

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CSX TRANSPORTATION, INC., :

4 Petitioner :

5 v. : No. 06-1287

6 GEORGIA STATE BOARD OF :

7 EQUALIZATION, ET AL. :

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9 Washington, D.C.

10 Monday, November 5, 2007

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12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:04 a.m.

15 APPEARANCES:

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17 the Petitioner.

18 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the

19 Solicitor General, Department of Justice, Washington,

20 D.C.; on behalf of the United States, as amicus

21 curiae, supporting the Petitioner.

22 WARREN R. CALVERT, ESQ., Senior Assistant Attorney

23 General, Atlanta, Ga.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-1287, CSX Transportation v. the Georgia State Board of Equalization.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

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

Congress, in what is now section 11501(b)(1), crafted what this Court described as a straightforward approach to determining whether a State is unlawfully taxing railroad property. Congress used a precise formula that is set out in a pictorial form on page 6 of the Petitioner's brief, and I think it's probably easier to kind of follow along on that.

What basically Congress said is -- is that the court, in making a determination as to whether there's an illegal tax, considers the assessed value of rail transportation property as the numerator on the left side of the -- of the fraction, compares that to the true market value of rail transportation property, and then compares that ratio to the ratio created by examining the assessed value of other commercial and

1 industrial property over the true market value.
2 Fortunately, in this particular case, three out of four
3 of those variables are agreed to by the parties, so the
4 only issue in this case is what constitutes the true
5 market value of the rail transportation property within
6 the meaning of that statute.

7 This Court in Burlington Northern first
8 evaluated the language of this statute and held, in what
9 I think the Court later would describe as a
10 straightforward fashion, that 10501(b)(1) declares that
11 the district court -- for the district court, that it is
12 necessary for that court to determine what the true
13 market values of the respective properties are.

14 JUSTICE ALITO: Is it realistic to -- to
15 think that you can calculate with any degree of
16 precision what the true market value of CSX's property
17 is? The range of values that were calculated by both of
18 these experts are really astonishing, from \$12.3 billion
19 to \$8.1 billion for Dickerson, from \$9.3 to \$5.9 for
20 Tegarden. It's like \$3 or \$4 billion doesn't mean
21 anything. What is the -- can this be done with any
22 precision or is it more -- more realistic just to say
23 that what the district court would have to do is to
24 figure out whether the State's calculation is within
25 some reasonable range?

1 MR. PHILLIPS: No, I think it's pretty clear
2 that Congress did not adopt that particular formulation.
3 What Congress tasked the district court with doing was
4 determining the true market value. And -- and if you
5 look at footnote 8 of the district court's opinion, I
6 think he does a fairly interesting job of explaining
7 what that would normally mean. He says: In a more --
8 in an ordinary valuation case, I would take in all of
9 the expert testimony from the railroad, I would take in
10 all of the expert testimony of the State, I would
11 evaluate them, and I would come up with a conclusion as
12 to what I think is the true market value.

13 CHIEF JUSTICE ROBERTS: And do you want the
14 district court to, in addition, determine which
15 methodology most accurately reflects that true market
16 value?

17 MR. PHILLIPS: No, I don't think --

18 CHIEF JUSTICE ROBERTS: You want to be able
19 to challenge the State's chosen methodology for
20 determining market value?

21 MR. PHILLIPS: Yes. I think every facet of
22 the question of -- that goes into the determination of
23 what is a true market value --

24 CHIEF JUSTICE ROBERTS: So if the -- so if
25 the district court says this methodology, methodology A,

1 most accurately yields true market value, that is giving
2 rise to a Federal rule of determining value, isn't it?

3 MR. PHILLIPS: No. I think that all it says
4 is that, in this particular case under these particular
5 circumstances, that methodology led to--

6 CHIEF JUSTICE ROBERTS: Well, I don't see
7 how --

8 MR. PHILLIPS: -- what was the true market
9 value.

10 CHIEF JUSTICE ROBERTS: I don't see how it
11 varies based on the particular circumstances. If he
12 says I think -- you know, whatever it is --
13 discounted-value approach is the best way for
14 determining market value, he's not going to in the next
15 case, or the next district court isn't going to be able
16 to say I think reproduction cost is the best method.
17 You're going to establish a Federal rule for what is the
18 best way of determining market value.

19 MR. PHILLIPS: Mr. Chief Justice, I think
20 that's not accurate. I think what will happen is that
21 the -- circumstances change every day. Let's just take
22 a pretty simple example. Let's assume that in day -- in
23 year 1 the district court decides to use discounted cash
24 flow. In year 2 it turns out that CSX or some other
25 railroad property is sold, so that you have an actual

1 direct sales comparison data available to you by which
2 to make the market value.

3 CHIEF JUSTICE ROBERTS: That happens -- that
4 happens once every 25 years. If you prevail on a method
5 that you think is more favorable to railroads in -- in
6 -- before a particular district court, you're going to
7 cite that district court in the next case that you've
8 got, and you say: Look, a district court's already
9 looked at this, and they've said method A is a better
10 way of determining market value.

11 MR. PHILLIPS: Right. And I'm sure that's
12 true, that we'll cite it, but the reality is that the
13 district court in the second case is not bound by the
14 decision of the district court in the first case. And
15 the truth is every single one of these --

16 CHIEF JUSTICE ROBERTS: So if a district
17 court says in one case method A is the best way to get
18 market value and another district court says method B,
19 and they both appeal, the court of appeals is going to
20 have to resolve that conflict, isn't it?

21 MR. PHILLIPS: Well, at the end of the day
22 the district court's going to make a valuation. It's
23 going to say that this is the true market value. That
24 determination is a question of fact. And, therefore,
25 yes, the court of appeals will evaluate that to

1 determine whether or not that fact is clearly erroneous.

2 JUSTICE ALITO: And I think you've said that
3 CSX has properties in 15 States that use the unit method
4 of calculation.

5 MR. PHILLIPS: I believe that's correct.

6 JUSTICE ALITO: So if you challenge all of
7 those, there could be 15 different district court
8 findings on true market value, and so within each
9 circuit the court of appeals would have to decide which
10 district court was correct as a matter of fact?

11 MR. PHILLIPS: Sure, Justice Alito, that's
12 exactly what could happen. But the reality is, is that
13 that's exactly what's been going on since the statute
14 was enacted in 1976. Forty-eight of the 50 States have
15 railroads that -- that have to be evaluated and, as the
16 AAR's amicus brief points out, there have been 12 cases
17 on this particular issue. It is not as though it is
18 cost-free for the railroads to challenge what the --
19 what the States are doing under these circumstances.
20 There's no cost-shifting or fee-shifting arrangement.
21 And, second, you're suing the very person who's going to
22 be making the decision next year as to the value of your
23 property.

24 CHIEF JUSTICE ROBERTS: Well, but it has
25 already been pointed out if the range is, you know, a

1 variable of \$4 billion, I think it probably is worth
2 their while to challenge what they think is a low
3 valuation.

4 MR. PHILLIPS: Yes. Well, blissfully --

5 CHIEF JUSTICE ROBERTS: Or a high valuation.

6 MR. PHILLIPS: -- more often than not it
7 turns out that the overvaluations are not nearly that
8 stark. But that's -- but I think that goes to the core
9 point here, which is that if this Court concludes like
10 the Eleventh Circuit did, which is that there is no basis
11 for challenging the methodology, then it would have been
12 completely within the province of the State of Georgia
13 to say we're going to adopt a stock-and-debt method,
14 which virtually everybody recognizes is not an accurate
15 way to determine true market value, that that number
16 would have been \$12.2 billion.

17 CHIEF JUSTICE ROBERTS: What is -- what if
18 we were to adopt a different approach which said that
19 you can challenge the methodology when different
20 methodologies are used, but if the State is using the
21 same methodology, that's their choice? It seems to me
22 the only other alternative is to have the Federal
23 judiciary develop a Federal rule about what methodology
24 has to be used.

25 MR. PHILLIPS: Well, I don't think there's

1 ever a reason why the Federal court has to adopt a
2 single methodology, and I don't think that's what
3 Congress intended. I think what Congress intended is
4 what happens in every run-of-the-mine valuation case
5 that comes up in either State or Federal court, which is
6 that each side presents its best guess as to what the
7 true market value is, and the district court resolves
8 those differences and comes out with a number that they
9 -- that the district court believes constitutes the true
10 market value.

11 JUSTICE SCALIA: I suppose there are a lot
12 of valuation cases under the Takings Clause, aren't
13 there?

14 MR. PHILLIPS: Yes, Justice Scalia, there
15 are, but --

16 JUSTICE SCALIA: Is there a standard Federal
17 rule for how you evaluate --

18 MR. PHILLIPS: If you read footnote 8 in the
19 district court's opinion, the district judge says, if
20 this were a typical valuation case, what I would have
21 done is I would have listened to this -- to the
22 railroad, I would have listened to the State, and I
23 would have made a judgment as to what I think is the
24 right --

25 CHIEF JUSTICE ROBERTS: Isn't that how it

1 works in utility rate regulation? Isn't there, in fact,
2 a standard Federal method of determining what rates
3 affect the taking of property and which rates don't?

4 MR. PHILLIPS: But that's because there's
5 usually a -- which rates affect the taking of property?

6 CHIEF JUSTICE ROBERTS: Yes, for a challenge --

7 MR. PHILLIPS: Or what the rates
8 ought to be?

9 CHIEF JUSTICE ROBERTS: The rate of return
10 on a public utility.

11 MR. PHILLIPS: But that's because that's
12 regulated by a Federal agency that formulates a very
13 precise approach typically. But there's nothing like
14 that -- and that approach governs every utility subject
15 to the jurisdiction of FERC.

16 JUSTICE KENNEDY: I was going to ask this
17 question: Is it -- would it be permitted for a State to
18 say that, with respect to utilities and certain
19 industries, including railroads, we use valuation method
20 A; with respect to commercial rental real estate
21 property, we use valuation method B? Is that permitted?

22 MR. PHILLIPS: It's permitted for them to
23 use different methodologies because typically they do. I
24 mean the reality is they almost never use the same
25 methodology for determining railroad property as they do

1 for other commercial and industrial property because the
2 data that are available for the two are never the same.

3 JUSTICE KENNEDY: So is a large -- large
4 part of the argument you would make that other utilities
5 are comparable or not comparable to a railroad?

6 MR. PHILLIPS: You would make that argument,
7 but you'd also make an argument as to sort of what data
8 are available in any particular case to allow a
9 particular methodology to be used.

10 JUSTICE KENNEDY: Suppose an accounting
11 journal or some prestigious group of accountants and tax
12 appraisers came up with a new theory for evaluating
13 railroad property and it was conceded by all to be
14 highly accurate. Could they use just that for the
15 railroad and different methodologies for all other
16 utilities all over the country?

17 MR. PHILLIPS: At the end of the day, the
18 test here is purely a results-driven test. It doesn't
19 -- it doesn't tell the State what methodologies to use
20 on either side of the equation. What it says is, at the
21 end of the process, do you end up with a ratio between
22 assessed and true market value for each that's within 5
23 percent?

24 JUSTICE SCALIA: Mr. Phillips --

25 JUSTICE KENNEDY: So that if -- if you had

1 the Platonic, the ideal valuation method, the State
2 could use it only if it ended up with the right ratio?

3 MR. PHILLIPS: Well, the State can use
4 any -- the State can assess any way it wants to in
5 defense of its ultimate outcome.

6 JUSTICE KENNEDY: But in the end it has to
7 have the right ratio.

8 MR. PHILLIPS: At the outcome it has to have
9 the right ratio, but that's clearly what Congress
10 intended. I mean this language could not be more
11 straightforward in saying --

12 JUSTICE KENNEDY: Well, Congress uses the
13 word "true market value," and under this hypothetical I
14 come very close to true market value, and you say it
15 doesn't work.

16 MR. PHILLIPS: Well, my guess is that the
17 district judge in that situation would probably say that
18 that is the true market value. The problem is when you
19 deviate from that methodology when you're valuing
20 commercial and industrial property, what happens in that
21 context? Does that end up with a -- with a true market
22 value --

23 JUSTICE KENNEDY: I thought --

24 MR. PHILLIPS: -- that's much higher or
25 lower?

1 JUSTICE KENNEDY: I thought your -- I
2 thought your submission was that even if is true market
3 value for the railroads, the ratio still has to be in
4 line if the methodology is different.

5 MR. PHILLIPS: Right. Well, at the end of
6 the day, that's right. The question here is the
7 comparison of assessed to true market value on both
8 sides of the equation. It doesn't dictate the
9 methodology for getting there in either situation.

10 JUSTICE SCALIA: Mr. Phillips, could I come
11 back to this question of whether there's going to be a
12 uniform Federal rule or not? When the district court
13 makes this finding of what the true market value is,
14 that's a finding of fact, I assume.

15 MR. PHILLIPS: I believe it is. Yes, Your
16 Honor.

17 JUSTICE SCALIA: And it would be reviewed
18 under a clearly erroneous standard by the court of
19 appeals?

20 MR. PHILLIPS: Yes, Justice Scalia.

21 JUSTICE SCALIA: And if there were various
22 methodologies that were possible and this was one of the
23 ones that was ballpark, at least reasonable, would the
24 court of appeals have any basis for -- for reversing the
25 -- how could you say it --

1 MR. PHILLIPS: More often than not, my
2 answer would be no, there wouldn't be any basis. It
3 would probably be --

4 CHIEF JUSTICE ROBERTS: Well, more often
5 than not. But, in fact, it is an ultimate finding of
6 fact, but it's based on valuation methodologies, and
7 that's what's at issue here. No one doubts that the
8 application of a methodology can be challenged. The
9 question is whether or not, if you start out -- I
10 reached these facts because I used reproduction costs as
11 my method of valuation, and your submission is going to
12 be that vastly overvalues our property --

13 MR. PHILLIPS: Right.

14 CHIEF JUSTICE ROBERTS: -- then you should use
15 a different method. That's a legal question. That's
16 not a method of -- a question of fact.

17 MR. PHILLIPS: But the protection that we're
18 seeking, Justice, to answer Justice Scalia's question,
19 is to have the independent, de novo assessment by the
20 district court. I mean that's the real purpose of the
21 statute --

22 CHIEF JUSTICE ROBERTS: What if the district
23 court --

24 MR. PHILLIPS: -- is to provide a Federal
25 forum.

1 CHIEF JUSTICE ROBERTS: What if there's one
2 methodology that gets you an answer within a 20-percent
3 margin of error, up or down, and there's another
4 methodology that gives you an answer with a 5-percent
5 margin of error, up or down? Can you challenge the
6 application of one of those as opposed to the other?

7 MR. PHILLIPS: Well, it depends on what
8 you're asking me. Are you talking about in the district
9 court or in the court of appeals? If it's in the
10 district court, of course you can challenge it because
11 the question for the district court is not with
12 deference to how the State is evaluating this issue.
13 The question is for the district court, de novo, to make
14 a determination of what the true market value is.

15 CHIEF JUSTICE ROBERTS: Well, the method we
16 --

17 MR. PHILLIPS: But asking me on the court of
18 appeals' side, that's a different question.

19 CHIEF JUSTICE ROBERTS: My question assumes
20 that the methodology leads to a value that is either 20
21 percent higher or lower in one case, and 5 percent
22 higher or lower in the other case.

23 MR. PHILLIPS: As I understand the way this
24 statute applies, this is not a statute that worries
25 about sort of how you get to the numbers. All this

1 statute worries about is when you get to a number at the
2 end of the day, is it within 5 percent of the same
3 number that you -- the same ratio you would have gotten
4 using whatever methodology you use on the commercial and
5 industrial side. If the answer to that is it's more
6 than 5 percent, then we are entitled to injunctive
7 relief; and if it's not, then we're not entitled to
8 injunctive relief. And that's why I think it doesn't
9 make sense to think about this in the context of -- is
10 there, you know, deference to the way the State analyzes
11 the --

12 JUSTICE SOUTER: May I approach the same
13 issue this way? When a State board in this case
14 determines what method of valuation it is going to use,
15 what does it consider? What are the reasons that it
16 chooses method A rather than method B?

17 MR. PHILLIPS: Well, in some ways it's
18 difficult to know. In this particular case --

19 JUSTICE SOUTER: Well, what -- what should
20 the reasons be?

21 MR. PHILLIPS: Well, I think they should --
22 I think should be applying the professional standards of
23 appraisal.

24 JUSTICE SOUTER: Well, but the professional
25 standards, I take it, are not simply rules that one can

1 grab out of thin air depending on one's mood. Doesn't
2 --

3 MR. PHILLIPS: Trust me, having read them,
4 you can't grab them out of thin air.

5 JUSTICE SOUTER: Yes. But doesn't one have
6 to choose the methodology based on some factual
7 determination on -- which would support --

8 MR. PHILLIPS: Right.

9 JUSTICE SOUTER: -- a conclusion that this is
10 a better methodology --

11 MR. PHILLIPS: To be sure.

12 JUSTICE SOUTER: -- for this case than
13 others?

14 MR. PHILLIPS: And, Justice Souter --

15 JUSTICE SOUTER: All right.

16 MR. PHILLIPS: -- that's driven largely by
17 what data are available --

18 JUSTICE SOUTER: Okay, but it --

19 MR. PHILLIPS: -- and what do we know about
20 how these methods have been applied in the past to value
21 this particular property.

22 JUSTICE SOUTER: But at the end of the day,
23 it's a determination which is based upon facts. There
24 are good reasons in fact to choose method A rather than
25 method B.

1 MR. PHILLIPS: And it's also --

2 JUSTICE SOUTER: Right?

3 MR. PHILLIPS: There's also an element of
4 judgment.

5 JUSTICE SOUTER: Would it make sense then
6 for a reviewing court to review the basis upon which the
7 methodology was chosen, and if, in fact, there is a
8 reasonable basis for choosing methodology A rather than
9 methodology B, accept it and defer it to that extent?

10 MR. PHILLIPS: In a -- in a different world,
11 that would make perfect sense. That's a -- that's an
12 approach Congress clearly could have embraced. The
13 problem is Congress didn't do that. Congress said
14 choose the true market value.

15 JUSTICE SCALIA: I'm not sure what his
16 question is. I think he's talking about reviewing the
17 district court's judgment on that basis.

18 MR. PHILLIPS: Oh, I thought he was talking
19 about reviewing the State's judgment.

20 JUSTICE SOUTER: No, I'm talking about
21 reviewing the judgment of the State --

22 JUSTICE SCALIA: Of the State.

23 JUSTICE SOUTER: -- valuating authority in
24 choosing one method rather than another.

25 MR. PHILLIPS: And the answer to that is

1 that Congress didn't intend to set this up as a review
2 process of what the State does. Congress intended for
3 the district court to do what this Court said in -- in
4 Burlington Northern, make the necessary determination of
5 the true market value of that property.

6 JUSTICE SOUTER: But we don't -- we don't
7 know -- there is no way of telling whether there is a
8 variation or there isn't a variation under the
9 congressional formula, unless we first have a formula
10 for determining what the value -- what the true value of
11 the railroad property is. We know that can vary. That
12 can vary depending upon the methodology chosen. The
13 methodology chosen is dependent upon good facts, to pick
14 one or the other; and, therefore, doesn't the very --
15 the very criterion that Congress chose ultimately depend
16 upon the methodology?

17 MR. PHILLIPS: No, I don't think so. I
18 think what the Court said is that -- or what Congress
19 has said is that the district court can take all of that
20 into account, but at the end of the day, it is the
21 district court serving as a check on what the State does
22 that decides what the true market value is.

23 I'd like to reserve the balance of my time,
24 Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Phillips.

2 Mr. Hallward-Driemeier.

3 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE,

6 SUPPORTING THE PETITIONER

7 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,

8 and may it please the Court:

9 Congress did not, in the 4-R Act, establish
10 a right to obtain in Federal court administrative review
11 of State valuations. Rather, it established a Federal
12 right against State discrimination in which the railroad
13 could bring a de novo suit in Federal court to vindicate
14 that right.

15 Justice Alito pointed out the wide range of
16 values that could be generated by generally accepted
17 methodologies -- \$6 billion to \$12.4 billion, in this
18 case. Clearly, if one were to accept the State's rule
19 that any reasonable methodology, by which they mean any
20 methodology that is reasonable in the abstract that may
21 have been approved by this Court in the 1800s, a State
22 could hide any variety of -- of discriminations within
23 that rubric. There would be very little, if any, meat
24 to Federal court review under the 4-R Act.

25 JUSTICE SOUTER: What -- what if you take my

1 variation on it, and that is, we don't defer to the
2 State's choice in the abstract, i.e., if we -- if there
3 are 10 methods, as long as it's one of the 10 it's okay?
4 Rather, if we defer at all, we defer to the choice that
5 is made to -- to accept one or the other methodology,
6 and we look to the reasons that the State gives for
7 making that choice. Would that take all the teeth out
8 of the Federal act?

9 MR. HALLWARD-DRIEMEIER: Well, I -- I think
10 that it would, to a large extent, undermine the -- the
11 right and protection that Congress intended. And -- and
12 partly, I think that the -- Your Honor's question is
13 based on a faulty premise, and that is that the State
14 uses a single methodology in carrying out its valuation.

15 JUSTICE SOUTER: Your -- your point is well
16 taken. It -- it has a variety, and then it makes some
17 kind of a judgmental choice as between the results it
18 gets. But that, I guess, just makes my question more
19 complicated. As long as it -- as long as it has good
20 reasons for selecting, let's say, the three competing
21 methodologies that it uses, and as long as it has a
22 rational -- gives a rational basis for the ultimate
23 resolution, should -- should we not or should a court
24 not defer to -- to the choices?

25 MR. HALLWARD-DRIEMEIER: Well, I think that

1 to call the weighing of the three evidences of value
2 that might be generated by cost, income, sales methods,
3 a --a choice of methodology to which the Federal court
4 is required to defer is a misnomer, because it really is
5 an exercise of judgment with respect to the facts of the
6 case and the reliability of the data available.

7 JUSTICE SOUTER: But doesn't --

8 MR. HALLWARD-DRIEMEIER: And --

9 JUSTICE SOUTER: Doesn't the judgment get
10 exercised in determining what facts are good reasons for
11 selecting this methodology, or this variant of
12 methodology, for this particular case?

13 MR. HALLWARD-DRIEMEIER: I think Your Honor
14 is -- is correct, that the -- because -- because you're
15 pointing out that really the choice among methodologies
16 is more a question of what are the facts on the ground,
17 what is the reliable, available data that could be used
18 in generating these different evidences of value. And
19 the court's role, in our view, is to consider all of the
20 evidences of value, not just the State's evidence. That
21 would be the proper approach in a suit for
22 administrative review -- of administrative determination
23 by the State, but it is a de novo proceeding in which
24 the court is to consider all evidence of value to
25 determine, to its own satisfaction, what the true market

1 value of the railroad is.

2 JUSTICE SCALIA: Even if you don't agree
3 with Justice Souter's test for the district court review
4 of the State, might you agree with it as applied to the
5 court of appeals' review of the district court's job?

6 MR. HALLWARD-DRIEMEIER: I do believe that
7 the court of appeals' review -- is reviewing a
8 determination of fact by the district court. There may
9 be subsidiary questions of law that the court of appeals
10 would review. For example --

11 JUSTICE SCALIA: Well, are you going to
12 answer my question, yes or no?

13 MR. HALLWARD-DRIEMEIER: I do believe --
14 yes, that the review of the appellate court of the
15 district court's finding is different than the review of
16 the district court's review of --

17 JUSTICE SCALIA: I didn't ask whether it was
18 different. I asked whether a reasonable basis for plain
19 error -- for clearly erroneous review, by the court of
20 appeals, begins with assessing whether the methodology
21 used by the district court is reasonable?

22 MR. HALLWARD-DRIEMEIER: Well, again, I
23 don't think that it's fair to assume that the district
24 court would have used a single methodology. Rather --

25 JUSTICE SCALIA: Well, a combination of

1 methodologies. I mean I'm talking about -- when I say
2 "methodology," I mean even if it uses a combination of
3 five different ones, okay?

4 MR. HALLWARD-DRIEMEIER: Well, I --

5 JUSTICE SCALIA: Is it reasonable? How do
6 you propose to have the court of appeals review the
7 district court's selection of methodologies?

8 MR. HALLWARD-DRIEMEIER: Well, it would be,
9 as -- as Justice Souter suggested, a question of whether
10 those methodologies -- whether the evidence in the case
11 indicated that those methodologies were reliable
12 indications of value.

13 JUSTICE SCALIA: Were reasonable. Do they
14 have to have been the very best?

15 MR. HALLWARD-DRIEMEIER: It would have to be
16 reasonable for the court to have relied on them --

17 JUSTICE SCALIA: Is it clearly erroneous if
18 it -- if it may not be the very best, but it's ballpark
19 and there's disagreement as to what the very best would
20 be?

21 MR. HALLWARD-DRIEMEIER: I -- I do believe
22 that's true, and that is in the nature of the appellate
23 court's review of a factual finding by the district
24 court.

25 JUSTICE STEVENS: May I ask this question?

1 I understood you to be arguing that the district court
2 made an error of law in not receiving evidence that --
3 of a different methodology offered by the railroads.
4 And also, if they conceivably -- if I understood you
5 correctly, you could send the case back; they could then
6 receive the evidence and come to precisely the same
7 conclusion that they already came to. That would be
8 permissible, wouldn't it?

9 MR. HALLWARD-DRIEMEIER: It -- it would be
10 permissible. You're absolutely right, Justice Stevens.

11 JUSTICE GINSBURG: Mr. Hallward, there's
12 something not quite right about that. Wasn't all the
13 evidence submitted, but the district judge said, now I
14 have all the evidence, but I can't consider? It isn't a
15 question of introducing new evidence when it goes back.
16 It is a question of looking at the body of evidence that
17 was submitted.

18 MR. HALLWARD-DRIEMEIER: That's right. And
19 it's not a question of whether it was excluded, in the
20 sense that Tegarden wasn't allowed to testify. It was
21 excluded by the court from its consideration.

22 CHIEF JUSTICE ROBERTS: Were all of the
23 values that were arrived at in this case within the
24 ballpark?

25 MR. HALLWARD-DRIEMEIER: Well, I -- whether

1 they are in a ballpark is not the test. Whether they
2 are indications, reliable indications, of true market
3 value. True market value is a fact that, as the Court
4 recognized in Burlington Northern, must be determined by
5 the Federal court.

6 CHIEF JUSTICE ROBERTS: Were all the
7 valuations used here reliable indications of true market
8 value?

9 MR. HALLWARD-DRIEMEIER: Well, they were --
10 Respondent argues that they were all reasonable
11 methodologies. But, no, I don't think that it's -- it
12 is true that the true market value of the railroad is
13 either \$6 billion or \$12 billion. The determination the
14 Federal court has to decide is what is the true market
15 value.

16 CHIEF JUSTICE ROBERTS: Well, there's no way
17 to tell. Everybody agrees we're just making more or
18 less educated guesses.

19 MR. HALLWARD-DRIEMEIER: I don't -- I don't
20 think that that --

21 CHIEF JUSTICE ROBERTS: And so the district
22 court has to engage in purely fictional enterprise, and
23 say yes, all the methodologies give you a range of \$6 to
24 \$12 billion, but I think the answer is \$8.2 billion.

25 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I

1 -- I do believe that there are bases upon which one can
2 distinguish between the reliability of the
3 stock-and-debt method in this case, and the income
4 methods that the two parties used. I think that there
5 is --

6 JUSTICE ALITO: But would you disagree if
7 you -- if you had 10 totally disinterested experts, not
8 paid by either side, and they engaged in this, that they
9 would not all come to the same number, that there would
10 be a range and probably a fairly significant range?

11 MR. HALLWARD-DRIEMEIER: There would be a
12 range. I don't know that it would be a range from \$6 to
13 \$12 billion. But -- I think --

14 JUSTICE GINSBURG: Could the district court
15 appoint a special master to help her?

16 MR. HALLWARD-DRIEMEIER: Well, the district
17 -- as in the Tahoe Regional Planning case, the Court
18 indicated that district courts, as the -- frequently
19 have to undertake complicated valuation questions, and
20 they rely on the testimony of experts. Appointment of a
21 master might well be permissible.

22 But I want to go back to the textual
23 indications, that this is a question for the Federal
24 court. The -- there is no question that the statute
25 refers to the burden of proof in determining true market

1 value. In Burlington Northern, the Court recognized
2 that the allocation of burden of proof demonstrates that
3 it is a fact to be proved to the court. In fact, in
4 (c), with respect to true market value of the commercial
5 and industrial properties, it specifically says that it
6 is to be proved to the satisfaction of the court. Now,
7 in Burlington Northern, the Court remarked that it would
8 be unreasonable to construe the statute to lead to
9 strikingly different approaches, whether the railroad's
10 challenge was based on the alleged undervaluation of
11 other properties or overvaluation of the railroad
12 property.

13 Now, we know from the statute that the
14 court is not to defer to any methodology, or amalgam of
15 methodologies, the State uses in valuing other
16 commercial and industrial property. Rather, the court
17 is to look to the best evidence of value, which is sales
18 data. Now, if the court has sales data available to it
19 in the case regarding the value of the railroad,
20 certainly the court should rely on that reliable
21 information, rather than the State's chosen methodology.

22 Thank you very much.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Hallward-Driemeier.

25 Mr. Calvert.

1 ORAL ARGUMENT OF WARREN R. CALVERT

2 ON BEHALF OF THE RESPONDENT

3 MR. CALVERT: Mr. Chief Justice, and may it
4 please the Court:

5 Subsection (b)(1) constitutes a narrow
6 exception to the normal rule of Federal noninterference
7 in State tax administration that is designed to prohibit
8 a specific type of tax discrimination. What CSX
9 contends here is that Congress meant this
10 antidiscrimination provision to secure for the railroads
11 what no other taxpayer, to our knowledge, currently has.
12 And that is an -- an absolute right to come into Federal
13 court and to have a Federal judge redetermine the market
14 value of its property for State property tax purposes in
15 whatever manner the Federal court finds to be
16 appropriate, without regard to the State's choice of a
17 reasonable valuation method.

18 JUSTICE SCALIA: It seems to be what it says
19 though, isn't it?

20 MR. CALVERT: Your Honor, I don't think
21 that's what it plainly says.

22 JUSTICE SCALIA: What -- what's the
23 language? What's the crucial language?

24 MR. CALVERT: Well, it requires the
25 comparison of the --

1 JUSTICE SCALIA: No, it doesn't require --
2 what does it say the district court is supposed to find?

3 MR. CALVERT: Well, it has to find the
4 assessed value of the railroads, the true market value
5 of the railroads --

6 JUSTICE SCALIA: It's supposed to find the
7 true market value of the railroads.

8 MR. CALVERT: That's correct.

9 JUSTICE SCALIA: That doesn't seem to me
10 fuzzy language.

11 MR. CALVERT: Well, Your Honor --

12 JUSTICE SCALIA: The district court is
13 supposed to find the true market value.

14 MR. CALVERT: Well, I think in large part
15 the railroad's argument is it's -- it places on the one
16 word "true" and the term "true market value" a weight
17 that it cannot bear. The complaint that the railroads
18 filed in this case, and this is confirmed by the
19 legislative history, acknowledged that the word "true
20 market value" meant the same as "fair market value" or
21 "market value."

22 JUSTICE SCALIA: It's a very strange way of
23 saying the district judge is to -- is to ask whether the
24 State has used one of a number of reasonable methods of
25 determining the market value. To say go find the true

1 market value is a very strange way of saying that, and
2 that's what you -- that's what you're saying it means.

3 MR. CALVERT: Your Honor, I think the -- if
4 Congress had said the district court is to find fair
5 market value or the market value, it would seem -- it
6 would seem less strange. And we think there's going to
7 be a range. In any case like this, as evidenced by the
8 appraisals, the appraisal prepared by the railroad's
9 appraiser, as evidenced by the State's appraiser,
10 there's going to be a range of possible market values.

11 JUSTICE SOUTER: Well, everybody accepts --

12 JUSTICE KENNEDY: Why would your position be
13 any stronger if it used "fair market value"?

14 MR. CALVERT: Well, Your Honor, I think that
15 in the same way that CSX --

16 JUSTICE KENNEDY: Or any weaker?

17 MR. CALVERT: Well, Your Honor, the way that
18 the railroad says you have to look for the one value
19 that's true, I would say that if the statute said "fair
20 market value" the question is -- there could be many
21 market values that are fair.

22 JUSTICE KENNEDY: What do you mean? We have
23 false "fair market value"? I never heard of such a
24 thing.

25 MR. CALVERT: I don't believe -- believe so,

1 Your Honor. But I think there is a -- there is a range
2 of possible market values that can be considered fair.

3 JUSTICE SOUTER: Isn't the point not that
4 anyone is denying that there can be a range, that there
5 -- everybody agrees that there is not here, simply
6 because there is not one methodology, there is not an
7 exact science which is operating? But isn't the real
8 point the point that Justice Scalia made, that when
9 Congress uses the term "true market value," when it has
10 a criterion of truth, the one thing that does seem to be
11 clear is that, if you are looking for truth, you do not
12 defer to a party in interest? And isn't that the one
13 point? And if you accept that point, then doesn't it
14 follow that methodology is up to the assessment of the
15 district court?

16 MR. CALVERT: I would say that's true, Your
17 Honor, but I would say that the statute does not plainly
18 lead to that result.

19 JUSTICE SOUTER: How could it put it -- say
20 it more plainly than using the criterion of truth?

21 MR. CALVERT: Well, again, Your Honor --

22 JUSTICE SOUTER: Truth -- whatever "truth"
23 means, it doesn't mean deferring to a party in interest.
24 Isn't that correct?

25 MR. CALVERT: Well, I don't believe, Your

1 Honor, that it is possible to -- to say with any type of
2 absolute certainty or precision that one number --

3 JUSTICE SOUTER: We all accept that. The
4 question is not whether we're talking about rocket
5 science in valuation. The question is whether we are
6 deferring to the choice made by a party in interest.
7 And doesn't the criterion of truth imply that we do not?

8 MR. CALVERT: No, Your Honor, I don't think
9 that it does. Again, if the -- if the statute had said
10 what it easily could have said and what the legislative
11 history says it could have said and what CSX complaint
12 in this case acknowledged it could have said, that what
13 the district court had to find was the market value of
14 the property.

15 JUSTICE SOUTER: So Congress in effect was
16 engaging in -- in Pontius Pilate's exercise, what is
17 truth?

18 JUSTICE SCALIA: I was expecting you to say
19 that: What is truth?

20 (Laughter.)

21 MR. CALVERT: Your Honor -- Your Honor, I
22 would say that the statute does -- does not plainly
23 require that if a State has determined the market value
24 of the railroad by correctly applying a reasonable
25 valuation method, that the statute unambiguously allows

1 the taxpayer to come in and challenge that -- not just
2 the application of that method but the -- but the
3 methodology itself.

4 JUSTICE GINSBURG: And if you limit it to
5 the application and not the methodology, then Congress's
6 overriding goal was there was a problem with
7 overevaluation of the railroad's property, and Congress
8 was responding to that problem of overevaluating the
9 property. But if you limit the challenger to just the
10 application, then you are not going to have as vigorous
11 a check on overevaluation as you would have if you could
12 -- if you could reach back to the methodology.

13 MR. CALVERT: Your Honor, I think what --
14 what CSX would like in this case is to turn the Federal
15 district court, the judge, into a board of equalization
16 who has to -- who has to consider every -- each and
17 every objection to each and every decision that the
18 State has made in valuing its property.

19 JUSTICE SOUTER: But what you are saying is
20 that the -- that the court is simply being turned into a
21 -- a grade school math teacher who -- who looks to see
22 whether the sums are added up correctly. That can't be
23 what Congress had in mind.

24 MR. CALVERT: Well, no, Your Honor. That's
25 -- that's not our position. In fact, the -- the

1 objections that -- that CSX had specifically to the
2 State's application of the discounted cash flow were
3 more than what could be fairly described as checking the
4 math. It wasn't a -- a situation where one number had
5 had the decimal point in the wrong place. But there was
6 -- there was days of expert testimony, for example,
7 regarding whether the State's use of a 6.3 terminal
8 growth rate in the discounted cash flow was an
9 appropriate number for this railroad.

10 JUSTICE SOUTER: In other words, there was
11 -- there was a -- a contest about the judgment used by
12 the State in -- in selecting one point of datum in its
13 calculation, right?

14 MR. CALVERT: That among other --

15 JUSTICE SOUTER: All right. If that kind of
16 judgment -- if it makes sense under the statute to put
17 that kind of judgment in question, why doesn't it
18 equally make sense under the statute to put other
19 questions of judgment, such as the selection of the
20 methodology to which the data point in fact is relevant?
21 Where do you stop?

22 MR. CALVERT: Well, we think it is -- the
23 difference, Your Honor, is, while we believe that a
24 State should have -- should have the right to choose
25 among the various reasonable types of valuation methods

1 that can be used in a case like this --

2 JUSTICE SOUTER: I know that's why you
3 think. My question is, if you agree that it's
4 appropriate under the congressional statute to challenge
5 one issue of judgment, why isn't it equally appropriate
6 to challenge other issues of judgment, i.e., selection
7 of methodology?

8 MR. CALVERT: Well, because if -- it's one
9 thing to say that the State can choose the valuation
10 formula; it's another thing that the State is able to
11 dictate how you fill in the variables. If a State can
12 say we're going to use the discounted-cash-flow
13 analysis, but here's the way we're going to --

14 JUSTICE SOUTER: Each one, as I understand
15 it, is a question of judgment about what is appropriate
16 on the facts of this case, or these kinds of cases.

17 JUSTICE SCALIA: The trouble is you can't
18 find a -- it is a line, but it's not a line you can
19 derive from true market value. I mean, you can do it,
20 but what in the statute suggests that that's what you
21 should do?

22 MR. CALVERT: Well, Your Honor, I believe
23 what you have to find in the statute, because this is a
24 limited exception to the rule that Federal courts will
25 not interfere with the State's administration of its own

1 tax system, is -- I think you need to find something in
2 the statute which plainly allows the Federal courts to
3 get into the minutia of not just the way in which the
4 discounted-cash-flow formula has been applied or not the
5 way in which a stock-and-debt formula has been applied,
6 but its choice at the -- at the very beginning to use
7 those methodologies.

8 JUSTICE BREYER: The reason that they do
9 that is because none of these methods comes even close
10 to working out what the company is really worth because,
11 if we had, we wouldn't be here. We'd be out in Wall
12 Street. We'd make billions.

13 (Laughter.)

14 JUSTICE BREYER: All right. So they don't
15 know, and they use all these different methods sort of
16 as checks one on the other. Now, the railroad simply
17 wants to say: Look, you had an expert here and he went
18 and used a method, and it comes up with a certain
19 number, but if you look at a few other methods, you'll
20 see that's an outlier. Okay? Now, why shouldn't it be
21 able to do that?

22 MR. CALVERT: Well, I guess -- Your Honor, I
23 think it's specifically because there is that range of
24 values, that if Congress had intended to -- that the
25 district courts would examine each and every decision

1 made by the States in deciding it's going to use this
2 method --

3 JUSTICE BREYER: They're not going to do
4 that. The State has enormous leeway. Anyone who -- who
5 valued a railroad running through the center of this
6 city, of what it would be worth if the property were
7 sold on the private market, you'd get an astronomical
8 number. So the chances of this number being higher than
9 the sales value of private property is not great.

10 So, if you've come in with some method that
11 puts it higher than that, well, why shouldn't they be
12 able to come in and say: Look, look what they've got
13 with this method, which in our opinion is not a fair
14 method. Now, why not? Because after all, if you're
15 going to say they can't, then there is no check on the
16 State working out a method that discriminates, as
17 Justice Ginsburg said, seriously against the railroads.

18 MR. CALVERT: Well, I think -- I think the
19 result of that, Your Honor, is -- is you're going to
20 have a Federal court setting a Federal standard of
21 valuation for Georgia.

22 JUSTICE BREYER: What they're going to do is
23 they're simply going to let people present the evidence
24 as you've heard, which will have 15 valuation methods if
25 they want, all serving each as checks on the other.

1 There's no single method. So, why -- why would you end
2 up with that result?

3 MR. CALVERT: Well, Your Honor, that's what
4 -- that's what CSX is -- is arguing here today, but
5 that's not what they argued in the district court. They
6 --

7 JUSTICE GINSBURG: I thought -- I thought
8 you conceded that that was what it would be, because you
9 said that the Federal court would be turned into a board
10 of equalization, and a board of equalization is not
11 making grand law for setting precedent.

12 MR. CALVERT: Well, I think, Your Honor,
13 what CSX asked in this case is they -- they have taken
14 the position, and I believe they still take it for this
15 Court, that a stock-and-debt method will never give a
16 reliable -- reliable estimate of the value of the
17 railroad. So they want -- what they want to come out of
18 this litigation is the State of Georgia cannot use that
19 at all.

20 JUSTICE GINSBURG: I think what they want is
21 to be able to attack the methodology and not be limited
22 to the application of whatever methodology the State
23 prefers.

24 MR. CALVERT: That's correct, Your Honor,
25 but the point that I'm trying to make is that what they

1 -- what they want to see come out of this case is the
2 State of Georgia -- not simply that the State of Georgia
3 can't -- couldn't use the stock-and-debt methodology for
4 this tax year; they want a ruling that basically says it
5 can't use it for any year.

6 JUSTICE SCALIA: No, I don't think --
7 they're not going to get that from this Court, any more
8 than they could get it from the court of appeals. All
9 the court of appeals can say, it seems to me, is that
10 the methodology that the district court used was not
11 clearly erroneous.

12 I think another district court in a later
13 year could probably use a different methodology, which
14 would again be affirmed by the court of appeals because
15 it was not clearly erroneous. We're not -- I don't
16 think either the court of appeals or this Court is
17 placing any stamp on a particular methodology.

18 MR. CALVERT: But -- but Your Honor, that is
19 -- that is what they tried to get from the district
20 court in this case.

21 JUSTICE SCALIA: Maybe they did, but they're
22 not going to get it here.

23 (Laughter.)

24 JUSTICE STEVENS: May I ask this question
25 about your -- your position? Supposing Dickerson had

1 adopted the stock-and-debt method and taken the \$12
2 million -- \$12 billion figure and said that's really a
3 reasonable basis, and that he ended up with that value.
4 Would you be able to defend that decision with precisely
5 the same arguments that you're making today?

6 MR. CALVERT: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: Well, that's what --
8 I'm sorry.

9 JUSTICE STEVENS: I just wanted to be sure.

10 CHIEF JUSTICE ROBERTS: I thought that would
11 be part of your response to Justice Breyer, that you had
12 five different methodologies here and you chose the
13 lowest one. And the question really is, how many more
14 methodologies do you have to look at if you're going to
15 choose the lowest one in each case?

16 MR. CALVERT: Well -- and that is what we
17 did in this case, Your Honor.

18 JUSTICE ALITO: If it had been -- I'm
19 sorry -- if it had been Dickerson's methodology at the
20 last step to choose the highest value, would that be
21 reasonable?

22 MR. CALVERT: Again, Your Honor, I think --
23 I think a State could do that. You're still within the
24 range of values. Now, I will say this: If a State had
25 done that in an effort to -- to overvalue the railroads

1 or to discriminate against them or to treat them
2 differently than other taxpayers, I think you might have
3 a problem under the statute, but I don't think it's a
4 problem under (b)(1). I think that would be a problem
5 under (b)(4), which is the --

6 JUSTICE SCALIA: This State appraiser, as I
7 understand it, had never done an appraisal before of --
8 of this magnitude, right?

9 MR. CALVERT: No, Your Honor. He'd done
10 well over a thousand appraisals involving the
11 application of the unit rule. What he had not -- what
12 he had not done before is provide a written narrative
13 report much like the railroad's appraiser did, but the
14 valuation work sheets that are attached as part of the
15 joint exhibit basically set out the calculations. Then
16 when he did his full appraisal report, it includes
17 certain narrative materials, certain explanation of the
18 various methods he used. But --

19 JUSTICE SCALIA: I'm looking for the
20 footnote, but I -- I was -- I was impressed by what
21 seemed to me the -- the vast difference in -- in
22 qualifications and experience of the -- of the State
23 appraiser and of the expert who was brought in by the
24 railroad at the trial. And it seemed to me quite absurd
25 to say we have to defer to -- to this novice in the

1 field, and -- and not look at the -- at the testimony of
2 -- of someone who has done a lot of it before.

3 MR. CALVERT: No. The State's appraiser,
4 Your Honor, had done -- had done well over -- well over
5 a thousand of these types of appraisals. He has taught
6 in national schools on these issues. He has published
7 in State and national journals on these issues. So we
8 contend that his -- his credentials are --

9 JUSTICE SCALIA: Did you have a response --

10 MR. CALVERT: -- sound.

11 JUSTICE SCALIA: Did you have a response
12 for that footnote? I didn't --

13 MR. CALVERT: Yes. We do, Your Honor.

14 JUSTICE SCALIA: I'm sorry.

15 MR. CALVERT: We have our own footnote.

16 JUSTICE SCALIA: I must have skipped that.

17 A little footnote battle here, right?

18 MR. CALVERT: That was footnote 3, Your
19 Honor.

20 JUSTICE SCALIA: Of yours?

21 MR. CALVERT: Of our brief.

22 CHIEF JUSTICE ROBERTS: You know, if this
23 comes down, as it probably would in every case, to a
24 battle of competing experts, are you aware of any other
25 area where we say that a district court cannot look at

1 the methodology used by an expert in determining whether
2 or not to give credence to the expert's opinion?

3 MR. CALVERT: No, I'm not, Your Honor.

4 CHIEF JUSTICE ROBERTS: So why should we
5 create a special rule here for -- for the State?

6 MR. CALVERT: Well, this is a -- this is a
7 special statute, and again I think what CSX is asking
8 for this -- for this Court to do is create a special
9 rule for it which gives it, unique among taxpayers as
10 far as we are aware, the right to come into Federal
11 court and challenge each and every decision that the
12 State has made in valuing its property for property
13 taxes and have the Federal court redetermine that value.

14 JUSTICE SOUTER: Well, if -- I take it to --
15 to determine how far you could go with that, I take it
16 that, on your view, if the State's appraiser had never
17 done an appraisal before in his life, if he were plucked
18 off the street by the State and said, you know, appraise
19 the railroad property, we're making you a State
20 appraiser, on your view the district court could not
21 look behind that?

22 MR. CALVERT: Well, the district court could
23 certainly thoroughly examine the way in which the -- the
24 reasonable valuation methodologies that the State
25 selected were applied.

1 JUSTICE SOUTER: Exactly. But the selection
2 of the methodology by the guy off the street could not
3 be examined.

4 MR. CALVERT: Well -- well, Your Honor, we
5 think the -- the methodology has to at least be
6 reasonable.

7 JUSTICE SOUTER: Well, it's -- it's one of
8 the recognized methodologies.

9 MR. CALVERT: I think if the State has used
10 --

11 JUSTICE SOUTER: It happens to be the one
12 that gives the highest number, but -- but it's a
13 recognized methodology, and there are certain --
14 certainly examples in which that methodology has been
15 used. And I take it that if the guy off the street
16 picks one of those, and that's all we know about it, the
17 district court on your view cannot look behind it.

18 MR. CALVERT: I -- I'd say that's correct.
19 If it's a widely used, accepted valuation methodology
20 like the ones the State used in this case, that the
21 question --

22 JUSTICE SCALIA: And that's what you have
23 here. I'm -- I've looked at your footnote, and I see
24 that indeed Mr. Dickerson did have over 30 years of
25 experience, including well over a thousand valuations

1 performed under the unit rule; performed under one
2 method of evaluation, right?

3 MR. CALVERT: The --

4 JUSTICE SCALIA: But the whole issue here is
5 that that method of valuation, however expert he is at
6 it, is not proper here. It doesn't work. That there --
7 that there are other ones that should have been brought
8 to bear.

9 JUSTICE GINSBURG: I thought both sides
10 agreed that the unit rule was --

11 JUSTICE SCALIA: Was one of the ones, yes;
12 but -- but it's not the only one.

13 JUSTICE GINSBURG: That there's --

14 JUSTICE SCALIA: That's the only one he's an
15 expert in.

16 MR. CALVERT: Both sides agree that the unit
17 rule --

18 JUSTICE GINSBURG: Both sides agree?

19 MR. CALVERT: -- is appropriate in this case.
20 The question then is how to -- how to determine what the
21 unit value of the company was. But there's no dispute
22 in this case that the unit rule is appropriate. So the
23 appraisals that the State's appraiser had performed
24 under the unit rule are exactly the type of appraisal --

25 JUSTICE SCALIA: And he used different

1 methodologies under the unit rule. He has used -- he
2 has used different methodologies under the rule.

3 MR. CALVERT: Than the railroad did.
4 Correct.

5 JUSTICE GINSBURG: I guess the term
6 "methodology" is confusing because you could think it
7 means unit rule --

8 MR. CALVERT: Right.

9 JUSTICE GINSBURG: -- or you could think
10 how, under the unit rule, what is the --

11 MR. CALVERT: That's right, Your Honor. If
12 I could make -- if I could make one point about the unit
13 rule and the choice between the unit rule and what we
14 refer to as the summation approach, the specific dispute
15 in this case has been between the various methods for
16 determining what the unit value of the company was for
17 2002 under the unit rule, but the argument that CSX is
18 making in this case would also put -- put into play a
19 State's most fundamental methodological choice between
20 the unit-rule and the summation approaches, and CSX's
21 reply brief admits as such.

22 The railroads had -- had made such an
23 argument in the Chesapeake Western case out of the
24 Fourth Circuit where -- where Virginia's courts had held
25 that the unit rule was not an appropriate valuation

1 method under their statutes to arrive at fair market
2 value. The railroads came in and said that, under the
3 4-R Act, we are entitled to put in -- put on proof under
4 the unit rule as to what our fair market value, that the
5 Federal statute makes all that open. The district court
6 has to consider all that evidence. And what the -- and
7 the Fourth Circuit rejected that argument.

8 CHIEF JUSTICE ROBERTS: What if --

9 MR. CALVERT: But that's the implication.

10 CHIEF JUSTICE ROBERTS: What if the State
11 elected to use reproduction cost as its valuation
12 method, which I guess everybody agrees vastly overstates
13 the value of the railroad?

14 MR. CALVERT: Well, I think the problem,
15 Your Honor, with reproduction cost is -- is how to -- is
16 how to accurately account for obsolescence. My
17 understanding of the objection --

18 CHIEF JUSTICE ROBERTS: So if there are
19 problems with a particular methodology, the methodology
20 can be challenged?

21 MR. CALVERT: It's possible, Your Honor,
22 that a -- a reproduction cost methodology might -- might
23 so inadequately deal with the issue of obsolescence that
24 you just have to say that's not a reasonable
25 methodology, as applied to railroads.

1 JUSTICE SOUTER: How could you say it on
2 your theory?

3 MR. CALVERT: Pardon me?

4 JUSTICE SOUTER: How could you say it
5 consistently with your position here?

6 MR. CALVERT: Well, I think, Your Honor, the
7 court is allowed to examine whether you have a --
8 whether the State has used a reasonable methodology.

9 JUSTICE SOUTER: Then why doesn't the court
10 have an opportunity or the right to examine whether any
11 particular methodology is reasonable as applied to this
12 taxpayer and this kind of property at this time?

13 MR. CALVERT: Well, I think that goes to the
14 question of whether you have properly applied a
15 reasonable valuation methodology, and there's --

16 JUSTICE SOUTER: Well, I thought -- I
17 thought you were saying that the reproduction method had
18 such severe problems associated with it that it simply
19 would not be a fair methodology to use, and at least a
20 reviewing court, a district court could -- could draw
21 that conclusion. I thought that was your answer.

22 MR. CALVERT: Well, I think it depends, Your
23 Honor, on -- if you have a reproduction cost method that
24 you have applied to property that -- property that has
25 only just recently been purchased, then I don't think

1 you're going to have a -- a problem with it at all, even
2 --

3 JUSTICE SOUTER: We're talking about the
4 railroads like -- like CSX, and I thought your answer
5 was that a -- a district court could conclude that, as
6 applied in a case like this, that there are so many
7 problems that it simply would not be a reasonable
8 valuation method.

9 MR. CALVERT: I -- I think that is possible.

10 JUSTICE SOUTER: All right. Then -- well,
11 then, how do you draw a line?

12 MR. CALVERT: Well, again, Your Honor, I
13 think --

14 JUSTICE SOUTER: If you can do that, why
15 can't it do what -- what your brother is -- is saying it
16 should do in this case?

17 MR. CALVERT: Well, I think, Your Honor,
18 that in -- in -- again, I don't think that is the
19 argument they have made in this case.

20 JUSTICE SOUTER: Well, let's assume I'm
21 making that argument now in my question. Why -- why can
22 you draw the line that you want to draw?

23 MR. CALVERT: Well, again, I think that goes
24 to whether the application is going to be -- is going to
25 be reasonable in the particular situation.

1 CHIEF JUSTICE ROBERTS: And your argument is
2 that it's not reasonable because it must overstate the
3 value by a particular percentage or number.

4 And I think Justice Souter's question is:
5 Well, where do you draw the line? If it -- if you say
6 it's not reasonable because it overstates value by 50
7 percent, is a methodology that overstates value by 20
8 percent reasonable or not?

9 MR. CALVERT: Well, I --

10 CHIEF JUSTICE ROBERTS: Keeping in mind all
11 the methodologies here range from \$8 -- \$6 billion to
12 \$12 billion.

13 MR. CALVERT: And I -- I think, if you
14 looked at the mid-point of the ranges that each -- each
15 of the appraisers had, you would have a variation maybe
16 of about 20 percent either way. Again, I don't think
17 that's going to be determinative as to whether you've
18 got a reasonable methodology; whether it's been properly
19 applied is what that range is. I think that's the
20 nature of the -- of the appraisal task that States have.

21 JUSTICE SCALIA: Mr. Calvert, can you tell
22 me how this thing works, or how it may work in the
23 future? Does the State just whip up a number and lay it
24 on the railroad, or -- or, in fact, is there some
25 discussion each year between the railroad's experts and

1 the -- and the State's experts as to what the right
2 number should be?

3 MR. CALVERT: What happens, Your Honor, is
4 that the railroad returns are filed with the State; and
5 there's a period of time during which the State examines
6 those returns, takes the evaluation methodologies that
7 it has selected, applies it to the data that it has for
8 those particular companies, comes up with -- with
9 numbers. That information, typically, is shared with
10 the railroads for them to come back and say, well, we
11 think you've used a cost of capital that's too low; we
12 think you've done -- done this; this number really, we
13 believe, should be --

14 JUSTICE SCALIA: Okay. So there is some
15 give-and-take discussion before -- before the State
16 comes down firmly and says, cough up the money?

17 MR. CALVERT: Typically, Your Honor.

18 JUSTICE SCALIA: Okay.

19 JUSTICE STEVENS: Can I ask this question
20 about the unit rule? I take it that Georgia is figuring
21 out what the entire value of the railroad is throughout
22 the country. Have other States had to make the same
23 determination to apply their unit rules?

24 MR. CALVERT: I'm sorry, Your Honor?

25 JUSTICE STEVENS: Say, do Tennessee and

1 Mississippi have to also apply the unit rule to value
2 the property of this particular railroad?

3 MR. CALVERT: I think -- I think the
4 majority of States that value railroad property use the
5 unit rule.

6 JUSTICE STEVENS: Is it admissible evidence
7 to find out what others -- figures other States have
8 come up with? Because you're all taking the same answer
9 --

10 MR. CALVERT: I --

11 JUSTICE STEVENS: -- if you all use the unit
12 rule.

13 MR. CALVERT: We are, Your Honor, though if
14 you're -- if a State is using a different methodology to
15 determine the unit rule, I think you would probably --

16 JUSTICE STEVENS: What if the evidence shows
17 that 49 States have come up with a valuation of \$5
18 billion, and you can use a method that comes up with \$8
19 billion? Would that be admissible evidence?

20 MR. CALVERT: I think it probably would be,
21 Your Honor. And --

22 JUSTICE STEVENS: Does the record contain
23 any such evidence in this case? Do we know what other
24 States have found?

25 MR. CALVERT: I think the evidence in this

1 case was that the -- the State of Georgia's unit value,
2 at least within the southeast States, was -- was the
3 largest number.

4 JUSTICE STEVENS: Was the highest?

5 MR. CALVERT: That's correct.

6 JUSTICE STEVENS: Doesn't that raise some
7 suspicion about maybe they have a different approach
8 than is commonly applied, seeking precisely the same
9 answer to precisely the same question?

10 MR. CALVERT: Well, Your Honor, I think our
11 -- our response is that we believe -- that in 2002 what
12 the State did was not only to make some changes in its
13 valuation methodologies, but it also made a fairly
14 significant change in the income numbers that the State
15 was using to apply its discounted-cash-flow analysis.

16 And specifically what it did it started
17 using -- instead of numbers from the regulatory report,
18 the R-1 report that the railroads filed with the Surface
19 Transportation Board, it began to use income numbers
20 from the annual reports to shareholders.

21 There's a significant difference in those
22 numbers, and the testimony in this case was that the
23 47-percent increase that CSX saw in its assessment from
24 2001 to 2002 was attributable to the difference in the
25 income numbers that were being used.

1 I -- I suspect that for many of the other
2 States that are -- that have low numbers for CSX, that
3 they still use numbers from the regulatory reports as
4 opposed to the annual reports.

5 So, that's one reason that I believe we've
6 got -- we had such a larger number for 2002 than many
7 other States, because our appraiser was looking to the
8 correct income numbers.

9 If I could, just in the remaining time that
10 I've got, I'd like to mention a couple of points. The
11 CSX has contended that this line between method and
12 application is simply unworkable; and, therefore, the
13 Court shouldn't recognize any -- any such distinction
14 under the statute.

15 We think there are a couple points where the
16 -- where the lines are clear. One is between the
17 unit-rule and the summation approaches. The brief filed
18 by the Association of American Railroads acknowledges
19 that those are two different methods.

20 It's not -- one could not say that a
21 stock-and-debt method is just an application of
22 discounted cash flow, so there are certain places where
23 those lines are clear.

24 We believe the fact that the line may not
25 always be -- or the boundaries may not always be

1 perfectly distinct, or that the test may not always be
2 what it might be easy to describe in the abstract,
3 doesn't mean that the distinction should not be
4 recognized at all under the statute.

5 Also, there is the way in which the Eleventh
6 Circuit formulated the test where the Eleventh Circuit
7 said a line -- the line was -- between the method and
8 application was between nonfactual determinations used
9 in constructing the valuation process, however broad or
10 narrow they might be. The court said that constitutes a
11 method. Everything else is an application.

12 The suggestion has been made by the
13 Solicitor General in their brief that that means as long
14 as the State can -- can announce or can -- can set out
15 its valuation rule in general enough terms, make it
16 general enough, then that would become part of the
17 method and not part of the application.

18 I think if the Eleventh Circuit's opinion is
19 -- is read in context, the Eleventh Circuit didn't say
20 that. Specifically, the Eleventh Circuit was -- was
21 saying -- was rejecting the argument in that case that
22 only the distinction between the unit-rule and the
23 summation approaches was the only methodological
24 distinction. And the court was saying: We think that
25 differences in methodologies include the stock-and-debt,

1 the discounted-cash-flow, and the market-multiples
2 approaches used in this case.

3 So the Eleventh Circuit did go and consider
4 the argument that the State had -- should not have used
5 a 6.3-percent terminal growth rate in the
6 discounted-cash-flow analysis, even though that it used
7 that in all -- for all public utilities.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Calvert.

10 Mr. Phillips, you have three minutes
11 remaining.

12 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
13 ON BEHALF OF THE PETITIONER

14 MR. PHILLIPS: Thank you, Mr. Chief Justice.
15 I will try to be brief.

16 First of all, Justice Stevens, in response
17 to your question on the comparisons between Georgia and
18 other States, on page 22 of our cert petition we pointed
19 out that, in the 2006 tax year, Georgia and Florida had
20 adopted unit values of \$11.2 and \$12.9 billion; whereas,
21 every other State in those jurisdictions that used the
22 unit value had an assessment value of -- of \$7.1
23 billion. And the -- the Respondent State did not
24 question that.

25 So I mean the reality is there are wide

1 swings, and it does make a difference what methodology
2 you do, and it's part of the reason why it's absolutely
3 critical that the Court should enforce the language of
4 the statute. As Justice Scalia quite properly
5 recognizes, is it the true market value?

6 And this is not a statute like, for
7 instance, 28 U.S.C. 1254(d)(1) in AEDPA, which says that
8 Federal courts should defer to any reasonable
9 determination by the State courts in a judgment of
10 Federal law.

11 This is a statute that invests the district
12 court with the exclusive authority to make the
13 determination of the true market value.

14 CHIEF JUSTICE ROBERTS: I assume that's in
15 the normal context of the adversary process. In other
16 words, the district court doesn't necessarily have to
17 come up with a number independent of what the parties
18 present to it.

19 MR. PHILLIPS: No.

20 CHIEF JUSTICE ROBERTS: It can decide which
21 of the presentations is closer to true market value.

22 MR. PHILLIPS: Absolutely. That's -- and
23 that's exactly the point, Mr. Chief Justice, that there
24 isn't any single method that's out there. All we have
25 are a series of evidences of value, and the district

1 court needs to be able to evaluate them without regard
2 to some kind of thumb on the scale of the State, in
3 favor of the State. And as you asked the question --
4 you know, is there any other valuation process that
5 would work this way -- the answer was no. And the --
6 but the problem is that there's nothing in this -- in
7 this statute that remotely suggests that Congress would
8 have wanted to do anything other than the ordinary or
9 typical valuation in this context.

10 Justice Souter, I think you made the point
11 -- it's the one I wanted to make in my opening
12 statement, which is: How is it possible that Congress,
13 recognizing decades of discrimination involving tens or
14 hundreds of millions of dollars, would have said: And
15 now when you get to the point of trying to correct that
16 discrimination, what are you going to do? Defer to the
17 entity that's been discriminating for all of those
18 years. It is passing -- at least passing strange, if
19 not incredible, to think that that's what Congress
20 meant.

21 It is much more sensible to think that
22 Congress wanted the district court to serve as a serious
23 check on what the State did. That's what we didn't get
24 in this case. That's what we're entitled to. I urge
25 the Court to vacate and to remand.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 Mr. Phillips.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the
6 above-entitled matter was submitted.)

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