -- the
22 hand-picked class of competitors, that the courts
23 actually have to weigh a State's reasons for the
24 exemptions in its tax code and with a focus on whether
25 the railroads are suffering any practical disadvantage.

1 And that's what the Eleventh Circuit refused to do.
2 That's ultimately what the district court did do.
3 And I think I disagree with my friend on the
4 other side about the burden of proof in this case. It's
5 always going to be the railroad's burden of proof to
6 show discrimination. And I think the district court
7 applied exactly the right formula for determining that.
8 Which is -- which is if you're in the zone where you're
9 using the railroads' competitors as a comparison class,
10 then you're in that area because you're worried about
11 whether they're suffering some practical disadvantage
12 vis-à-vis their competitors. And so it makes sense only
13 to strike down a tax if they actually are suffering some
14 real world practical disadvantage and that's something
15 that they never showed in this case.
16 Ultimately, what the Court should do is it
17 should put itself in the position of a state and local
18 policy maker who is trying to impose a fair and
19 non-discriminatory tax scheme that does not discriminate
20 against railroads but does actually require them to pay
21 their fair share of taxes.
22 I think we proposed two rules in this case
23 that would allow that State policy maker, when he or she
24 is being lobbied by all sorts of other industry groups
25 to get tax exemptions, to figure out whether they can

1 give those tax exemptions without also eliminating the
2 taxes that a completely separate industry group would
3 ultimately pay. And that is that you can use a
4 comparison class of general other businesses with a
5 focus on whether railroads are being singled out or you
6 can say the courts must actually weigh a State's reasons
7 for the exemptions in its tax code with a focus on
8 whether railroads are being practically disadvantaged.
9 Unless the Court has any further
10 questions --
11 CHIEF JUSTICE ROBERTS: Anything you can
12 give us on barges?
13 MR. BRASHER: Well, I would make one point
14 about that and that the only thing in the record is not
15 only that they're 1 percent of the market, but that
16 specific stipulation that we entered into is about the
17 intrastate market, 1 percent of the intrastate market.
18 And that's actually where they're taxed.
19 So the only thing in the record about
20 barges, it doesn't even go to -- to my friend's
21 arguments. And once again, they're not asking for the
22 same tax treatment as the interstate water carriers. If
23 they were, then there would be a lot more litigation on
24 that point because those water carriers have an
25 exemption that, like I said, taxes when they're moving

1 goods from one place to an Alabama to another but
2 doesn't tax them when they're moving those goods from
3 Alabama to another state.
4 So that's the same ship going from one place
5 in Alabama to another place, paying taxes on its diesel
6 fuel. When the same ship goes from Alabama to somewhere
7 else, it's not. That's not what the railroads ever
8 asked for which is the reason why that issue has not
9 really been litigated in the case.
10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.
12 (Whereupon, at 12:11 p.m., the case in the
13 above-entitled matter was submitted.)
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