

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES DAWSON, ET UX., )  
 )  
Petitioners, )  
 )  
v. ) No. 17-419  
DALE W. STEAGER, WEST VIRGINIA )  
 )  
STATE TAX COMMISSIONER, )  
 )  
Respondent. )  
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Pages: 1 through 73

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DALE W. STEAGER, WEST VIRGINIA )

STATE TAX COMMISSIONER, )

Respondent. )

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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.

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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 CHIEF JUSTICE ROBERTS: What if --

25 JUSTICE ALITO: I don't follow why

1 that is so. If the -- if you have two  
2 categories of state employees and they're very  
3 similar and they're treated differently, and  
4 then you have a category of federal employees  
5 who are similar to both of those categories of  
6 state employees, wouldn't you have to determine  
7 which group of state employees are most -- are  
8 more similar to the federal employees?  
9 Otherwise, it -- I don't see how it's  
10 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 170 --

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 perhaps the most important point,  
19 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. First, it's different in  
8 kind here because it's not the line the State  
9 drew.

10 The State didn't draw a line based on  
11 benefits. They could have. They could have  
12 done a facially neutral scheme that perhaps  
13 exempted a certain contribution rate or a  
14 certain benefit payout, but that's not what  
15 they did here.

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

24 So, you know, it's -- it's -- it's --  
25 the State has just decided, look, this is a



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

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

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

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

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

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

13           MR. ROSENBERG: Sure.

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

16           MR. ROSENBERG: Right.

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

23           MR. ROSENBERG: Right, because it's  
24           facially discriminatory. And -- and it doesn't  
25           provide any opportunity for any federal

1 employees to ever be part of it. It would be  
2 different if it were done as a facially neutral  
3 law.

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

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

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

25 In Jefferson County, for example, this

1 Court looked at a fairly narrow category, state  
2 judges versus federal judges, and only upheld  
3 that taxation scheme because the federal judges  
4 and state judges were treated the same.

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

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

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

24 The inquiry is one of similarity. Is  
25 -- is the state retiree or employee similar

1 enough to the federal retiree or employee that  
2 there shouldn't be discrimination?

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

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

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

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

24 For example, in this case, Section  
25 12(c)(5), which is the broader exemption that

1 only gets a small -- a smaller exemption, was  
2 specifically extended to federal employees two  
3 weeks after the Davis decision, but the State  
4 didn't extend 12(c)(6) and, therefore, it's  
5 facially discriminatory.

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

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Huston.

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

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

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

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

1 JUSTICE ALITO: Could you just say  
2 what you mean by "facially discriminatory"?

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

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

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

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

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

1       federally employed teacher, as opposed to a law  
2       enforcement officer, this tax exemption is  
3       still facially discriminatory. But Mr. Dawson  
4       in that hypothetical is not himself suffering  
5       discrimination. He's the wrong plaintiff.

6                   And I also think that that's --

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

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

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

25                  And if the Court thinks it has enough



1 to decide the case, we're comfortable with --

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

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

10 MR. HUSTON: Your Honor --

11 CHIEF JUSTICE ROBERTS: Think  
12 carefully before answering.

13 (Laughter.)

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

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

24 MR. HUSTON: Well, again, I think this  
25 -- it depends on how the state has drawn the

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

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

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

1 people pay more in -- in -- in -- make more of  
2 a contribution, all of that, do I understand  
3 your position correctly, is just irrelevant?

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

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

14 And so, to return to your hypothetical  
15 from the last -- from the last session, if you  
16 imagine that it turns out that the State  
17 actually has selected only those plans where  
18 the employees, say, contribute less than  
19 5 percent to their retirement and it has put in  
20 the, you know, disfavored category all  
21 employees who contribute more than 5 percent.

22 If Mr. Dawson is in the disfavored  
23 class, if it turns out that he lines up with  
24 the class of -- of workers that West Virginia  
25 is not affording the benefit, he has not

1 suffered discrimination.

2 Now, at the time we wrote the --

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

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

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

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

20 JUSTICE ALITO: Let me try this out.  
21 Let me try this out and see if this is close to  
22 what you're saying. Where you have a variety  
23 of categories of state employees and some get  
24 the benefit in question and some don't get the  
25 benefit in question, so the first step would be

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

9 But the -- I think even when you do  
10 that, you will very -- unless this -- unless  
11 the states get to do just about what --  
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 could --  
15 what could -- this is going to the exact same  
16 thing. What could West Virginia say on a  
17 remand and what could the West Virginia court  
18 find on a remand in -- in -- in defense of a  
19 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 it  
22 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 similarly  
15 situated state employees. This case is  
16 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 determined 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 question.

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 on --

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

1 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 BREYER: That sounds like  
16 you're saying we discriminate on the basis of  
17 source.

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

25 JUSTICE BREYER: Yeah. But what you

1 say is let's look at the state plan here and  
2 let's look at the federal plan. So you're  
3 saying they're the same people. They do the  
4 same thing. Is there discrimination?

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

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

17 JUSTICE ALITO: Could you just  
18 explain, what are the unique characteristics of  
19 those who get the favorable treatment, the  
20 characteristics that distinguish them from the  
21 state employees who don't get it? What are the  
22 characteristics that they -- they have? And  
23 then we can see whether a marshal or a deputy  
24 marshal has those characteristics.

25 MS. SEE: All of those characteristics

1 go to the particular retirement plan that  
2 they're part of.

3 JUSTICE KAGAN: It's this benefits and  
4 contributions?

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

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

14 JUSTICE ALITO: All right. Well --

15 JUSTICE KAGAN: Well, we can't  
16 possibly -- I'm sorry.

17 JUSTICE ALITO: Deputy marshals have a  
18 risk too.

19 MS. SEE: There are some deputy  
20 marshals who are eligible for the exemption but  
21 not all of them. And, yes, and so -- but the  
22 distinction is the deputy marshals in West  
23 Virginia who receive the exemption are those  
24 whose retirements benefits come from a deputy  
25 marshal only plan. The deputy marshal --



1 JUSTICE ALITO: Why does that matter?

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

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

16 Does that violate the statute? Now I  
17 thought the answer to that question is yes, it  
18 does violate the statute. Don't look into the  
19 state's actual reasons; just look into whether  
20 they end up with less money in their pocket and  
21 they're just -- maybe you could say a  
22 justification, but the justification can't be,  
23 well, we have a set of complicated retirement  
24 systems that pays the state people even more.

25 MS. SEE: Well, Your Honor, we -- we

1 agree that the State's -- the State's reason is  
2 not the deciding line here. The deciding line  
3 is what the State actually did.

4 And the way to do that, as Phillips  
5 Chemical explains, is to look at the way that  
6 the favored tax class is drawn.

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

17 MS. SEE: Yes, Your Honor.

18 JUSTICE KAGAN: Now it seems to me  
19 that we couldn't possibly do anything --  
20 suppose -- even if you were right, that -- that  
21 if the State showed all of that, I mean, we're  
22 not in a position to rule in your favor here.

23 At the very most, you're entitled to  
24 -- or at the very most, what we should do is  
25 remand so that the state court could figure out

1 whether, in fact, the members of this state  
2 plan, as compared to federal employees, receive  
3 lower benefits, make higher contributions, and  
4 are similarly in a -- you know, and -- and --  
5 and don't share this characteristic of a  
6 law-enforcement-only plan?

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

15 JUSTICE GINSBURG: But what happens to  
16 --

17 JUSTICE KAGAN: So that is very  
18 interesting because --

19 JUSTICE GINSBURG: -- the -- this was  
20 not raised the first time around. Why should  
21 you get a second chance?

22 MS. SEE: Well, Your Honor, it was  
23 raised the first time around, both the  
24 similarly-situated point and the step two  
25 significant differences. At every stage in the

1 state court litigation, the parties argued that  
2 these taxpayers were not similarly situated to  
3 those who receive the exemption.

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

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

17 MS. SEE: We do, Your Honor, on most  
18 parts.

19 JUSTICE KAGAN: Because you think that  
20 the states should be able to prove that the  
21 members of this plan are different from federal  
22 employees, notwithstanding that the state has  
23 made a non-neutral distinction. And on the  
24 contrary, Mr. Rosenberg thinks the fact that  
25 the state has made a non-neutral facial

1 distinction is game over.

2 MS. SEE: Well, Your Honor,  
3 respectfully, my friend's position for  
4 Petitioners would be at odds with what this  
5 Court has done before.

6 JUSTICE GORSUCH: Well, but, counsel,  
7 I guess I'm struggling with what Justice Kagan  
8 is. When we interpret statutes, we usually  
9 start and maybe finish with the plain language  
10 of them these days. And the statute here says  
11 if it discriminates on the basis of source,  
12 game over.

13 I look at the West Virginia statute  
14 and it contains none of the subtleties that  
15 West Virginia has, after the fact, imagined for  
16 its statute. It says only state law  
17 enforcement officers, period. It doesn't  
18 describe the nature of their contributions or  
19 anything else like that.

20 Why shouldn't that be the end of the  
21 inquiry under a normal statutory interpretation  
22 analysis where we don't bother looking at  
23 secret purposes when the plain text is clear?

24 MS. SEE: Because, Your Honor, even  
25 under that approach, Mr. Dawson, this

1     Petitioner, is not being treated different from  
2     state employees. The fact that there may be  
3     another hypothetical federal retiree who could  
4     bring a claim, who could bring an argument that  
5     his or her retirement plan looks very similar  
6     to the retirement plans exempted under West  
7     Virginia law, that may be a case for another  
8     day.

9             But that still leaves the fact that  
10     this Petitioner has not made out a claim that  
11     he is being treated differently.

12             JUSTICE SOTOMAYOR: I'm sorry --

13             JUSTICE KAVANAUGH: Is that --

14             JUSTICE SOTOMAYOR: -- there's never  
15     going to be an identical federal plan to an  
16     identical state plan unless the state chooses  
17     to model its plan on -- out of a federal plan.

18             This is an invitation to just throw  
19     Davis away. All a state has to say is we're  
20     going to favor our retirees because our plan is  
21     structured in X way and the federal plan is  
22     not. It makes no sense to me, what you're  
23     saying.

24             MS. SEE: Well, no, Your Honor,  
25     because we're not arguing that the Court needs

1 to look at all of the particular details of the  
2 plan, but only what -- what is the broadest  
3 point of commonality that sweeps in all of  
4 those plans that receive the exemption and  
5 those who don't.

6 And the State's position is that point  
7 of commonality is that there are plans that are  
8 available only to law enforcement officers.

9 That's all that this Court has to do.  
10 And this Court may second-guess the wisdom of a  
11 state giving a tax exemption based on that  
12 criteria, but, respectfully, that's not a  
13 decision for this Court and not one that the  
14 government requests that it --

15 JUSTICE SOTOMAYOR: So, even if the  
16 two plans are identical, merely because the  
17 state chooses a police-officer-only plan,  
18 that's enough of a difference to do away with  
19 Davis?

20 MS. SEE: Yes, Your Honor, to the  
21 extent that they are identical in terms of  
22 benefits or -- or -- or the way that term of  
23 service is concluded. Yes, that may be true  
24 because those aren't the distinctions in the  
25 statute.

1 JUSTICE SOTOMAYOR: Why isn't that  
2 just plain source?

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

8 But that does not mean that that --  
9 that that statute would automatically be struck  
10 down because the State would still have the  
11 opportunity at the second stage of the analysis  
12 to show that there are significant differences.

13 JUSTICE ALITO: Well, what would be  
14 the argument for giving favorable treatment --  
15 suppose we're just talking about categories of  
16 state employees, and you have -- you have law  
17 enforcement -- you have law enforcement  
18 officers who are basically identical, but one  
19 is in a law-enforcement-only plan and the other  
20 is in a plan that includes other employees.  
21 What would be the reason for treating those --  
22 those differently?

23 MS. SEE: Well -- well, the reason, we  
24 suggest, is because there are special funding  
25 considerations when you have a retirement plan



1 that's only available to those in a high-risk  
2 profession, such as law enforcement.

3 JUSTICE ALITO: Okay. Well, so now  
4 you're saying it's funding considerations, but  
5 it's not just the fact that they're -- they're  
6 only law enforcement officers.

7 MS. SEE: No, Your Honor, I'm saying  
8 that would be the justification for a state to  
9 draw a line between law-enforcement-only and  
10 something else. But the proper inquiry is to  
11 look at the line in the statute and then to  
12 take -- take the state statute at its word.

13 In this case, we give an exemption to  
14 members of law-enforcement-only plans. If  
15 there were a federal retiree who could raise  
16 that claim, that person would be similarly  
17 situated.

18 JUSTICE KAVANAUGH: In terms of job  
19 duties --

20 MS. SEE: Yes, Your Honor.

21 JUSTICE KAVANAUGH: -- in terms of job  
22 duties, is there a distinction that you see  
23 between the favored state employees and the  
24 disfavored state employees in terms of job  
25 duties?

1 MS. SEE: Yes, Your Honor. Yes, Your  
2 Honor, we believe there is. The example of a  
3 sheriff is -- is the strongest example in this  
4 record. Mr. Dawson didn't retire as a deputy  
5 marshal. He retired as a full marshal. And  
6 federal law says that the duties of a marshal  
7 and a deputy for that instance are comparable  
8 to the duties of a state sheriff. Not a state  
9 deputy sheriff. And the reality is that  
10 that's --

11 JUSTICE KAVANAUGH: And what are the  
12 distinctions between the state -- again, just  
13 on my question, the distinctions between the  
14 state favored class and the disfavored state  
15 class? I just want to --

16 MS. SEE: Well -- well, with respect  
17 to sheriffs, most sheriffs, in fact, virtually  
18 all state sheriffs in West Virginia, do not  
19 receive the exemption. Most of them do not  
20 because they are part of the general public  
21 employees retirement system.

22 JUSTICE KAVANAUGH: How do their job  
23 duties differ?

24 MS. SEE: Well, the job -- the job  
25 duties are different. There are many other job

1 duties that this Court did not -- I'm sorry,  
2 that the state court did not reach. Those  
3 particular distinctions were not part of the  
4 consideration.

5 So, if this Court believed that the  
6 appropriate response is to look at job duties,  
7 then, yes, West Virginia agrees that remand  
8 would be appropriate to flesh out those  
9 differences.

10 CHIEF JUSTICE ROBERTS: Most --

11 JUSTICE ALITO: Suppose a retiree --

12 CHIEF JUSTICE ROBERTS: No, go ahead.

13 JUSTICE ALITO: Suppose a retiree had  
14 worked for 20 years as a deputy sheriff, one  
15 year as a sheriff, and then retired. What --  
16 what would that -- how would that employee be  
17 treated?

18 MS. SEE: Well, if the employee had  
19 worked -- worked for 20 years as a deputy  
20 sheriff, let's assume that their deputy sheriff  
21 retirement benefits had vested, they would have  
22 the ability to receive those benefits. They  
23 would have to stop receiving them while they  
24 were a sheriff but could receive them later.

25 That particular employee would be able

1 to exempt the benefits from their time as a  
2 deputy sheriff because they came from the  
3 deputy sheriff plan, not any benefit --

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

13 MS. SEE: Because, Your Honor, I was  
14 assuming for the purposes of that question that  
15 this hypothetical deputy sheriff was part of  
16 the deputy sheriffs' retirement system in West  
17 Virginia. We don't know --

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

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

21 JUSTICE ALITO: -- because suppose the  
22 state -- the state has a -- all of its  
23 employees are in one plan, okay, and the state  
24 says those people get this benefit. And now  
25 you have a federal employee who comes along,

1 and the state says, well, you don't get that  
2 benefit because you weren't in the state plan.

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

4 MS. SEE: We would say that employee,  
5 yes, has made out a case that he or she is  
6 being treated different than similarly situated  
7 state employees.

8 JUSTICE ALITO: Okay. So then I don't  
9 know what you're -- where you're going with the  
10 fact that it turns on whether you're in one  
11 plan or another plan.

12 MS. SEE: It -- it turns on the  
13 particular components of the plan.

14 JUSTICE ALITO: Yeah, the components  
15 of the plan, but not the mere fact that you are  
16 or are not a -- a member of that plan.

17 MS. SEE: Your Honor, it does depend  
18 on whether someone is a member of the plan, but  
19 in order to determine if a similarly-situated  
20 federal employee is being treated different, we  
21 have to look at what describes that plan. What  
22 are those characteristics?

23 And if they were a federal employee  
24 who could show that his or her retirement plan  
25 had similar characteristics, then, yes, we

1 would agree that person's treated different  
2 from similarly-situated employees.

3 JUSTICE GINSBURG: But, in fact, there  
4 is no such -- we know what the federal  
5 retirement plans are, and there's no retirement  
6 plan like these four.

7 MS. SEE: Correct, Your Honor. And --  
8 and that's --

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

19 MS. SEE: Yes, Your Honor, that's what  
20 this Court held in Jefferson County. There,  
21 the federal taxpayers made an argument that it  
22 was impossible for them to ever qualify for the  
23 county exemption.

24 This Court said that was not enough to  
25 strike that statute.

1                   JUSTICE GINSBURG: I thought the Court  
2 said in Jefferson County that state judges and  
3 federal judges were treated the same?

4                   MS. SEE: They did say they were  
5 treated the same, and job duties was relevant  
6 there because the statute drew distinctions  
7 based on individuals who were members of  
8 covered professions who did or did not pay  
9 other state license fees. So that --

10                  JUSTICE BREYER: I began to see this  
11 as a different issue than I had initially  
12 thought. So don't say I'm right if I'm wrong.  
13 Okay?

14                  MS. SEE: All right.

15                  (Laughter.)

16                  JUSTICE BREYER: And if I'm off base,  
17 just say it. But the statute says you cannot  
18 tax the pay of a -- or compensation of a  
19 federal official if the tax -- unless the tax  
20 does not discriminate because of the source of  
21 the pay or compensation.

22                  MS. SEE: Yes.

23                  JUSTICE BREYER: Okay. So then we  
24 have some money that the marshals get. And  
25 they put that money into a federal fund, which

1 is a retirement fund. And the state in its  
2 taxation discriminates against them, but not  
3 because of their pay or compensation, but,  
4 rather, because of the nature of the retirement  
5 fund that they put it in.

6 Is that what you're saying?

7 MS. SEE: Yes, if the distinction is  
8 based on the type of retirement fund, and,  
9 again, the only reason that distinction matters  
10 is because that's the distinction in the state  
11 tax code.

12 And in Phillips Chemical, this Court  
13 said that is the line the Court should look at.  
14 How has the state drawn the favored class --

15 JUSTICE BREYER: Okay.

16 JUSTICE SOTOMAYOR: It's a simple --

17 JUSTICE BREYER: So where did I get --  
18 I didn't -- for some reason, it's not  
19 necessarily your fault, but I -- this is a  
20 fairly simple point.

21 Look at the retirement fund, and if  
22 that's the basis for the discrimination against  
23 the federal employees, that's fine. That isn't  
24 their pay or compensation.

25 And -- and that's what we should be



1 looking at?

2 MS. SEE: Your Honor, I would add to  
3 that --

4 JUSTICE BREYER: Is that right?

5 MS. SEE: Yes, but I would add to  
6 that.

7 JUSTICE BREYER: But I didn't get that  
8 out of the brief too well, but maybe that's my  
9 fault. Okay.

10 MS. SEE: Well, if -- if the  
11 distinction is that is a federal retirement  
12 plan and that is the reason that someone is or  
13 is not in the favored class, then that would be  
14 discriminatory under the doctrine.

15 But that's not what this West Virginia  
16 tax regime is doing, because the reality is  
17 there are many state -- state retirees, over  
18 98 percent, who are in the disfavored class.  
19 And there are many state law enforcement  
20 officers, some with identical jobs, who are  
21 also in the disfavored class.

22 CHIEF JUSTICE ROBERTS: It seems to me  
23 that Davis makes it very clear that that's not  
24 a significant consideration. If you have a  
25 small retirement benefit, and say this is

1 available for all people who do X, unless  
2 you're paid from a federal plan, would that  
3 violate Davis or not?

4 You have 99 percent of the state  
5 employees are not eligible for it, but it says  
6 if you're in this category, a tiny category,  
7 you get the benefit, unless you're a federal  
8 retiree.

9 MS. SEE: Well, Your Honor, the first  
10 question would be whether the particular  
11 challenger is, in fact, in that tiny category.

12 CHIEF JUSTICE ROBERTS: Yeah, but that  
13 first question was not the one I asked. I  
14 asked a different one, which is you argued  
15 that, well, it depends on how many of the state  
16 employees are eligible or not. And I thought  
17 Davis said specifically it doesn't, it depends  
18 upon the source.

19 So if it -- if it's five employees in  
20 the state, and there's one who's a federal  
21 employee, and your plan says these five get it  
22 and no federal employee gets it, does that  
23 violate Davis or not?

24 MS. SEE: Your Honor, in that case, it  
25 probably would. And that's because we're not

1 saying that the sheer small number of employees  
2 who would benefit or not matters. It's  
3 relevant, though, because this tax regime  
4 treats 98 percent of state employees different  
5 from --

6 CHIEF JUSTICE ROBERTS: Well, you just  
7 said it doesn't matter and then you tell me it  
8 matters.

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

19 JUSTICE KAVANAUGH: On -- on job  
20 duties, if -- if we conclude that that's most  
21 significant, were Dawson's job duties similar  
22 to the duties of the favored state employees?

23 MS. SEE: They were similar, yes, Your  
24 Honor, but that does not end the inquiry  
25 because they were just as similar to the

1 disfavored state law enforcement employees.

2 JUSTICE KAVANAUGH: Okay. And your  
3 opposing counsel says in that circumstance  
4 where you're similar to both the favored and  
5 the disfavored state employees, that the state  
6 is required to go with the favored state  
7 employees as the treatment for the federal  
8 employees, if you're following me, why is your  
9 opposing counsel wrong on that point?

10 MS. SEE: Because courts are never  
11 required to turn a blind eye to evidence in the  
12 record that shows that the comparison class a  
13 plaintiff has brought forward is inappropriate.

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

17 MS. SEE: Because --

18 JUSTICE KAVANAUGH: -- in the sense  
19 that they're similarly situated in both the  
20 favored and the disfavored. That's what you  
21 just said, I think.

22 MS. SEE: Right, because it doesn't  
23 show what -- what the actual dividing line is  
24 in that case. We know the dividing line is not  
25 between those who have certain job duties or

1 not, because a police officer who lives five  
2 miles away from another police officer may have  
3 vastly different state tax treatment with  
4 identical job duties.

5 That's not how the state tax is  
6 drawing the distinction.

7 JUSTICE KAVANAUGH: But I think the  
8 only way to be sure in that circumstance that  
9 we're describing that you're not discriminating  
10 against the federal employees is to be -- to  
11 give them the treatment that the favored state  
12 employees get.

13 If you give them the treatment that  
14 the disfavored state employees get, you're  
15 never going to be sure whether that's based on  
16 discrimination against the federal government  
17 or not. And that's what the statute seems to  
18 target, making sure that there's not  
19 discrimination against the federal employees.

20 MS. SEE: Your Honor, this Court has  
21 never held a most favored taxpayer standard.  
22 In fact, in Jefferson County, that was just as  
23 true there, because there were many state  
24 officers who received the exemption and did  
25 not.

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

9           CHIEF JUSTICE ROBERTS: Thank you,  
10          counsel.

11          Four minutes, Mr. Rosenberg.

12          REBUTTAL ARGUMENT OF LAWRENCE D.

13          ROSENBERG ON BEHALF OF THE PETITIONERS

14          MR. ROSENBERG: I just have a few  
15          points in rebuttal.

16          First of all, in response to the  
17          question that Justice Breyer and the Chief  
18          Justice posed at the end, this plainly is  
19          discrimination based on the source. If you're  
20          in the state plans, you get the exemption. No  
21          federal plans get the exemption. That is  
22          classic discrimination based on source.

23          Secondly, there is no reason for  
24          remand. And I do think that the space between  
25          me and my brother from the Solicitor General's

1 Office is actually much smaller than it  
2 appears. What I think the Solicitor General  
3 was saying is that there's no question that at  
4 step one of Davis, this is facially  
5 discriminatory. It -- it violates the law.

6 The question is, are U.S. Marshals the  
7 right plaintiffs? And before the State had  
8 articulated its reasons for arguing that they  
9 were, the government said maybe a remand would  
10 be appropriate. Here, however, we know what  
11 the state has argued.

12 The state has argued these financial  
13 considerations that plainly are not the line  
14 that the state drew. The record itself, the  
15 Joint Appendix establishes that the -- the  
16 factors that the state argues were not  
17 even-handedly drawn.

18 In this circumstance, there is no  
19 reason for a remand. Moreover, many of the  
20 financial arguments that the state raised were  
21 rejected.

22 JUSTICE SOTOMAYOR: Could you slow  
23 down?

24 MR. ROSENBERG: I'm sorry.

25 JUSTICE SOTOMAYOR: There's a lot of

1 generalities. Give me specifics.

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

9 We know that some entitlement to  
10 Social Security gets the exemption. Some  
11 don't. We know some higher contribution rates  
12 get the exemption. Some don't. That's Joint  
13 Appendix page 28 and 29. That chart shows that  
14 clearly. Right?

15 So we know that they weren't the basis  
16 for the line that the state drew and they're  
17 not even-handedly applied.

18 Moreover, many of those arguments were  
19 raised in the circuit court, and the circuit  
20 court rejected them and said Davis precludes  
21 them because they're just ultimately an  
22 argument about the amount of compensation.

23 And if the state were going to draw  
24 the line based on that, it would have drawn the  
25 line neutrally based on the line of



1 compensation, not done it the way it did, which  
2 was to discriminate based on source.

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

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

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

18 If you were a deputy sheriff or a  
19 state trooper, and then became a sheriff, you  
20 are still covered.

21 And there is nothing in the record  
22 that indicates that most sheriffs weren't  
23 previously deputy sheriffs or state troopers.  
24 So the -- the sheriff distinction that the  
25 state makes isn't -- isn't supported here. And

1 the record doesn't justify this notion that  
2 counsel mentioned about law enforcement-only  
3 plans.

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

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

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

19 The Court should reverse. No remand  
20 on the merits is necessary.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel. The case is submitted.

23 (Whereupon, at 11:11 a.m., the case  
24 was submitted.)

25

## Official - Subject to Final Review

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