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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 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 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 industrial property over the true

1 market value. Fortunately, in this particular case
2 three out of four of those variables are agreed to by
3 the parties, so the only issue in this case is what
4 constitutes the true market value of the rail
5 transportation property within the meaning of that
6 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 think
15 that you can calculate with any degree of precision what
16 the true market value of CSX's property is? The range
17 of values that were calculated by both of these experts
18 are really astonishing, from 12.3 billion to 8.1 billion
19 for Dickerson, from 9.3 to 5.9 for Tegarden. It's like
20 \$3 or \$4 billion doesn't mean anything. What is the --
21 can this be done with any precision or is it more
22 realistic just to say that what the district court would
23 have to do is to figure out whether the State's
24 calculation is within some reasonable range?

25 MR. PHILLIPS: No, I think it's pretty clear

1 that Congress did not adopt that particular formulation.
2 What Congress tasked the district court with doing was
3 determining the true market value. And if you look at
4 footnote 8 of the district court's opinion, I think he
5 does a fairly interesting job of explaining what that
6 would normally mean. He says: In an ordinary valuation
7 case I would take in all of the expert testimony from
8 the railroad, I would take in all of the expert
9 testimony of the State, I would evaluate them and I
10 would come up with a conclusion as to what I think is
11 the true market value.

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

16 MR. PHILLIPS: No, I don't --

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

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

23 CHIEF JUSTICE ROBERTS: So if the, so if the
24 district court says this methodology, Methodology A,
25 most accurately yields true market value, that is giving

1 rise to a Federal rule of determining value, isn't it?

2 MR. PHILLIPS: No. I think all it says is
3 that in this particular case under these particular
4 circumstances that methodology led to what was the true
5 market value.

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

15 MR. PHILLIPS: Mr. Chief Justice, I think
16 that's not accurate. I think what will happen is that
17 the circumstances change every day. Let's just take a
18 pretty simple example. Let's assume that in year 1 the
19 district court decides to use discounted cash flow. In
20 year 2 it turns out that CSX or some other railroad
21 property is sold, so that you have an actual direct
22 sales comparison data available to you by which to make
23 the market value.

24 CHIEF JUSTICE ROBERTS: That happens, that
25 happens once every 25 years. If you prevail on a method

1 that you think is more favorable to railroads before a
2 particular district court, you're going to cite that
3 district court in the next case that you've got and you
4 say: Look a district court's already looked at this and
5 they said Method A is a better way of determining market
6 value.

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

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

17 MR. PHILLIPS: Well, at the end of the day
18 the district court's going to make a valuation. It's
19 going to say that this is the true market value. That
20 determination is a question of fact and therefore, yes,
21 the court of appeals will evaluate that to determine
22 whether or not that fact is clearly erroneous.

23 JUSTICE ALITO: I think you said that CSX
24 has properties in 15 States that use the unit method of
25 calculation.

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

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

7 MR. PHILLIPS: Sure, Justice Alito, that's
8 exactly what could happen. But the reality is is that
9 that's exactly what's been going on since the statute
10 was enacted in 1976. 48 of the 50 States have railroads
11 that have to be evaluated and, as the AAR's amicus brief
12 points out, there have been 12 cases on this particular
13 issue. It is not as though it is cost-free for the
14 railroads to challenge what the States are doing under
15 these circumstances. There is no cost shifting or fee
16 shifting arrangement. And second, you're suing the very
17 person who's going to be making the decision next year
18 as to the value of your property.

19 CHIEF JUSTICE ROBERTS: Well, but it's
20 already been pointed out if the range is a variable of
21 \$4 billion I think it probably is worth their while to
22 challenge what they think is a low valuation.

23 MR. PHILLIPS: Yes. Well, blissfully, more
24 often than not it turns out that the overvaluation are
25 not nearly that stark. But I think that goes to the

1 core point here, which is that if this Court concludes
2 like the Eleventh Circuit did, which is that there is no
3 basis for challenging the methodology, then it would
4 have been completely within the province of the State of
5 Georgia to say, we're going to adopt a stock and debt
6 method, which virtually everybody recognizes is not an
7 accurate way to determine true market value, that that
8 number would have been \$12.2 billion.

9 CHIEF JUSTICE ROBERTS: What if we were to
10 adopt a different approach which said that you can
11 challenge the methodology, methodology, when different
12 methodologies are used, but if the State is using the
13 same methodology that's their choice? It seems to me
14 the only other alternative is to have the Federal
15 judiciary develop a Federal rule about what methodology
16 has to be used.

17 MR. PHILLIPS: Well, I don't think there's
18 ever a reason why the Federal court has to adopt a
19 single methodology and I don't think that's what
20 Congress intended. I think what Congress intended is
21 what happens in every run of the mine valuation case
22 that comes up in either State or Federal court, which is
23 that each side presents its best guess as to what the
24 true market value is and the district court resolves
25 those differences and comes out with a number that the

1 district court believes constitutes the true market
2 value.

3 JUSTICE SCALIA: I suppose there are a lot
4 of valuation cases under the Takings Clause, aren't
5 there?

6 MR. PHILLIPS: Yes, Justice Scalia, there
7 are.

8 JUSTICE SCALIA: Is there a standard Federal
9 rule for how you evaluate --

10 MR. PHILLIPS: If you read footnote 8 of the
11 district court's opinion, the district judge says, if
12 this were a typical valuation case what I would have
13 done is I would have listened to the railroad, I would
14 have listened to the State and I would have made a
15 judgment as to what I think is the right --

16 CHIEF JUSTICE ROBERTS: Isn't that how it
17 works in utility rate regulation? Isn't there in fact a
18 standard Federal method of determining what rates affect
19 the taking of property --

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

22 CHIEF JUSTICE ROBERTS: Yes, if it's
23 challenged --

24 MR. PHILLIPS: Or what the rates ought to
25 be?

1 CHIEF JUSTICE ROBERTS: The rate of return
2 in a public utility.

3 MR. PHILLIPS: But that's because that's
4 regulated by a Federal agency that formulates a very
5 precise approach typically. But there's nothing like
6 that -- and that approach governs every utility subject
7 to the jurisdiction of FERC.

8 JUSTICE KENNEDY: I was going to ask this
9 question. Is it -- would it be permitted for a State to
10 say that, with respect to utilities and certain
11 industries, including railroads, we use valuation Method
12 A, with respect to commercial rental real estate
13 property we use valuation Method B? Is that permitted?

14 MR. PHILLIPS: It's permitted for them to
15 use different methodologies because typically they do.
16 The reality is they almost never use the same
17 methodology for determining railroad property as they do
18 for other commercial and industrial property because the
19 data that are available for the two are never the same.

20 JUSTICE KENNEDY: So is a large part of the
21 argument you would make that other utilities are
22 comparable or not comparable to a railroad?

23 MR. PHILLIPS: You would make that argument,
24 but you'd also make an argument as to sort of what data
25 are available in any particular case to allow a

1 particular methodology to be used.

2 JUSTICE KENNEDY: Suppose an accounting
3 journal or some prestigious group of accountants and tax
4 appraisers came up with a new theory for evaluating
5 railroad property and it was conceded by all to be
6 highly accurate. Could they use just that for the
7 railroad and different methodologies for all other
8 utilities all over the country?

9 MR. PHILLIPS: At the end of the day the
10 test here is purely a results-driven test. It doesn't
11 tell the State what methodologies to use on either side
12 of the equation. What it says is at the end of the
13 process you end up with a ratio between assessed and
14 true market value for each that's within 5 percent.

15 THE COURT: Mr. Phillips --

16 JUSTICE KENNEDY: So that if had the
17 Platonic, the ideal valuation method, the State could
18 use it only if it ended up with the right ratio?

19 MR. PHILLIPS: Well, the State can use
20 any -- the State can assess any way it wants to in
21 defense of its ultimate outcome.

22 JUSTICE KENNEDY: But in the end it has to
23 have the right ratio.

24 MR. PHILLIPS: At the outcome it has to have
25 the right ratio. That's clearly what Congress intended.

1 I mean, this language could not be more straightforward.

2 JUSTICE KENNEDY: Well, Congress uses the
3 word "true market value" and under this hypothetical I
4 come very close to true market value, and you say it
5 doesn't work.

6 MR. PHILLIPS: Well, my guess is that the
7 district judge in that situation would probably say that
8 that is the true market value. The problem is when you
9 deviate from that methodology when you're evaluating
10 commercial and industrial property what happens in that
11 context? Does that end up with a true market value
12 that's much higher or lower.

13 JUSTICE KENNEDY: I thought your -- I
14 thought your submission was that even if is true market
15 value for the railroad, the ratio still has to be in
16 line if the methodology is different.

17 MR. PHILLIPS: Right. Well, at the end of
18 the day that's right. The question here is the
19 comparison of assessed to true market value on both
20 sides of the equation. It doesn't dictate the
21 methodology for get ting there in either situation.

22 JUSTICE SCALIA: Mr. Phillips, could I come
23 back to this question of whether or not there's going to
24 be a uniform Federal rule or not. When the district
25 court makes this finding of what the true market value

1 is that's a finding of fact, I assume.

2 MR. PHILLIPS: I believe that is, yes.

3 JUSTICE SCALIA: And it would be reviewed
4 under a clearly erroneous standard by the court of
5 appeals?

6 MR. PHILLIPS: Yes, Justice Scalia.

7 JUSTICE SCALIA: And if there were various
8 methodologies that were possible and this was one of the
9 ones that was ballpark at least reasonable, would the
10 court of appeals have any basis for reversing the, how
11 could you say it's --

12 MR. PHILLIPS: More often than not, my
13 answer would be no, there wouldn't be any basis.

14 CHIEF JUSTICE ROBERTS: Well, more often
15 than not. But in fact it is an ultimate finding of
16 fact, but it's based on valuation methodology and that's
17 what's at issue here. No one doubts that the
18 application of a methodology can be challenged. The
19 question is whether or not if you start out -- I reached
20 these facts because I used reproduction costs as my
21 method of valuation, and your submission is going to be
22 that vastly overvalues our property and you should use a
23 different method. That's a legal question. That's not
24 a method -- question of fact.

25 MR. PHILLIPS: But the protection that we're

1 seeking, Justice, to answer Justice Scalia's question,
2 is to have the independent de novo assessment by the
3 district court. I mean, that's the real purpose of the
4 statute, is to provide a Federal forum.

5 CHIEF JUSTICE ROBERTS: What if the district
6 court -- what if there is one methodology that gets you
7 an answer within 20 percent margin of error, up or down,
8 and there is another methodology that gives you an
9 answer with a 5 percent margin of error, up or down?
10 Can you challenge the application of one of those as
11 opposed to the other.

12 MR. PHILLIPS: Well, it depends on what
13 you're asking me. Are you talking about how the
14 district court, or the court of appeals? If it's in the
15 district court --

16 CHIEF JUSTICE ROBERTS: Well, of course you
17 can challenge it.

18 MR. PHILLIPS: -- because the question for
19 the district court is not with deference to how the
20 State is evaluating this issue. The question is for the
21 district court, de novo, to make a determination of what
22 the true market value is. But asking on the court of
23 appeals side, that's a different question.

24 CHIEF JUSTICE ROBERTS: My question -- my
25 question assumes that the methodology leads to a value

1 that is either 20 percent higher or lower in one case,
2 and 5 percent higher or lower in the other case.

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

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

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

24 JUSTICE SOUTER: Well, what should the
25 reasons be?

1 MR. PHILLIPS: Well, I think they should be
2 applying the professional standards of appraisal.

3 JUSTICE SOUTER: Well, but the professional
4 standards, I take it, are not simply rules that one can
5 grab out of thin air depending on one's mood. Doesn't
6 --

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

9 JUSTICE SOUTER: Doesn't one have to choose
10 the methodology based on some factual determination on
11 -- which would support a conclusion that this is a
12 better methodology for this case and others --

13 MR. PHILLIPS: To be sure.

14 JUSTICE SOUTER: -- for this case than
15 others?

16 MR. PHILLIPS: And Justice Souter, that's
17 driven largely by what data are available and what do we
18 know about how these methods have been applied in the
19 past to value this particular property.

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

24 MR. PHILLIPS: There is also an element of
25 judgment.

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

6 MR. PHILLIPS: In a different world, that
7 would make perfect sense. That's an approach Congress
8 clearly could have embraced. The problem is Congress
9 didn't do that. Congress said choose the true market
10 value.

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

14 JUSTICE SOUTER: I'm talking about reviewing
15 the judgment of the State authority in choosing one
16 method rather than another.

17 MR. PHILLIPS: Right. And the answer to
18 that is that Congress didn't intend to set this up as a
19 review process of what the State does. Congress
20 intended for the district court to do what this Court
21 said in Burlington Northern, make the necessary
22 determination of the true market value of that property.

23 JUSTICE SOUTER: But we don't -- we don't
24 know, there is no way of telling whether there is a
25 variation, or there isn't a variation under the

1 congressional formula, unless we first have a formula
2 for determining what the value -- what the true value of
3 the railroad property is. We know that can vary. That
4 can vary depending upon the methodology chosen. The
5 methodology chosen is dependent upon good facts, to pick
6 one or the other; and therefore, doesn't the very -- the
7 very criterion that Congress chose ultimately depend
8 upon the methodology?

9 MR. PHILLIPS: No, I don't think so. I
10 think what the Court said is that -- or what Congress
11 has said is that the district court can take all of that
12 into account; but at the end of the day, it is the
13 district court serving as a check on what the State does
14 that decides what the true market value. I'd like to
15 reserve the balance of my time, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Phillips.

18 Mr. Hallward-Driemeier.

19 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER
20 ON BEHALF OF THE UNITED STATES AS
21 AMICUS CURAIE SUPPORTING THE PETITIONER

22 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,
23 and may it please the court:

24 Congress did not, in the 4-R Act, establish
25 a right to obtain in Federal court administrative review

1 of State valuations. Rather, it established a Federal
2 right against State discrimination in which the railroad
3 could bring a de novo suit in Federal court to vindicate
4 that right. Justice Alito pointed out the wide range of
5 value that could be generated by generally accepted
6 methodologies -- 6 billion to 12.4 billion, in this
7 case. Clearly, if one were to accept the State's rule
8 that any reasonable methodology, by which they mean any
9 methodology that is reasonable in the abstract that may
10 have been approved by this Court in the 1800's, a State
11 could hide any variety of discriminations within that
12 rubric. There would be very little, if any meat to
13 Federal court review under the 4-R Act.

14 JUSTICE SOUTER: What if you take my
15 variation on it, and that is, we don't defer it to the
16 State's choice in the abstract, i.e. if we -- if there
17 are 10 methods, as long as it's one of the 10 it's okay?
18 Rather, if we defer at all, we defer it to the choice
19 that is made to -- to accept one or the other
20 methodology, and we look to the reasons that the State
21 gives for making that choice? Would that take all the
22 teeth out of the Federal act?

23 MR. HALLWARD-DRIEMEIER: Well, I think that
24 it would, to a large extent, undermine the right and
25 protection that Congress intended. And partly, I think

1 that the -- Your Honor's question is based on a faulty
2 premise, and that is that the State uses a single
3 methodology in carrying out its valuation.

4 JUSTICE SOUTER: Your point is well taken.
5 It has a variety, and then it makes some kind of a
6 judgmental choice as between the results it gets. But
7 that I guess just makes my question more complicated.
8 As long as it -- as long as it has good reasons for
9 selecting, let's say the three competing methodologies
10 that it uses, and as long as it has a rational -- gives
11 a rational basis for the ultimate resolution, should we
12 not or should a court not defer to the choices?

13 MR. HALLWARD-DRIEMEIER: Well, I think that
14 to call the weighing of the three evidences of value
15 that might be generated by cost income, sales methods, a
16 choice of methodology to which the Federal court is
17 required to defer is a misnomer, because it really is an
18 exercise of judgment with respect to the facts of the
19 case and the reliability of the data available.

20 JUSTICE SOUTER: But doesn't the judgment
21 get exercised in determining what facts are good reasons
22 for selecting this methodology, or this variant of
23 methodology, for this particular case?

24 MR. HALLWARD-DRIEMEIER: I think Your Honor
25 is correct, that the -- because you're pointing out that

1 really, the choice among methodologies is more a
2 question of what are the facts on the ground, what is
3 the reliable, available data that could be used in
4 generating these different evidences of value. And the
5 court's role, in our view, is to consider all of the
6 evidences of value, not just the State's evidence. That
7 would be the proper approach in a suit for
8 administrative review -- of administrative determination
9 by the State, but is a de novo proceeding in which the
10 court is to consider all evidence of value to determine,
11 to its own satisfaction, what the true market value of
12 the railroad is.

13 JUSTICE SCALIA: Even if you don't agree
14 with Justice Souter's test for the district court review
15 of the State, might you agree with it as applied to the
16 court of appeals review of the district court's job?

17 MR. HALLWARD-DRIEMEIER: I do believe that
18 the court of appeals review is reviewing a determination
19 of fact by the district court. There may be subsidiary
20 questions of the law that the court of appeals would
21 review. For example --

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

24 MR. HALLWARD-DRIEMEIER: I do believe --
25 yes, that the review of the appellate court of the

1 district court's finding is different than the review of
2 the district court's review of --

3 JUSTICE SCALIA: I didn't ask whether it was
4 different. I asked whether a reasonable basis for plain
5 error -- for clearly erroneous review, by the court of
6 appeals, begins with assessing whether the methodology
7 used by the district court is reasonable.

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

11 JUSTICE SCALIA: Well, a combination of
12 methodologies. I'm talking about -- when I say
13 methodology, I mean even if it uses a combination of
14 five different ones, okay.

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

16 JUSTICE SCALIA: Is it reasonable? How do
17 you propose to have the court of appeals review the
18 district court's selection of methodologies?

19 MR. HALLWARD-DRIEMEIER: Well, it would be,
20 as Justice Souter suggested, a question of whether those
21 methodologies -- whether the evidence in the case
22 indicated that those methodologies were reliable
23 indications of value.

24 JUSTICE SCALIA: -- were reasonable? Do
25 they have to have been the very best?

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

3 JUSTICE SCALIA: Is it clearly erroneous if
4 it may not be the very best, but it's ballpark and there
5 is disagreement as to what the very best would be?

6 MR. HALLWARD-DRIEMEIER: I do believe that's
7 true, and that is in the nature of the appellate court's
8 review of the factual finding by the district court.

9 JUSTICE STEVENS: May I ask this question?
10 I understood you to be arguing that the district court
11 made an error of law in not receiving evidence of a
12 different methodology offered by the railroads. And
13 also, if they conceivably -- if I understood you
14 correctly, you could send the case back, they could then
15 receive the evidence and come to precisely the same
16 conclusion that they already came to. That would be
17 permissible, wouldn't it?

18 MR. HALLWARD-DRIEMEIER: It would be
19 permissible. You're absolutely right, Justice Stephens.

20 JUSTICE GINSBURG: There's something not
21 quite right about that. Wasn't all the evidence
22 submitted, but the district judge said, I have all the
23 evidence, but I can't consider. It isn't a question of
24 introducing new evidence when it goes back. It's a
25 question of looking at the body of evidence that was

1 submitted.

2 MR. HALLWARD-DRIEMEIER: That's right. It's
3 not a question of whether it was excluded, in the sense
4 that Tegarden wasn't allowed to testify. It was
5 excluded by the court in its consideration.

6 CHIEF JUSTICE ROBERTS: Were all of the
7 values that were arrived at in this case within the
8 ballpark?

9 MR. HALLWARD-DRIEMEIER: Well, I -- whether
10 they are in the ballpark is not the test. Whether they
11 are indications -- reliable indications of true market
12 value. True market value is a fact that, as the Court
13 recognized in Burlington Northern, must be determined by
14 the Federal court.

15 CHIEF JUSTICE ROBERTS: Were all the
16 valuations used here reliable indications of true market
17 value?

18 MR. HALLWARD-DRIEMEIER: Well, they were --
19 Respondent argues that they were all reasonable
20 methodologies. But no, I don't think that it's true
21 that the true market value of the railroad is either 6
22 billion or 12 billion. The determination the Federal
23 court has to decide is what is the true market value.

24 CHIEF JUSTICE ROBERTS: Well, there is no
25 way to tell. Everybody agrees we're just making more or

1 less educated guesses.

2 MR. HALLWARD-DRIEMEIER: I don't think that
3 that --

4 CHIEF JUSTICE ROBERTS: And so the district
5 court has to engage in purely fictional enterprise, and
6 say yes, all the methodologies give you a range of 6 to
7 12 billion, but I think the answer is 8.2 billion.

8 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
9 do believe that there are bases upon which one can
10 distinguish the reliability of the stock and debt method
11 in this case, and the income that the two parties used
12 --

13 JUSTICE ALITO: Would you disagree if had
14 you 10 totally disinterested experts, not paid by either
15 side, and they engaged in this, that they would not all
16 come to the same number, that there would be a range and
17 probably a fairly significant range?

18 MR. HALLWARD-DRIEMEIER: There would be a
19 range. I don't know that it would be a range from 6 to
20 12 billion. But -- I think --

21 JUSTICE GINSBURG: Could the district court
22 appoint a special master to help her?

23 MR. HALLWARD-DRIEMEIER: Well, the district
24 -- as in the Tyler Regional Planning case, the Court
25 indicated that district courts frequently have to

1 undertake complicated valuation questions, and they rely
2 on the testimony of experts. Appointment of a master
3 might well be permissible. But I want to go back to the
4 textual indications, that this is a question for the
5 Federal court. There is no question that the statute
6 refers to the burden of proof in determining true market
7 value. In Burlington Northern, the Court recognized
8 that the allocation of burden of proof demonstrates that
9 it is a fact to be proved to the Court. In fact, in se,
10 with respect to true market value of the commercial and
11 industrial properties, it specifically says that it is
12 to be proved to the satisfaction of the Court. Now in
13 Burlington Northern, the Court remarked that it would be
14 unreasonable to construe the statute to lead to
15 strikingly different approaches, whether the railroad's
16 challenge was based on the alleged undervaluation of
17 other properties or overvaluation of the railroad
18 property. Now, we know from the statute that the court
19 is not to defer to any methodology, or amalgam of
20 methodologies, the State uses in valuing other
21 commercial and industrial property. Rather, the court
22 is to look to the best evidence of value, which is sales
23 data. Now, if the court has sales data available to it
24 in the case regarding the value of the railroad,
25 certainly the court should rely on that reliable

1 information, rather than the State's chosen methodology.
2 Thank you very much.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Hallward-Driemeier.

5 Mr. Calvert.

6 ORAL ARGUMENT OF WARREN R. CALVERT
7 ON BEHALF OF THE RESPONDENTS

8 MR. CALVERT: Mr. Chief Justice, and may it
9 please the court.

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

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

25 MR. CALVERT: Your Honor, I don't think

1 that's what it plainly says.

2 JUSTICE SCALIA: What's the language?
3 What's the crucial language?

4 MR. CALVERT: Well, it requires the
5 comparison of --

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

8 MR. CALVERT: Well, it has to find the
9 assessed value of the railroad, the true market value of
10 the railroads --

11 JUSTICE SCALIA: It's supposed to find the
12 true market value of the railroads. It doesn't seem to
13 me fuzzy language. District court is to find true
14 market value.

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

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

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

15 JUSTICE KENNEDY: Or any weaker?

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

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

24 MR. CALVERT: I don't believe so, Your
25 Honor. But I think -- I think there is a range of

1 possible market values that can be considered fair.

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

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

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

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

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

24 MR. CALVERT: Well, I don't believe, Your
25 Honor, that it is possible to say with any type of

1 absolute certainty or precision that one --

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

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

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

16 JUSTICE SCALIA: I was expecting you to say,
17 that what is truth?

18 (Laughter.)

19 MR. CALVERT: Your Honor, I would say that
20 the statute does not plainly require that if a State has
21 determined the market value of the railroad by correctly
22 applying a reasonable valuation method, that the statute
23 unambiguously allows the taxpayer to come in and
24 challenge that -- not just the application of that
25 method but the -- but the methodology itself.

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

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

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

21 MR. CALVERT: Well, no, Your Honor. That's
22 not our position. In fact, the objections that CSX had
23 specifically to the State's application of the
24 discounted cash flow were more than what could be fairly
25 described as checking the math. It wasn't a situation

1 where one number had had the decimal point in the wrong
2 place but there was -- there was days of expert
3 testimony, for example, regarding whether the State's
4 use of a 6.3 terminal growth rate in the discounted cash
5 flow was an appropriate number for this railroad.

6 JUSTICE SOUTER: In other words, there was
7 -- there was a contest about the judgment used by the
8 State in selecting one point of datum in its
9 calculation, right?

10 MR. CALVERT: That among other --

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

18 MR. CALVERT: Well, we think it is -- the
19 difference, Your Honor, is, while we believe that a
20 State should have -- should have the right to choose
21 among the various reasonable types of valuation methods
22 that can be used in a case like this --

23 JUSTICE SOUTER: I know that's why you
24 think. My question is, if you agree that it's
25 appropriate under the congressional statute to challenge

1 one issue of judgment, why isn't it equally appropriate
2 to challenge other issues of judgment, i.e., selection
3 of methodology?

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

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

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

18 MR. CALVERT: Well, Your Honor, I believe
19 what you have to find in the statute, because this is a
20 limited exception to the rule that Federal courts will
21 not interfere with the State's administration of its own
22 tax system, is -- I think you need to find something in
23 the statute which plainly allows the Federal courts to
24 get into the minutia of not just the way in which the
25 discounted cash flow formula has been applied or not the

1 way in which a stock-and-debt formula has been applied,
2 but its choice at the -- at the very beginning to use
3 those methodologies.

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

9 (Laughter.)

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

18 MR. CALVERT: Well, I guess -- Your Honor, I
19 think it's specifically because there is that range of
20 value, that if Congress had intended to -- that the
21 district courts would examine each and every decision
22 made by the States deciding it's going to use this
23 method --

24 JUSTICE BREYER: They're not going to do
25 that. The State has enormous leeway. Anyone who valued

1 a railroad running through the center of this city, of
2 what it would be worth if the property were sold on the
3 private market, you'd get an astronomical number. So
4 the chances of this number being higher than the sales
5 value of private property is not great.

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

14 MR. CALVERT: Well, I think -- I think the
15 result of that, Your Honor, is -- is you're going to
16 have a Federal court setting a Federal standard of
17 valuation for Georgia.

18 JUSTICE BREYER: What they're going to do is
19 they're simply going to let people present the evidence
20 as you've heard, which will have 15 valuation methods if
21 they want, all serving each as checks on the other.
22 There's no single method. So why would you end up with
23 that result?

24 MR. CALVERT: Well, Your Honor, that's what
25 -- that's what CSX is -- is arguing here today, but

1 that's not what they argued in the district court. They
2 --

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

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

15 JUSTICE GINSBURG: I think what they want is
16 to be able to attack the methodology and not be limited
17 to the application of whatever methodology the State
18 prefers.

19 MR. CALVERT: That's correct, Your Honor,
20 but the point I'm that trying to make is that what they
21 -- what they want to see come out of this case is the
22 State of Georgia -- not simply that the State of Georgia
23 couldn't use the stock-and-debt methodology for this tax
24 year; they want a ruling that basically says it can't
25 use it for any year.

1 JUSTICE SCALIA: No, I don't think they're
2 not going to get that from this Court, any more than
3 they could get it from the Court of Appeals. All the
4 Court of Appeals can say, it seems to me, is that the
5 methodology that the district court used was not clearly
6 erroneous.

7 I think another district court in a later
8 year could probably use a different methodology, which
9 would again be affirmed by the Court of Appeals because
10 it was not clearly erroneous. We're not -- I don't
11 think either the Court of Appeals or this Court is
12 placing any stamp on a particular methodology.

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

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

18 (Laughter.)

19 JUSTICE STEVENS: May I ask this question
20 about your position? Supposing Dickerson had adopted
21 the stock-and-debt method and taken the \$12 million --
22 \$12 billion figure and said that's really a reasonable
23 basis, and then he ended up with that value. Would you
24 be able to defend that decision with precisely the same
25 arguments that you're making today?

1 MR. CALVERT: Yes, Your Honor.

2 CHIEF JUSTICE ROBERTS: Well, that's what --
3 I'm sorry.

4 JUSTICE STEVENS: I just wanted to be sure.

5 CHIEF JUSTICE ROBERTS: I thought that would
6 be part of your reply to Justice Breyer, that you had
7 five different methodologies here and you chose the
8 lowest one; and the question really is how many more
9 methodologies do you have to look at if you're going to
10 choose the lowest one in each case.

11 MR. CALVERT: Well, and that is what we did
12 in this case, Your Honor.

13 JUSTICE ALITO: If it had been -- I'm
14 sorry -- if it had been Dickerson's methodology at the
15 last step to choose the highest value, would that be
16 reasonable?

17 MR. CALVERT: Again, Your Honor, I think --
18 I think a State could do that. You're still within the
19 range of value. I will say this. If the State had done
20 that in an effort to overvalue the railroads, or to
21 discriminate against them or to treat them differently
22 than other taxpayers, I think you might have a problem
23 under the statute, but I don't think it's a problem
24 under (b)(1). I think that would be a problem under
25 (b)(4) which is the --

1 JUSTICE SCALIA: This State appraiser as I
2 understand it had never done an appraisal before of --
3 of this magnitude, right?

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

14 JUSTICE SCALIA: I'm looking for the
15 footnote, but I -- I was, I was impressed by what seemed
16 to me the -- the vast difference in -- in qualifications
17 and experience of the -- of the State appraiser and of
18 the expert who was brought in by the railroads at the
19 trial. And it seemed to me quite absurd to say we have
20 to defer to -- to this novice in the field, and -- and
21 not look at the -- at the testimony of -- of someone who
22 has done a lot of it before.

23 MR. CALVERT: No. The State's appraiser,
24 Your Honor, had done, had done well over -- well over a
25 thousand of these types of appraisals. He has taught in

1 national schools on these issues. He has published in
2 State and national journals on these issues, so we
3 contend that his -- his credentials are --

4 JUSTICE SCALIA: Did you have a response --
5 did you have a response to that footnote? I didn't --

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

7 JUSTICE SCALIA: I'm sorry. I must have
8 skipped that.

9 MR. CALVERT: We have our own footnote.

10 JUSTICE SCALIA: A little footnote battle
11 here, right?

12 MR. CALVERT: That is footnote 3, Your
13 Honor.

14 JUSTICE SCALIA: Of yours?

15 MR. CALVERT: Of our brief.

16 CHIEF JUSTICE ROBERTS: You know, if this
17 comes down as it probably will in every case, to a
18 battle of competing experts, are you aware of any other
19 area where we say that a district court cannot look at
20 the methodology used by an expert in determining whether
21 or not to give credence to the expert's opinion?

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

23 CHIEF JUSTICE ROBERTS: So why should we
24 create a special rule here for the State?

25 MR. CALVERT: Well, this is a -- this is a

1 special statute and again I think what CSX is asking for
2 this -- for this Court to do is create a special rule
3 for it which gives it, unique among taxpayers, as far as
4 we are aware, the right to come into Federal court and
5 challenge each and every decision that the State has
6 made in valuing property for property taxes and have the
7 Federal court redetermine that value.

8 JUSTICE SOUTER: Well, if -- I take it to
9 determine how far you could go with that, I take it
10 though in your view if the State's appraiser had never
11 done an appraisal before in his life, if he were plucked
12 off the street by the State and said, you know,
13 "appraise the railroad property; we are making you a
14 State appraiser," on your view the district court could
15 not look behind that?

16 MR. CALVERT: Well, the district court could
17 certainly thoroughly examine the way in which the -- the
18 reasonable valuation methodologies that the State
19 selected were applied.

20 JUSTICE SOUTER: Exactly. But the selection
21 of the methodology by the guy off the street could not
22 be examined.

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

25 JUSTICE SOUTER: Well, it's -- it's one of

1 the recognized methodologies.

2 MR. CALVERT: I think if the State has used
3 --

4 JUSTICE SOUTER: It happens to be the one
5 that gives the highest number. But it's a recognized
6 methodology and there are certain -- certainly examples
7 in which that methodology has been used, and I take it
8 that if the guy off the street picks one of those, and
9 that's all we know about it, the district court on your
10 view cannot look behind it.

11 MR. CALVERT: I'd say that's correct. If
12 it's a widely used accepted valuation methodology like
13 the ones the State used in this case, that the question
14 --

15 JUSTICE SCALIA: And that's what you have
16 here. I've looked -- I've looked at your footnote and I
17 see that indeed Mr. Dickerson did have over 30 years
18 experience including well over a thousand valuations --
19 performed under the unit rule; performed under one
20 method of evaluation, right?

21 MR. CALVERT: The --

22 JUSTICE SCALIA: But the whole issue here is
23 that that method of valuation, however expert he is at
24 it, is not proper here. It doesn't work. That there
25 are other ones that should have been brought to bear.

1 JUSTICE GINSBURG: I thought both sides
2 agreed that the unit --

3 JUSTICE SCALIA: Was one of the ones, yes;
4 but that's not the only one. That's the only one he is
5 an expert in.

6 MR. CALVERT: Both sides agree that the unit
7 rule is appropriate in this case. The question then is
8 how to -- how to determine what the unit value of the
9 company was; but there is no dispute in this case that
10 the unit rule is appropriate. So the appraisals that
11 the State's appraiser had performed under the unit rule
12 are exactly the type of appraisals --

13 JUSTICE SCALIA: And it's different
14 methodologies under the unit rule. He has used -- he
15 has used different methodologies under --

16 MR. CALVERT: Than the railroad did.
17 Correct.

18 JUSTICE GINSBURG: I guess the term
19 methodology is confusing because you could think it
20 means unit rule --

21 MR. CALVERT: Right.

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

24 MR. CALVERT: That's right, Your Honor. If
25 I could make -- if I could make one point about the unit

1 rule and the choice between the unit rule and what we
2 refer to as the summation approach, the specific dispute
3 in this case has been between the various methods for
4 determining what the unit value of the company was for
5 2002 under the unit rule -- but the argument that CSX is
6 making in this case would also put -- put into play a
7 State's most fundamental methodological choice between
8 the unit rule and the summation approaches, and CSX's
9 reply brief admits as such.

10 The railroads had made -- had made such an
11 argument in the Chesapeake Western case out of the
12 Fourth Circuit where -- where Virginia's courts had held
13 that the unit rule was not an appropriate valuation
14 method under their statutes to arrive at fair market
15 value, the railroads came in and said under the 4-R Act,
16 we are entitled to put on proof under the unit rule as
17 to what our fair market value, that the Federal statute
18 makes all that open; the district court has to consider
19 all that evidence. And what the -- and the Fourth
20 Circuit rejected that argument, but that's the
21 implication.

22 CHIEF JUSTICE ROBERTS: What if what if the
23 State elected to use reproduction cost as its valuation
24 method, which I guess everybody agrees vastly overstates
25 the value of the railroad?

1 MR. CALVERT: Well I think the problem, Your
2 Honor, with reproduction cost is -- is how to -- is how
3 to accurately account for obsolescence. My
4 understanding of the objection --

5 CHIEF JUSTICE ROBERTS: So if there are
6 problems with a particular methodology, the methodology
7 can be challenged?

8 MR. CALVERT: It's possible, Your Honor,
9 that a reproduction cost methodology might -- might so
10 inadequately deal with the issue of obsolescence that
11 you just have to say that's not a reasonable
12 methodology, as applied to railroads.

13 JUSTICE SOUTER: How could you say it on
14 your theory?

15 MR. CALVERT: Pardon me?

16 JUSTICE SOUTER: How could you say it
17 consistently with your position here?

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

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

25 MR. CALVERT: Well, I think that goes to the

1 question of whether you have properly applied a
2 reasonable valuation method, and there is --

3 JUSTICE SOUTER: I thought -- I thought you
4 were saying that the reproduction method had such severe
5 problems associated with it that it simply would not be
6 a fair methodology to use and at least a reviewing
7 court, a district court could -- could draw that
8 conclusion. I thought that was your answer.

9 MR. CALVERT: Well, I think it depends, Your
10 Honor, on if you have a reproduction cost method that
11 you have applied to property that -- property that has
12 only just recently been purchased, then I don't think
13 you're going to have a problem with it at all, even --

14 JUSTICE SOUTER: We are talking about the
15 railroads like CSX, and I thought your answer was that
16 a -- a district court could conclude that as applied in
17 a case like this, that there are so many problems that
18 it simply would not be a reasonable valuation method.

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

20 JUSTICE SOUTER: All right. Then well then
21 how do you draw a line?

22 MR. CALVERT: Well again, Your Honor, I
23 think --

24 JUSTICE SOUTER: If you can do that, why
25 can't it do what -- what your brother is saying it

1 should do in this case?

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

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

8 MR. CALVERT: Well again, I think that goes
9 to whether the application is going to be -- is going to
10 be reasonable in the particular situation.

11 CHIEF JUSTICE ROBERTS: Right. And your
12 argument is that it's not reasonable because it must
13 overstate the value by a particular percentage or
14 number.

15 And I think Justice Souter's question is:
16 Well, where do you draw the line?

17 If you say it's not reasonable because it
18 overstates value by 50 percent, is a methodology that
19 overstates value by 20 percent reasonable or not --

20 MR. CALVERT: Well, I --

21 CHIEF JUSTICE ROBERTS: -- keeping in mind
22 all the methodologies here range from 8 -- 6 billion to
23 12 billion.

24 MR. CALVERT: And I -- I think, if you
25 looked at the mid- point of the ranges that each -- each

1 of the appraisers had, you would have a variation,
2 maybe, of about 20 percent either way. Again, I
3 don't think that's going to be determinative as to
4 whether you've got a reasonable methodology, whether
5 it's been properly applied, and what that range is. I
6 think that's the nature of the -- of the appraisal task
7 that States have.

8 JUSTICE SCALIA: Mr. Calvert, can you tell
9 me how this thing works, or how it may work in the
10 future?

11 Does the State just whip up a number and lay
12 it on the railroad, or -- or, in fact, is there some
13 discussion each year between the railroad's experts and
14 the -- and the State's experts as to what the right
15 number should be?

16 MR. CALVERT: What happens, Your Honor, is
17 that the railroad returns are filed with the State; and
18 there is a period of time during which the State
19 examines those returns, takes the evaluation
20 methodologies that it has selected, applies it to the
21 data that it has for those particular companies, comes
22 up with numbers. Those -- that information, typically,
23 is shared with the railroads.

24 For them to come back and say: Well, we
25 think you've used cost of capital that's too low; we

1 think you've done -- done this; this number really, we
2 believe, should be --

3 JUSTICE SCALIA: Okay. So there is some
4 give-and-take discussion before the State comes down
5 firmly and says: Cough up the money?

6 MR. CALVERT: Typically, Your Honor.

7 JUSTICE SCALIA: Okay.

8 JUSTICE STEVENS: I take it this question
9 about the unit rule -- I take it Georgia is figuring out
10 what the entire value of the railroad is throughout the
11 country. Have other States had to make the same
12 determination to apply their unit rules?

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

14 JUSTICE STEVENS: Let's say, do Tennessee
15 and Mississippi have to also apply the unit rule to
16 value the property of this particular railroad?

17 MR. CALVERT: I think -- I think the
18 majority of States that value railroad property use the
19 unit rule.

20 JUSTICE STEVENS: Is it admissible evidence
21 to find out what other -- figures other States have come
22 up with? Because you're all taking the same answer,
23 aren't you --

24 MR. CALVERT: I --

25 JUSTICE STEVENS: -- if you all use the unit

1 rule?

2 MR. CALVERT: We are, Your Honor, though if
3 a State is using a different methodology to determine
4 the unit rule, I think you would probably expect --

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

9 MR. CALVERT: I think it probably would be,
10 Your Honor.

11 JUSTICE STEVENS: And does the record
12 contain any such evidence in this case? Do we know what
13 other States have found.

14 MR. CALVERT: I think the evidence in this
15 case was that the State of Georgia's unit value, at
16 least within the southeast States, was -- was the
17 largest number.

18 JUSTICE STEVENS: Was the highest?

19 MR. CALVERT: That's correct.

20 JUSTICE STEVENS: Doesn't that raise some
21 suspicion about maybe they have a different approach
22 than is commonly applied seeking precisely the same
23 answer to precisely the same question?

24 MR. CALVERT: Well, Your Honor, I think our
25 -- our response is that we believe that in 2002 what the

1 State did was not only to make some changes in its
2 valuation methodologies, but it also made a fairly
3 significant change in the income numbers that the State
4 was using to apply its discounted cash flow analysis.

5 And specifically what it did: It started
6 using -- instead of numbers from the regulatory report,
7 the R-1 report that the railroads filed with the Surface
8 Transportation Board, it began to use income numbers
9 from the annual reports to shareholders.

10 There is a significant difference in those
11 numbers, and the testimony in this case was that the 47
12 percent increase that CSX saw in its assessment from
13 2001 to 2002 was attributable to the difference in the
14 income numbers that were being used.

15 I suspect that for many of the other States
16 that have low numbers for CSX, that they still use
17 numbers from the regulatory reports as opposed to the
18 annual reports.

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

23 If I could, just in the remaining time that
24 I've got, I'd like to mention a couple of points. The
25 CSX has contended that this line between method and

1 application is simply unworkable; and, therefore, the
2 Court shouldn't recognize any -- any such distinction
3 under the statute.

4 We think there are a couple points where the
5 lines are clear. One is between the unit rule and the
6 summation approaches. The brief filed by the
7 Association of American Railroads acknowledges that
8 those are two different methods.

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

13 We believe the fact that the line may not
14 always be -- or the boundaries may not always be
15 perfectly distinct, or that the test may not always be
16 what it might be easy to describe in the abstract -- it
17 doesn't mean that the distinction should not be
18 recognized at all under the statute.

19 Also, there is the way in which the Eleventh
20 Circuit formulated the test where the Eleventh Circuit
21 said a line bar between method and application was
22 between nonfactual determinations used in constructing
23 the valuation process, however broad or narrow they
24 might be.

25 The Court said that constitutes the method.

1 Everything else is an application.

2 The suggestion has been made by the
3 Solicitor General in their brief that -- that that means
4 as long as the State can announce or can set out its
5 valuation rule in general enough terms, make it general
6 enough, then that will become part of the method and not
7 part of the application.

8 I think if the Eleventh Circuit's opinion is
9 read in context, the Eleventh circuit didn't say that.

10 Specifically, the Eleventh circuit was
11 distinct -- was saying -- was rejecting the argument in
12 that case that only the distinction between the unit
13 rule and the summation approach is -- was the only
14 methodological distinction. And the Court was saying:
15 We think that differences in methodologies include the
16 stock and debt, the discounted cash flow, and the market
17 multiples approaches used in this case.

18 So the Eleventh Circuit did go and consider
19 the argument that the State had -- should not have used
20 a 6.3 percent terminal growth rate in the discounted
21 cash flow analysis even though that it used that in --
22 in all -- for all public utilities.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Calvert. Mr. Phillips, you have three minutes
25 remaining.

1 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
2 ON BEHALF OF THE PETITIONER

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

4 I will try to be brief. First of all,
5 Justice Stevens, in response to your question on the
6 comparisons between Georgia and other States, on page 22
7 of our cert petition we pointed out that in the 2006 tax
8 year Georgia and Florida had adopted unit values of
9 \$11.2 billion and \$12.9 billion; whereas, every other
10 State in those jurisdictions that used the unit value
11 had an assessment value of \$7.1 billion. And the
12 Respondent State did not question that.

13 So I mean the reality is there are wide
14 swings, and it does make a difference what methodology
15 you do, and it's part of the reason why it's absolutely
16 critical that the Court should enforce the language of
17 the statute. As Justice Scalia quite properly
18 recognizes, it is the true market value.

19 And this is not a statute like, for
20 instance, 28 U.S.C. 1254(d)(1) in AEDPA, which says the
21 Federal courts should defer to any reasonable
22 determination by the State courts in a judgment Federal
23 law.

24 This is a statute that vests the district
25 court with the exclusive authority to make the

1 determination of the true market value.

2 CHIEF JUSTICE ROBERTS: I mean I assume
3 that's in the normal context of the adversary process.
4 In other words, the district court does not necessarily
5 have to come up with a number independent of what the
6 parties present to it.

7 MR. PHILLIPS: No.

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

10 MR. PHILLIPS: Absolutely. And that's -- and
11 that's exactly the point, Mr. Chief Justice. There
12 isn't any single method that's out there. All we have
13 are a series of evidences of value, and the district
14 court needs to be able to evaluate them without regard
15 to some kind of thumb on the scale of the State, in
16 favor of the State. And as you asked the question, you
17 know, is there any other valuation process that would
18 work this way, the answer was no. And the problem is
19 that there is nothing in this, in this statute that
20 remotely suggests that Congress would have wanted to do
21 anything other than the ordinary or typical valuation in
22 this context.

23 Justice Souter, I think you made the point,
24 which is the one I wanted to make in my opening
25 statement, which is how is it possible that Congress

1 recognizes decades of discrimination involving tens or
2 hundreds of millions of dollars would have said and now
3 when you get to the point of trying to correct that
4 discrimination, what are you going to do? Defer to the
5 entity that's been discriminating for all of those
6 years. It is at least passing strange, if not
7 incredible to think that that's what Congress meant.

8 It is much more sensible to think that
9 Congress wanted the district court to serve as a serious
10 check on what the state did. That's what we didn't get
11 in this case. That's what we are entitled to. I urge
12 the Court to vacate and to revamp.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Phillips, the case is submitted.

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

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