

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEPARTMENT OF REVENUE OF OREGON,
Petitioner v. ACF INDUSTRIES, INC., ET AL.

CASE NO: 92-74

PLACE: Washington, D.C.

DATE: Monday, November 8, 1993

PAGES: 1-50

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEPARTMENT OF REVENUE OF :

4 OREGON, :

5 Petitioner :

6 v. : No. 92-74

7 ACF INDUSTRIES, INC., ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Monday, November 8, 1993

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:02 a.m.

14 APPEARANCES:

15 VIRGINIA L. LINDER, ESQ., Solicitor General of Oregon,
16 Salem, Oregon; on behalf of the Petitioner.

17 KENT L. JONES, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; United
19 States, as amicus curiae in support of the
20 Petitioner.

21 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
22 the Respondents.

C O N T E N T S

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2	ORAL ARGUMENT OF	PAGE
3	VIRGINIA L. LINDER, ESQ.	
4	On behalf of the Petitioner	
5	KENT L. JONES, ESQ.	
6	United States, as amicus curiae	
7	in support of the Petitioner	
8	CARTER G. PHILLIPS, ESQ.	
9	On behalf of the Respondents	
10	REBUTTAL ARGUMENT OF	
11	VIRGINIA L. LINDER, ESQ.	
12	On behalf of the Petitioner	
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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-74, Department of Revenue of Oregon v. ACF
5 Industries.

6 Ms. Linder, you may proceed.

7 ORAL ARGUMENT OF VIRGINIA L. LINDER

8 ON BEHALF OF THE PETITIONER

9 MS. LINDER: Mr. Chief Justice, and may it
10 please the Court:

11 This case, like the one that precedes it, turns
12 on a question of statutory interpretation. It involves a
13 single statute. Section 11503 of the 4R Act prohibits
14 certain state practices that Congress has decided
15 unreasonably burden and discriminate against the railroad
16 industry. The plaintiffs in this case claim that the
17 Oregon property tax system discriminates against them
18 because it exempts certain categories of property from its
19 general property tax system without giving the same
20 exemption to the property that they own.

21 The question here is whether Oregon's exemption
22 policies discriminate against railroads in any way that
23 Congress acted to prohibit.

24 QUESTION: Now, Ms. Linder, we are concerned
25 here only with subsection (4), is that correct? That's

1 the only issue before us, the meaning of that subsection
2 (4)?

3 MS. LINDER: Justice O'Connor, the precise
4 question is the meaning of subsection (4). That is the
5 only subsection under which they proceeded.

6 QUESTION: All right. And it says that a state
7 may not impose another tax that discriminates against rail
8 carrier.

9 MS. LINDER: Yes, Your Honor.

10 QUESTION: All right, now, what other tax does
11 that mean? I mean, what's the meaning of that? Is that
12 other than an ad valorem property tax?

13 MS. LINDER: Our position is that's exactly what
14 it means.

15 QUESTION: That's how you read it?

16 MS. LINDER: Yes.

17 QUESTION: So it would cover sales taxes and
18 gross receipts taxes and income taxes?

19 MS. LINDER: That, the question of --

20 QUESTION: Yes? Under your theory.

21 MS. LINDER: Your Honor, that's an open
22 question.

23 QUESTION: Well, why wouldn't it? I mean, if it
24 means any other tax other than ad valorem, why doesn't it
25 pick up all those other taxes?

1 MS. LINDER: Taken as a matter of plain language
2 it certainly suggests that. Taken as a matter of
3 structure from the act as a whole, a more narrowing
4 definition can be given to it. And as a result lower
5 courts --

6 QUESTION: But you agree that the plain language
7 would suggest it would cover all these other taxes?

8 MS. LINDER: As a matter of pure plain language,
9 sitting along in that section, yes, Your Honor, we would
10 agree with that. When you look at it in the context of
11 the statute as a whole, what you end up with with the any
12 other tax that discriminates are five words in the context
13 of a statute that is otherwise wholly dedicated to the
14 proposition or to tests on ad valorem property taxes.

15 QUESTION: Well, but there was certainly some
16 indication in the legislative history that gross receipts
17 taxes and so forth were in the minds of the drafters of
18 that provision.

19 MS. LINDER: And we believe that's exactly what
20 that provision was intended to reach. We agree that it
21 would reach a gross receipts tax.

22 QUESTION: But the language would certainly
23 reach sales and income and other taxes.

24 MS. LINDER: The language would seem to sweep
25 more broadly in the provision itself.

1 QUESTION: Well, if it did then how do you view
2 the discrimination? No exemptions allowed for these other
3 taxes?

4 MS. LINDER: I believe that's our opponent's
5 argument, Your Honor. It is certainly not ours.

6 QUESTION: But if it doesn't reach that far, if
7 the and other language is qualified, and if it's qualified
8 in terms of the statute, then doesn't that mean that it's
9 plausible that another tax means a property tax that is
10 equalized so far as assessment and rate but has
11 differential exemptions? The minute you say another --
12 the point of the question was the minute you say that
13 another tax is more narrow than the language would suggest
14 and it's qualified by the rest of the act, it seems to me
15 that that is consistent with the proposal of the railroads
16 in this case.

17 MS. LINDER: Justice Kennedy, if I understand
18 the point of the question correctly, I think my answer is
19 that if we were looking at some other tax on property,
20 other than a generally applicable ad valorem property tax,
21 that was reached under subsection (b)(4), you might, the
22 question then would be other exemptions from that tax, I
23 would think, and what Congress would mean in terms of
24 exemptions from that same tax. I don't think that would
25 create license to go back up and revisit the judgment that

1 was made in the first three subsections of the act about
2 exempt property.

3 Our basic view of the statute is this. It is a
4 statutory hole. The first three subsections of the
5 statute are addressed to a generally applicable ad valorem
6 property tax system, and what you get if you want to sue a
7 state for its application of that tax to your property, is
8 you get what those first three sections provide for.

9 Subsection (b)(4) does not go back up and revisit the
10 grounds on which you may sue the state. Subsection (4)
11 provides exactly what, it means what it says. You can --

12 QUESTION: That's because it says another tax.

13 MS. LINDER: That's right.

14 QUESTION: But then why do you shy away from the
15 logical, what seems to me logical definition of another
16 tax in your response to Justice O'Connor's question, which
17 was some other tax other than an ad valorem property tax?

18 MS. LINDER: Mr. Chief Justice, I don't mean to
19 shy away from that at all. We think it does mean that.
20 The question may be, and it's not a question you need to
21 answer in this case we don't believe, how much broader it
22 is, how far beyond an ad valorem property tax it goes.
23 For instance, would it extend to a corporate income tax?
24 That question has never been answered and lower courts
25 have divided somewhat on those things.

1 QUESTION: And you say we don't have to answer
2 it here because what you're talking about is an ad valorem
3 property tax?

4 MS. LINDER: Precisely. The tax that Oregon
5 levies on the railroad cars in this case is a tax derived
6 from our general ad valorem property tax system that
7 applies to everyone. And for that reason, if it is to be
8 tested it needs to be tested under subsections (1) through
9 (3). It is not a tax that can be tested under subsection
10 (b) (4) .

11 QUESTION: Ms. Linder, you use the word general
12 ad valorem property tax. Does the statute contain the
13 word general?

14 MS. LINDER: It does not.

15 QUESTION: What would the situation be in your
16 view if all other taxpayers in the state paid a gross
17 receipts tax, an income tax, a sales tax, several taxes,
18 but none of them paid an ad valorem tax except the
19 railroads, so it was a special ad valorem tax? Would that
20 violate the statute or not?

21 MS. LINDER: Justice Stevens, my first answer to
22 it is you could test it under subsection (b) (4) . Whether
23 it would violate the statute is a far more difficult
24 question, but we would agree you may challenge that under
25 subsection (b) (4) . The difficulty is for purposes of that

1 section we have absolutely no test to apply --

2 QUESTION: There would be no discrimination
3 because everybody who is assessed an ad valorem tax would
4 pay at the same rate and the same amount. All railroads
5 would pay the same tax.

6 MS. LINDER: But at that point --

7 QUESTION: But you don't know whether you think
8 that would violate the statute or not?

9 MS. LINDER: I do not know whether it is a
10 discriminatory tax at that point. I believe that it is
11 not an ad valorem property tax in the sense that Congress
12 intended it.

13 QUESTION: You think Congress intended to
14 include the word general even though it doesn't appear in
15 the statute?

16 MS. LINDER: Yes. Yes.

17 QUESTION: But you say that that hypothetical
18 tax would not violate subsections (1) through (3) because
19 of the definition that allows exemptions?

20 MS. LINDER: Justice O'Connor, that hypothetical
21 tax simply doesn't fit the model contained in subsections
22 (1) through (3). The reference to an ad valorem tax,
23 granted one that does not have the word general in it, is,
24 we think the basic understanding there is a broad,
25 generally applied tax that extends to real and personal

1 property with a host of taxpayers in that group, and
2 that's certainly consistent with the history if it's
3 necessary to resort to that to see what Congress was
4 thinking about when it used the terms.

5 It's also very much the kind of property tax
6 that is contained within the structure and the model that
7 is devised by virtue of the assumption that we are going
8 to test the rates and the assessments that are levied on
9 railroad property against some other group of comparisons
10 and seek an average.

11 QUESTION: Is it typical that all states have
12 personal property taxes on commercial and industrial
13 property?

14 MS. LINDER: Justice O'Connor, it is typical,
15 yes.

16 QUESTION: And is it typical that these schemes
17 have exemptions?

18 MS. LINDER: Justice O'Connor, I know of no
19 state that does not.

20 Under our approach in that case what the
21 carlines must do is they must bring their challenge under
22 subsections (1) through (3), and if the challenge is
23 brought there then the immediate result is that they have
24 no cause of action.

25 QUESTION: Ms. Linder, how do you answer the

1 argument that under your view you couldn't have property B
2 taxed at a lower rate than railroad property, that would
3 be barred, but you could have a total exemption of
4 property B, and that would be okay? Under your reading of
5 the statute I take it that that would follow, that you
6 couldn't tax property B a little less, but the state could
7 exempt it altogether.

8 MS. LINDER: Justice Ginsburg, that is exactly
9 our reading of the statute. Our view of what Congress
10 both said and did and intended is that this was
11 essentially an equalization formula for railroad property.
12 Congress intended railroad property to get the benefit of
13 the average taxed property in the jurisdiction.

14 It is a very different proposition, states raise
15 and lower taxes on different taxpayers and different items
16 of property, as does the Federal Government, for a host of
17 reasons, drawing distinctions between types of property
18 and owners. But when governments exempt you are usually
19 dealing with a very powerful policy choice on a
20 government's part that suggests that perhaps a very
21 different policy is at work, and that is exactly the kind
22 of policy choice that drove the wording of the comparison
23 class and caused it to be limited to property subject to a
24 property tax levy.

25 So it is not the illogical result in any sense

1 to say that if we want to equalize railroad property and
2 insure that they are not taxed higher than some average,
3 we will look to some comparison that consists of taxed
4 property. Typically in equalization formulas, which were
5 expressly contemplated as Congress crafted the act, you do
6 not look to exempt property to equalize because as a
7 policy matter something different is going on when states
8 take the property out of its tax base altogether.

9 QUESTION: And you say that's reflected in
10 11503(a)(4) which defines property to be only property
11 that is subject to a property tax?

12 MS. LINDER: Justice Scalia, yes. That, we
13 believe that's exactly what it means. None of the parties
14 in this case seem to have squared off with us very
15 directly on that issue. Every lower court that has
16 examined it has so concluded, and we think for sound
17 policy reasons or sound text-based reasons.

18 QUESTION: You said that every state has some
19 exemptions. Tell me, what is the pattern so far as
20 equalization? Do most states have different
21 classifications of property so far as both assessment and
22 rate, or is that unusual?

23 MS. LINDER: Justice Kennedy, my understanding
24 is that the more common model is that there is not a broad
25 classification system in most states. There are some

1 states, I believe I have heard of one that has as many as
2 21 different classes of property, but my understanding is
3 that the common model in the states is to have a fairly
4 uniform system between real and personal property alike.

5 If we are correct that subsection (b)(4) has no
6 application to a general, to the levy of a generally
7 applicable property tax, and certainly even if there is
8 some application that you can bring for purposes of
9 subsection (b)(4), it should not be used to test a state's
10 exemption policies because those were expressly
11 contemplated in the first three sections and Congress
12 adopted an unqualified position on that matter. Then we
13 think this case is emend. At that point the carlines do
14 not state a claim under the statute.

15 There are other questions if we're wrong
16 concerning the remedy that would, the test that you would
17 apply and the remedy that you would attach, and those
18 questions become increasingly difficult once you begin to
19 try to take subsection (b)(4), which was not at all
20 tailored to the kind of challenge that they bring, and
21 determine how it is you would even challenge the very
22 thing that Congress contemplated in the first three
23 subsections.

24 The difficult with coming up with a test is
25 another reason that we think it demonstrates that neither

1 the language nor the structure nor anything Congress
2 intended, expected that we would be in subsection (b) (4) .

3 QUESTION: Ms. Linder, what is your view of the
4 district court, the district court held for Oregon but it
5 recognized the possibility of de facto discrimination,
6 which I took to mean if it turned out that they were
7 really exempting everything except railroad property?

8 MS. LINDER: That is, Justice Ginsburg, that is
9 what the district court assumed was one of the possible
10 things it might have to test for under subsection (b) (4) .

11 QUESTION: But I take it that your reading of
12 subsection (b) (4) wouldn't even leave room for that
13 because you say it just has no office with respect to this
14 very same tax.

15 MS. LINDER: That is correct to a point. That
16 is our reading, and I have to say to a point. There seems
17 clearly to be a point at which if you carve away
18 everything out of your tax system except the thing that
19 looks like a railroad, at that point you do not have the
20 broadly applicable tax system that Congress envisioned.

21 The problem with both what the district court
22 then examined, it found no violation even if it were to
23 use that kind of an inquiry, but the problem with the way
24 the examination gets made, and it's the problem with the
25 way the carlines want to make it in this case with their

1 persistent use of the number 67 percent of exempt
2 property, the point of talking about those kinds of
3 percentages is to suggest that the state is moving towards
4 a system that is no longer broadly applicable.

5 If you're going to test for that, you do not
6 look at the kinds of numbers certainly that the carlines
7 have used in this case. They don't tell you anything
8 about how much property you are taxing. They tell you
9 something about how valuable that property is, but it can
10 be one exemption and in this case it largely is. It is
11 business inventory.

12 QUESTION: Ms. Linder, I don't understand where
13 you get this up to a point. You don't seem to have the
14 courage of your convictions on this.

15 MS. LINDER: Justice Scalia --

16 QUESTION: Is it up to a point, past a certain
17 point it will not, no longer be the general system that
18 Congress had in mind? I mean, we're supposed to intuit
19 what Congress -- you come to us with a textual argument
20 and your textual argument is simply that by reason of
21 1105(a)(4) it is, you have simply not, there is no rate
22 applicable to commercial and industrial property that is
23 not taxed, and therefore you can't possibly be
24 discriminating against that property.

25 I don't know why you don't take it the way it's

1 written, and say that the safeguard against what Justice
2 Ginsburg is worried about is simply that no state is going
3 to cut off its nose to spite its face and exempt everybody
4 except railroads. But I don't see how you get to some
5 limitation. I know it's a feel good limitation, we all
6 would like to have it there, but how do you get it out of
7 the text as you have read the text to us?

8 MS. LINDER: I do get it out of the text, but I
9 want to emphasize that we are talking about something so
10 different than what we were talking about in Oregon, that
11 it wouldn't look anything like what Oregon is.

12 QUESTION: Let's concede that, but how do you
13 get it out of the text? Suppose I have a system in which
14 I exempt everything except railroads, an ad valorem
15 property tax that exempts everything except railroads.
16 Don't you have to say under your theory of the statute
17 that that's okay, if the state wants to be that nutty and
18 collect no other money?

19 MS. LINDER: I would agree I should adopt that
20 position wholeheartedly --

21 QUESTION: But you can't bring yourself to do
22 it.

23 MS. LINDER: I have difficulty bringing myself
24 to do it, Your Honor, because -- and again this is text-
25 based. If you look to what is going on in subsections (1)

1 through (3), the very expectation of the language of those
2 sections and the model that is created in them is that you
3 are dealing with a property tax system that includes on
4 some basis multiple property tax owners and multiple kinds
5 of property. And I think, for better or for worse, that
6 that's exactly what Congress intended, and if you have a
7 target tax that is levied on one property tax owner or one
8 piece of property, that is not what was contemplated
9 there.

10 You're also correct, it's not contemplated there
11 because it never happens.

12 QUESTION: I don't care what was contemplated.
13 I care what was legislated against --

14 MS. LINDER: And I'm talking about text and
15 structure when I say that.

16 QUESTION: Okay. Would you refresh my
17 recollection as to your position in the district court?
18 Did both parties agree on a 50 percent rule there?

19 MS. LINDER: Justice Stevens, no. The Ninth
20 Circuit -- if the question is did we take the position
21 that the test was some majority kind of test --

22 QUESTION: You get the impression from the court
23 of appeals description of what went on in the district
24 court that you would have agreed that if there had been an
25 exemption of over 50 percent of property in the state that

1 then there would have been a violation, and you in fact
2 argue it was only 30 percent whereas they said it was 67
3 percent.

4 MS. LINDER: Justice Stevens, the Ninth Circuit
5 statement on that was incorrect.

6 QUESTION: I see.

7 MS. LINDER: What we said to the Ninth Circuit
8 about that was even assuming that the test is what they
9 say it is, if you put the numbers together the way we
10 thought was accurate they didn't get to 50 percent.

11 QUESTION: And that was to put personal property
12 tax and real property tax in different categories for
13 purposes of the comparison?

14 MS. LINDER: That's right. That's how carlines
15 get to their 67 percent. They have to do that or they
16 don't get to --

17 QUESTION: Do you agree that that is a correct
18 methodology?

19 MS. LINDER: No, we don't. We think that is
20 dramatically --

21 QUESTION: You think personal and real property
22 should be lumped together in one category?

23 MS. LINDER: Yes.

24 QUESTION: What is your textual basis for that
25 in this case?

1 MS. LINDER: There are two. The first is in the
2 comparison class itself which refers to real or personal
3 property and doesn't suggest that you have to draw a line
4 between them and not put them both together.

5 There is another base as well. If you look to
6 subsection (c) which refers to the assessment methodology
7 that a state would use, there is a potential for the
8 assessment method to not have a sufficient number of
9 properties in the comparison so that you, if the district
10 court is dissatisfied that it is a reasonable sample of
11 properties from the comparison class, the district court
12 may then pull a new sample from the entire property tax
13 base in the taxing jurisdiction. And at that point the
14 language is quite clear, you go to all of the property.

15 The point of distinguishing in the statute
16 between real and personal, there is some doubt about what
17 Congress would intend if you had a state that
18 distinguished for purposes of rates or assessments between
19 real and personal property, and there is legislative
20 history, if you resort to it, to suggest that in a state
21 that drew a distinction that you shouldn't then look,
22 cross those boundaries and look at the rates or the
23 assessments that apply to the different kinds.

24 QUESTION: Of course even in that case your
25 language of the fourth, article (d) here refers simply to

1 discrimination against a carrier, which would imply that
2 in effect it's the composite bottom line that you're
3 concerned with on discrimination. Would you agree?

4 MS. LINDER: I would agree.

5 QUESTION: That subsection (c) you referred to,
6 it demonstrates that this is not a finely crafted piece of
7 legislation, doesn't it?

8 MS. LINDER: Justice Scalia, it demonstrates
9 that very well.

10 QUESTION: Because it says you can't get relief
11 for anything except discrimination by variable assessment.

12 MS. LINDER: That's exactly what it says. It
13 came into the statute at a time that the statute addressed
14 only assessments. It was never changed even though the
15 statute evolved after that point.

16 I'll reserve the remainder of my time.

17 QUESTION: Very well, Ms. Linder.

18 Mr. Jones, we'll hear from you.

19 ORAL ARGUMENT OF KENT L. JONES

20 UNITED STATES, AS AMICUS CURIAE

21 IN SUPPORT OF THE PETITIONER

22 MR. JONES: Mr. Chief Justice, and may it please
23 the Court:

24 Under the state's reading of the statute the 4R
25 Act would literally prohibit every imaginable form of

1 state tax discrimination other than discriminatory
2 property tax exemptions. If there is an eye in this
3 needle it would be large enough to drive the entire camel
4 through. The state, instead of simply preferentially
5 taxing non-railroad property, could not tax it at all,
6 exempting it entirely from the tax.

7 The courts of appeals have unanimously concluded
8 that that interpretation of the act is not sensible and
9 doesn't respond to either its language or its history. In
10 the view of the courts of appeals subsection (b)(4)
11 prohibits a discriminatory tax by any means other than
12 those already prohibited in the prior subsections.

13 This is, after all, national legislation. For
14 example, Ohio could enact a tax that discriminates by
15 assessment rates and that tax would violate (b)(1) and
16 (2). Oklahoma could enact a tax that discriminates by tax
17 rates and that tax would violate (b)(3). If Oregon enacts
18 a tax that has discriminatory exemptions that tax in the
19 language of the statute is another tax that results in
20 discrimination against railroads.

21 QUESTION: Mr. Jones, the Government, as I
22 understand it, agrees with the railroads on the scope of
23 section (4), but says, contrary to the railroads, that
24 every differentiation is not a discrimination. How does
25 that give the railroads anything more than the Equal

1 Protection Clause already gives them?

2 MR. JONES: Well, the Equal Protection Clause
3 under this Court's decision in Lehnhausen in 1972 doesn't
4 give the railroads very much at all. Lehnhausen built
5 upon what I think we can call the pigeon hole rule, which
6 was adopted in an opinion by Justice Frankfurter in 1940
7 in the Chesapeake and, I'm sorry, in the Nashville and
8 Chattanooga case. Putting those two rules together, what
9 this Court has held is that the Constitution doesn't bar
10 the states from treating railroad property differently
11 from all other kinds of property.

12 It was those constitutional holdings that were
13 the impetus for this legislation, so to suggest or to
14 conclude that only constitutional limits need apply to
15 discriminatory exemptions is to say Congress didn't change
16 the law.

17 QUESTION: So you think Congress set up kind of
18 a new kind of equal protection analysis different from the
19 courts, the Constitution, and it was just to be developed
20 on a case-by-case basis?

21 MR. JONES: They set up a standard. The
22 standard that they adopted was discrimination. It's a
23 statutory standard, it's not the equal protection
24 standard.

25 QUESTION: As strict scrutiny for railroads.

1 MR. JONES: No, sir, I don't think it's strict
2 scrutiny, but I do think that it's statutory specific
3 scrutiny.

4 QUESTION: Does it include disparate impact?

5 MR. JONES: I'm not sure if I can answer that in
6 the abstract, but I, let me see if I can answer your
7 question this way. It is a normal approach in
8 transportation legislation to talk about discrimination,
9 and in talking about discrimination the cases make the
10 point that a difference in treatment is not necessarily a
11 discriminatory treatment. That here, like in other
12 commercial contexts, a difference in treatment creates an
13 inference of discrimination, but the states can rebut that
14 inference by a showing of an appropriate justification.

15 QUESTION: They certainly can't rebut it if it
16 falls under (1) through (3).

17 MR. JONES: If it falls under (1) through (3)
18 you don't have to decide whether it's discriminatory.
19 Those are objective standards. The court doesn't have to
20 say it's discriminatory to have disparate assessment
21 rates. The statute says that. But with respect to
22 exemptions the court needs to decide whether the
23 exemptions are discriminatory.

24 QUESTION: What do you compare it to? To get
25 under (4), to find discrimination you have to compare A

1 with B.

2 MR. JONES: Yes.

3 QUESTION: What is it you're comparing?

4 MR. JONES: Well, what you're comparing is the
5 difference in treatment between the two types of property.
6 In the, this Court's decision in Arizona Public Service
7 Company v. Snead, which dealt with an analogous statute,
8 different in many details but analogous, and in that case
9 the Court indicated that the justifications have to be
10 related to the type of the tax involved.

11 In our view there are at least three
12 justifications that a state could claim to support a
13 difference in treatment. The first is to us the
14 relatively obvious one of a compensatory tax where the
15 exemption is with respect to property whose value is taxed
16 under a different statutory scheme. Because that
17 exemption is so obvious to us it explains why Congress
18 didn't try to deal with exemptions in (b)(1), (2), and
19 (3).

20 QUESTION: But as the railroads point out, the
21 property, the motor vehicle tax may be \$10 a vehicle,
22 which is hardly comparable to the kind of tax rates that
23 is imposed on the property tax generally.

24 MR. JONES: I agree with your statement in the
25 abstract. Of course many states have motor vehicle taxes

1 substantially higher. Another example of a compensating
2 tax might be a severance tax. Severance tax is imposed
3 once on the day of the production rather than every year
4 prior to production. There may be many valid reasons to
5 treat the value, to tax the value of that property under
6 that different method.

7 The key part of the compensating tax approach is
8 that it is a tax to which the railroad property would not
9 also be subject. It is a different tax scheme on value
10 that is not discriminatory in its character or in its
11 application.

12 QUESTION: Mr. Jones, I don't, I really have no
13 idea what, how to measure the kind of discrimination
14 you're talking about under the first three portions, and
15 when I'm confronted with a statute like this I am inclined
16 to give it the meaning that will least confuse the Federal
17 courts for the next 50 years, and if Congress wants to be
18 more precise they can. Why isn't the state's
19 interpretation just that kind of an interpretation?

20 You can exempt anything you want, and I'm not
21 even worried about before. I guess you could say well,
22 you're going to have to do some fancy footwork on the
23 before to figure out what discrimination was, but I
24 wouldn't even have to do that because subsection (c) says
25 you don't get relief under (4).

1 MR. JONES: I'm not sure which part of that
2 question you want me to address, Justice Scalia.

3 QUESTION: Address why the state's solution
4 isn't the simplest, the one that puts less strain on the
5 Federal courts and less fosters litigation into the
6 indefinite future.

7 MR. JONES: With all respect, Justice Scalia --

8 QUESTION: Whereas you come up with some test
9 that I don't know how to figure out, when you decide there
10 are too many exemptions or not.

11 MR. JONES: With all respect, Justice Scalia, I
12 am not familiar with any canon of statutory interpretation
13 whose objective is to avoid litigation of this kind of an
14 issue. But the statutory standard is discrimination.

15 QUESTION: Well, we're certainly in the field of
16 restricting state action. We have a canon that says you
17 have to be very clear when you're trying to impair
18 traditional state action, and certainly the imposition of
19 taxes is traditional state action.

20 MR. JONES: In the Piedmont case in 1932 this
21 Court said that national transportation legislation is
22 remedial legislation which should be broadly interpreted.
23 I am not suggesting that a broad interpretation is
24 necessary. I am --

25 QUESTION: What is not remedial legislation in

1 your estimation? Give me an example of non-remedial.

2 MR. JONES: I am not sure. A non-remedial
3 legislation --

4 QUESTION: Why would Congress ever pass
5 legislation that wasn't remedial, remedying something?

6 MR. JONES: I'm not sure if I can answer why
7 they would ever do it. I think they always have an
8 objective in mind, but I think that the Court is aware of
9 the distinctions it has drawn in its cases between
10 different types of statutes and has addressed as remedial
11 a statute such as this one that displaces pre-existing or
12 non-existing law to achieve the objective of the statute.

13 QUESTION: Don't all statutes displace pre-
14 existing or non-existing law? If not, why are they
15 passed?

16 MR. JONES: What these types of statutes do is
17 they -- well, there are two types. There's the new
18 regulatory scheme which this case does not involve. This
19 is not a preemption case. This is a substantive remedial
20 case. So if that were a distinction that I believe that
21 is appropriate to draw you could make, you could apply
22 that distinction here.

23 But my point with respect to Justice Scalia is
24 that the statute specifies the standard. It says a tax
25 that discriminates. It is the Court's function to

1 determine what that means.

2 And if I could return to what I was
3 suggesting --

4 QUESTION: Mr. Jones, you said it doesn't mean
5 what it means in equal protection. You're not willing to
6 say it's fixed scrutiny or what the standard is. You said
7 you can't answer the question in the abstract so let me
8 give you a concrete illustration, one category that's
9 exempt is business inventory. The railroad cars are not
10 exempt, business inventory is. How does that fit, is that
11 discrimination or not? How does one go about resolving
12 that question?

13 MR. JONES: Business inventories would be
14 exempt -- if business inventories are exempt, if they are
15 a type of property that railroads would normally own then
16 it's not discriminatory to exempt it. If it's a type of
17 property that is taxed under a different ad valorem scheme
18 then it's not discriminatory.

19 QUESTION: Business inventory is exempt from
20 this tax. Railroad cars are not. How does one determine
21 if that is impermissible discrimination?

22 MR. JONES: Absent a justification it is
23 discriminatory. That is what this Court has held under
24 analogous statutes involving transportation. It is the
25 state's obligation to justify it. If they cannot provide

1 the justification it violates the statute.

2 QUESTION: Thank you, Mr. Jones.

3 Mr. Phillips, we'll hear from you.

4 ORAL ARGUMENT OF CARTER G. PHILLIPS

5 ON BEHALF OF THE RESPONDENTS

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

8 The stipulation in this case, Oregon fully taxes
9 the personal property of every carline and railroad that
10 does business in the state, while at the same time Oregon
11 exempts from personal property taxes more than 67 percent
12 of the personal business property in that state.

13 QUESTION: Does the word "fully" have any
14 particular connotation when you say that, Mr. Phillips?

15 MR. PHILLIPS: Only in the context of the
16 stipulation, Mr. Chief Justice. The stipulation says they
17 fully tax to the full extent. There is evidence in the
18 record that indicates that there is under-assessment and
19 under-reporting. The railroads do not receive the
20 benefits of that. The role of under-assessing and under-
21 reporting in this case, however, is not significant
22 because with or without that particular component we find
23 that there is a majority discrimination in any event.

24 QUESTION: So nothing in this case turns upon
25 the meaning of the word "fully" in the stipulation?

1 MR. PHILLIPS: Not as the case comes to this
2 Court at this particular point.

3 In our view Oregon unquestionably treats the
4 railroad property worse than it treats the majority of the
5 other property within the state, and accordingly
6 respondents urge the Court to hold that Oregon imposes a
7 tax that results in discriminatory treatment against rail
8 carriers as that language appeared in the original version
9 of what is now 49 U.S.C. section 11503(b)(4), and
10 therefore the tax is unlawful.

11 In turn respondents urge the Court to hold that
12 the only appropriate remedy for that situation is to
13 enjoin the state from imposing that personal property tax
14 and thereby treat the railroad property just as it treats
15 the majority of other property within the state.

16 In doing that there are essentially three issues
17 in this case, although at this stage you might have lost
18 sight of a couple of them because the state for its part
19 focuses almost exclusively on the threshold question of
20 whether or not (b)(4) applies to anything at all, almost
21 in some respects, but certainly it raises the question of
22 whether (b)(4) applies to ad valorem taxes and whether it
23 challenges its exemption practices in this case.

24 The second --

25 QUESTION: Mr. Phillips, in applying subsections

1 1 through 3 we look to the definition, do we, of
2 commercial and industrial property?

3 MR. PHILLIPS: Yes, Justice O'Connor.

4 QUESTION: And the phrase subject to a property
5 tax levy means that under (1) through (3) the state can
6 have an exemption scheme?

7 MR. PHILLIPS: That is correct, Justice
8 O'Connor. All of the courts of appeals that have
9 addressed that issue have permitted that.

10 QUESTION: And that's why your clients did not
11 bring their cause of action under (1) through (3)?

12 MR. PHILLIPS: That is correct, Justice
13 O'Connor. If the Ninth Circuit had not originally taken
14 the position that there is no relief to be had for
15 exemptions under (b)(1) through (b)(3) we might have
16 pressed that argument. We certainly have done so in the
17 past.

18 QUESTION: But it is a bit odd, then, when you
19 come to (b)(4) to think that a state can't have
20 exemptions.

21 MR. PHILLIPS: I think what you --

22 QUESTION: It just seems anomalous at the bottom
23 line.

24 MR. PHILLIPS: Not if you put it in the context
25 of the precise language of (b)(4). (b)(4) says in the

1 original language that it prohibits any other tax that
2 results in discrimination. That is extraordinarily broad
3 language, Justice O'Connor.

4 QUESTION: Well, now it says another tax that
5 discriminates.

6 MR. PHILLIPS: I understand that, Justice
7 O'Connor.

8 QUESTION: Do you think that means something
9 different than any other tax?

10 MR. PHILLIPS: No, it has to mean the exact same
11 as any other tax because the change is not to have any
12 substantive effect, but the actual language adopted by
13 Congress is actually any other tax and that's the language
14 that ought to control in terms of the --

15 QUESTION: Well then where did impose another
16 tax, where did that language come from?

17 MR. PHILLIPS: That comes from the original
18 language as well, Justice, Mr. Chief Justice.

19 QUESTION: Well, surely if the language we're
20 dealing with says impose another tax that doesn't mean
21 exactly the same thing as if it said any other tax.

22 MR. PHILLIPS: Well, to the extent that it means
23 something different from that, Mr. Chief Justice, you
24 would apply the any other tax language because that's what
25 this Court said in Burlington Northern and that's what

1 Congress said it wanted to have happen. But this
2 recodification was not to implement any substantive
3 changes in the way the statute ought to be applied, and
4 therefore the extraordinarily expansive language of (b) (4)
5 as originally enacted in the 1976 4R Act is the language
6 that should guide this Court's interpretation of the
7 meaning of that provision.

8 QUESTION: Why did you say that was so in the
9 Burlington case?

10 MR. PHILLIPS: Because that is what Congress
11 indicated when it allowed the recodification in 1978. It
12 made it very clear that that recodification was not to
13 change the substantive sweep of any of the language
14 implemented through that recodification process.

15 QUESTION: Mr. Phillips, why isn't the most
16 natural reading of that language to refer to any tax other
17 than an ad valorem property tax?

18 MR. PHILLIPS: I think the most natural reading
19 of that language is to refer to any other tax that
20 discriminates. What we're talking about are other means,
21 or means of discrimination in the first two provisions,
22 and the language at the end both deals with additional
23 discriminations and also deals more broadly than the
24 earlier taxes. They don't talk strictly about property or
25 forms of property or railroad property. They deal much

1 more broadly with the question of discriminatory treatment
2 of rail carriers. And therefore that language, as the
3 Solicitor General argues in his brief and with which we
4 agree completely, encompasses a much broader prohibition
5 on discriminations than any of the other language.

6 QUESTION: So much so that it essentially
7 eclipses the other. I mean, why do you need (1), (2), (3)
8 if you have (4)? If (4) says no discrimination against
9 railroad property, period, then (1) to (3) are
10 superfluous.

11 MR. PHILLIPS: Well, except that (1) through (3)
12 identify precise definitions of objectively identifiable
13 discriminations that the statute prohibits. The language
14 results in discriminatory treatment doesn't self-define.

15 QUESTION: But neither does it to say any other
16 discrimination, which is the way you're using it.

17 MR. PHILLIPS: I think that's the most natural
18 way to understand the particular language that Congress
19 chose because --

20 QUESTION: Well, certainly the easiest way to
21 understand the language Congress chose is to take the
22 indication of (1) through (3) as being examples of the
23 discrimination that it referred to in the preamble
24 sentence of (b) and to assume that indeed the
25 discriminations that it is referring to are the same kinds

1 of discriminations, in other words the statute in fact
2 does define discrimination by example. It is using that
3 same sense of discrimination in (d), and that is
4 inconsistent with the reading of any other kind of
5 discrimination, in fact it's antithetical to it.

6 MR. PHILLIPS: I would have understood the way
7 you argued that, Justice Souter, for exactly the opposite
8 proposition, which is that it clearly must mean that the
9 state is not in a position where it can sit back and
10 exempt all of the other property of the state, leaving
11 only the railroads out there exposed to discrimination,
12 and find a way to argue that that's nevertheless not a
13 treatment that results in discrimination against the
14 railroads.

15 QUESTION: Well, that's not the point. I mean,
16 you clearly could so argue and you would probably have a
17 very good policy ground for so arguing, but I don't see
18 that as being the easiest way to read this text. It's
19 perfectly true that reading the text the way I do leaves a
20 loophole there. If some state really wants to go that
21 far, in the reading I have suggested it could do so.
22 Perfectly true. In which case I dare say you would be
23 back across the street getting that one fixed.

24 MR. PHILLIPS: Well, I'm sure that's true as
25 well, but it seems to me at least an odd approach to the

1 language of the statute to guarantee that it will be self-
2 defeating.

3 QUESTION: Is it so odd when you start with the
4 proposition that the statute is to begin with an exception
5 to the Tax Injunction Act?

6 MR. PHILLIPS: Well, it's interesting in that
7 regard because the states historically have now taken
8 diametrically opposed views of what this language means
9 precisely. On the one hand when they have non-ad valorem
10 taxes they tell you that it only applies to ad valorem
11 taxes, and when they have ad valorem taxes they tell you
12 it applies to every other tax except ad valorem taxes.
13 And presumably if you were interpreting this with
14 reference to the canon of construction under the Anti-
15 Injunction Act, both of those positions would be equally
16 supported in exactly the same way.

17 It seems to me the language is not so very plain
18 on either side that you can tell what Congress precisely
19 meant, but what you can tell is what Congress' objective
20 was here which was to avoid allowing railroads to be
21 treated more harshly than the majority of other property
22 within the state. And when you take that view, and to
23 adopt a view that guarantees that the state, excuse me,
24 that the railroads will have majority support, then it
25 seems to me the only way you can do that is to find that

1 (b) (4)'s very broad language is expansive enough to permit
2 the interpretation that the railroads propose here.

3 QUESTION: But you can't take that view, I take
4 it you would agree, solely as an inference from the text
5 itself. You've got to go behind the text in order to find
6 an intentional interpretive canon as broad as you propose.

7 MR. PHILLIPS: Every court of appeals that has
8 addressed this issue --

9 QUESTION: Do you agree with that?

10 MR. PHILLIPS: Well, no, I have some difficulty
11 with that, Justice Souter, because every court of appeals
12 that has addressed this issue, has read that language, has
13 inferred from that language that it is a catch-all
14 provision and that it really means any additional taxes
15 that discrimination over and above the ones that are
16 objectively identified in (b) (1) through (b) (3). And so I
17 find it at least presumptuous of me to suggest that that's
18 not a very natural and reasonable interpretation of that
19 language because there are a whole host of very talented
20 jurists who have reached that exact conclusion, indeed all
21 of them have.

22 QUESTION: Is your position essentially that
23 this is a most favored taxpayer clause? To the extent
24 that there is business and industrial property, if any of
25 that property is exempt then the railroad property must be

1 exempt?

2 MR. PHILLIPS: No, Justice Ginsburg, that is not
3 the position of the carlines in this case. Our position
4 on the proper interpretation of the term discrimination or
5 discriminatory treatment has been, is the same here as it
6 has been all along, which is that you must make the proper
7 comparison between personal and personal properties and
8 that exemption of more than 50 percent of the personal
9 property is a triggering point. And once the state
10 exempts more than 50 percent of other business' personal
11 property, other commercial and industrial property, then
12 you have discrimination that is per se invalid under
13 (b) (4) and ought to be set aside.

14 QUESTION: Why not 33-1/3 percent or 66-2/3?

15 MR. PHILLIPS: I have no trouble with 66-2/3.

16 QUESTION: I know that.

17 (Laughter.)

18 QUESTION: Pluck a number out of the air. I
19 mean, I am really reluctant to think that Congress wrote a
20 statute in which it expected us to just pluck some number
21 out.

22 MR. PHILLIPS: That is the exact same number,
23 Justice Scalia, that Congress would have you pluck out of
24 the air in applying the (b) (3) provision, because if you
25 have 50 percent of the personal property taxed at one

1 rate, or let's say 50 plus a little, and 49 percent taxed
2 another rate, the statute requires that the railroad
3 property be taxed at the lower rate, or whatever the
4 majority rate is. It could be favorable or unfavorable,
5 but that 50 percent majority line is inherent in (b)(3)
6 and makes sense in (b)(4).

7 QUESTION: Well, it seems to me when they wanted
8 numbers they stated numbers, as indicated in the later
9 provision where they say there has to be a 5 percent
10 differential. Why isn't it reasonable to read (1), (2),
11 and (3) as essentially reading out, well, you have to read
12 (1), (2), and (3) as saying that an exemption doesn't
13 count, an exemption at least for ad valorem taxes does not
14 count as discrimination at least for purposes of (1), (2),
15 and (3). Why not read (4) as saying that exemption is not
16 considered discrimination for purposes of (4) either,
17 since it hasn't been for (1), (2), and (3)?

18 MR. PHILLIPS: Because --

19 QUESTION: So that whatever constitutes
20 discrimination on the part of another tax, total exemption
21 of some category is not it.

22 MR. PHILLIPS: There is no textual basis for
23 that, Justice Scalia. There is a textual basis for the
24 (b)(1) through (b)(3) --

25 QUESTION: There is a textual basis. The

1 textual basis is that your preamble to the whole section
2 provides the following acts unreasonably burden and
3 discriminate against interstate commerce. They then give
4 you three examples. They then in subsection (4) use the
5 word discriminate again, and there is a textual basis for
6 saying that the definition of discriminate in (4) is
7 simply the same as the definition by example of
8 discriminate which is set out in (1), (2), and (3).
9 That's a textual basis.

10 MR. PHILLIPS: Except that the comparison is
11 that there's no language of discriminate that comes out of
12 (b) (1) through (b) (3), first of all, and second of all --

13 QUESTION: Isn't the structure of (1) through
14 (3) to exemplify the discriminations?

15 MR. PHILLIPS: But (b) (4) also exemplifies the
16 discrimination. I mean, it implements the discrimination.

17 QUESTION: Well, it doesn't exemplify, it
18 doesn't give an example. It doesn't exemplify. (1), (2),
19 and (3) are examples, and they are examples that follow
20 the use of a general word discriminate. (4) is not an
21 example section. (4) simply uses the word discriminate
22 again, and it's reasonable to assume that it's using the
23 word in the same sense that it has used it before as
24 defined by the three examples.

25 MR. PHILLIPS: Except that the purpose of it is

1 not to make comparisons to property. (b)(1) through
2 (b)(3) makes specific property types of comparisons.
3 (b)(4) protects a broader class. It protects rail
4 carriers. And therefore that language doesn't necessarily
5 take you back up to the discrimination language of the
6 preamble, and it ought to be given the full effect.

7 QUESTION: The carrier language doesn't, but the
8 discrimination language still may.

9 MR. PHILLIPS: The difficulty I have with your
10 argument, Justice Souter, is you still are dealing -- I
11 don't see how you get to the point where you say I can
12 take all of the property of the state out of the personal
13 property tax base except the railroads, and that's not a
14 tax that results in discrimination against the railroads,
15 against the rail carriers.

16 QUESTION: It depends on whether you're going to
17 redefine the word discrimination or not. Your argument
18 assumes that discriminate in (d) means something other
19 than the discrimination exemplified in (a) through (c).
20 If you don't make that assumption, if you say based on the
21 text I am going to assume that discriminate has a common
22 usage throughout this section, then in fact it is no
23 objection to the argument to say that yes, you may indeed
24 leave the railroad as the only taxpayer with respect to a
25 certain class of property. And if that's the case, if the

1 state does cut off its nose to spite its face, Congress is
2 the answer.

3 MR. PHILLIPS: I have two thoughts about that.
4 First of all, the use of the term discriminate in the
5 preamble talks about discriminating against interstate
6 commerce, whereas the term discriminate in subsection
7 (b) (4) talks about discrimination against rail carriers.
8 So I'm not sure that it's fair to infer that those
9 necessarily reincorporate each other, and it's an odd
10 phraseology. And again, I think if you take the (b) (1)
11 through (b) (3) and too narrow constrain them, what you do
12 is violence to the language differences between (b) (1) and
13 (b) (3), and (b) (4).

14 The specific exemptions provide that they are
15 taking out exemptions for making assessment ratio
16 decisions, and they are taking out exemptions from trying
17 to make rate judgments. That makes perfect sense if
18 anybody has ever tried to do a ratio assessment, an
19 assessment ratio analysis, because it's very hard to
20 figure out how you're going to assess property that has
21 never been taxed. So it makes perfect sense to take it
22 out of that context.

23 It's a much more streamlined and sensible way of
24 implementing the tax scheme, but that's not a reason then
25 to go and take away from (b) (4) the language that every

1 court of appeals has embraced and said is a catch-all
2 prohibition against all forms of discrimination.

3 QUESTION: How do the courts of appeals explain
4 the use of the word "other" in section (4)?

5 MR. PHILLIPS: They view the "other" as
6 referring to other forms of discrimination, so that it's
7 any other tax that discriminates.

8 QUESTION: Even though it modifies the word tax?

9 MR. PHILLIPS: Yes, Mr. Chief Justice. That,
10 coupled with the overall language in the purpose of the
11 statute, which was to provide a generalized protection
12 against unfair treatment to the railroads to insure their
13 financial stability and viability.

14 Now, assuming that the (b)(4) exemption applies
15 to the particular taxes here and that the exemption scheme
16 that the state has adopted is subject to scrutiny on the
17 standards of discrimination, we then come to the question
18 of on what basis do you decide that there has been
19 discrimination in this case. The position of the
20 carlines, as I suggested earlier, has remained steadfast,
21 that the appropriate comparison is between personal
22 property and personal property, and real property and real
23 property. The state defines those terms differently, the
24 state applies its exemption policies differently, and as a
25 consequence of that it is a legitimate position for the

1 carlines to take that those comparisons ought to be made
2 in the context of the specific case.

3 Under the stipulation as it comes to this Court,
4 agreed to by both parties, there is no doubt that 67
5 percent of the property other than the railroad's property
6 in the State of Oregon is exempt completely from taxation
7 while 33 percent of the property remains fully taxed, as
8 is the railroad property in this particular case.

9 QUESTION: Suppose the relief that the Court
10 ordered in the case was that you would simply get a 67
11 percent credit? Would that eliminate the discrimination?

12 MR. PHILLIPS: Our position is that does not
13 eliminate the discrimination, Justice Kennedy. The
14 problem with that argument is that our remedy flows
15 directly from the nature of the violation. If you treat
16 us worse than a majority of the taxpayers of the state, of
17 the property holders of the state, then the appropriate
18 remedy that flows from that, given that it's a statute
19 that prohibits imposing taxes in a particular way, is that
20 we be treated precisely as the majority is treated. And
21 in this case 67 percent of the taxpayers, the tax base, is
22 exempt from taxation and therefore we should be exempt
23 from taxation as well.

24 QUESTION: Well, you're put, under the formula
25 where you get a 67 percent credit, you are put in the same

1 position as all other taxpayers in the state.

2 MR. PHILLIPS: Technically you're certainly not,
3 because what you've done is you have created three
4 different categories of taxation. You've got exempt tax,
5 you've got fully taxed, and you've got railroad taxed, and
6 that seems to me an extraordinary remedy for a court to
7 order. There is nothing in the statute that provides for
8 that kind of relief, and it seems to us the more
9 appropriate course to take under those circumstances is
10 simply to place us in the position we would have been if
11 the state had treated us as well as it does the majority
12 of the other taxpayers in the state. In that event we
13 would be fully exempt from taxation.

14 QUESTION: Well then if the 50 percent threshold
15 is reached you do get a most favored nation type
16 treatment.

17 MR. PHILLIPS: That's correct, because that's
18 the only way to insure that we consistently are treated
19 like the majority of the other property, which we think
20 was a significant value that undergirds the statute. The
21 state did not disagree with that in its assessment. It
22 concedes that one of the purposes of the 4R Act in section
23 3061(d) was to insure that the fate of the railroads as
24 taxpayers would be tied or bound up with the fate of the
25 broader group of taxpayers in the state. As a consequence

1 of that, that remedy flows directly from the particular
2 violation that we assert in this particular case.

3 QUESTION: Mr. Phillips, with respect to the way
4 you calculate the relevant percentage, given the fact that
5 subsection (d) refers to discrimination against rail
6 carriers without reference to specific classes of property
7 or kinds of tax, why shouldn't you aggregate all of the
8 property to get in effect a composite rate, in which case
9 instead of 67 percent you would get, I guess what, 30
10 something percent in this case?

11 MR. PHILLIPS: I'm not exactly sure how the
12 numbers would play out.

13 QUESTION: In any case, why isn't it a bottom
14 line analysis as opposed to a class-by-class analysis?

15 MR. PHILLIPS: There are two answers to that.
16 First of all, that is not the approach that has ever been
17 taken with respect to (b)(1) and (b)(3). Under those
18 provisions it is never available to the railroad to argue
19 that the differentials in rates for personal property
20 should be compared to real property as a basis for seeking
21 some kind of relief. And it seems to us if you don't
22 compare it for (b)(3) there is really no reason to compare
23 it for (b)(4).

24 Second of all, it is wholly arbitrary to decide
25 that you're going to make a comparison with respect to

1 real property but then you're going to exclude all
2 intangible personal property. And the stipulation in this
3 case is that there is \$60 billion worth of intangible
4 personal property in the State of Oregon, all of which is
5 exempt, so that if you were to include that into the mix
6 you would end up with something akin, under the state's
7 reply brief analysis of all the property things, you'd end
8 up with an 89 percent exemption of property while we're
9 getting taxed fully. Under those circumstances it seems
10 clear to us that would be invalid.

11 But we have never argued, none of the railroads
12 nor the carlines have ever insisted on that kind of a
13 comparison. What we ask for is to be treated like the
14 property holders who are most comparable to us, business
15 and commercial industries. That is all we have asked for,
16 and it seems reasonable to us.

17 One last observation I would make with respect
18 to the Government's justifications argument, it seems to
19 me clear that justifications are not provided for for
20 (b) (1) and (b) (3), and no reason appears under our theory
21 of a majority rule to have justifications applied for
22 (b) (4). And in any event it is absolutely clear on the
23 record in this case that there is no justification within
24 the meaning of the Government's position that would
25 justify --

1 QUESTION: (b) (4) does use the word
2 discriminate, where (1), (2), and (3) don't.

3 MR. PHILLIPS: That is correct, Mr. Chief
4 Justice. On the other hand we're not talking about every
5 disparity giving rise to discrimination. Under our theory
6 of it, when you get above 50 percent you have the kind of
7 discrimination that should not warrant an additional
8 justifications argument.

9 I guess I would just go back to Justice Scalia's
10 sort of basic point here which is that to incorporate that
11 kind of a justifications analysis is to take what we think
12 is a relatively straightforward and simple analysis and
13 make it an extraordinarily complex and difficult problem
14 for the lower courts, and we see no reason to commend that
15 approach. Since the court of appeals enjoined properly
16 the tax in this case, it's judgment should be affirmed.

17 If there are no further questions.

18 QUESTION: Thank you, Mr. Phillips.

19 Ms. Linder, you have 2 minutes remaining.

20 REBUTTAL ARGUMENT OF VIRGINIA L. LINDER

21 ON BEHALF OF THE PETITIONER

22 MS. LINDER: I've only a couple of points to
23 make. Mr. Phillips said that in Oregon all carlines and
24 all railroad property is taxed. That is not true.
25 Railroad property is subject to the same set of

1 exemptions. If railroads own timberland they receive the
2 same tax treatment as any other taxpayer. As a result of
3 that, that is true with respect to any exemption, business
4 inventory as well.

5 The point of that is that in fact there is
6 extraordinary uniformity in the State of Oregon in its
7 taxing scheme. Railroads and carlines are in the host of
8 a great number of population that consists of a large
9 number of taxpayers, a large number of taxed property, and
10 they are in very good company in that way. They receive
11 exactly the same average tax rate and assessment of every
12 other taxpayer in the State of Oregon. Put aside the
13 percentages and the numbers which are designed to suggest
14 that something else occurs, it simply does not.

15 Beyond that our only other point is the point we
16 began with with this statute. When Congress crafted
17 subsections (1) through (3) and defined the comparison
18 class it was not simply declining to deal with exempt
19 property as the United States' Solicitor suggests. It was
20 defining discrimination in the process of doing that. And
21 the express policy choice plain in the text of the statute
22 was that states may exempt property from their taxation
23 schemes without penalty to railroads in the form of lower
24 taxes.

25 That same express policy runs directly to

1 timberland and agricultural land as to, you can no more
2 put exempt property back in the calculus and be true to
3 that policy choice than you can put timberland or
4 agricultural land back in the formula as well. It makes
5 no sense to say that in the first three sections of the
6 act Congress gave with one hand and then came down to the
7 fourth and took it away.

8 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Linder.

9 The case is submitted.

10 (Whereupon, at 12:01 p.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Department of Revenue of Oregon, Petitioner v. ACF Industries, Inc.

Case No. 92-74

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)

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