1   IN THE SUPREME COURT OF THE UNITED STATES

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3   POLAR TANKERS, INC.,   :

4   Petitioner   :

5   v.   :   No. 08-310

6   CITY OF VALDEZ, ALASKA.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, April 1, 2009

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11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:18 a.m.

14   APPEARANCES:

15   CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf

16   of the Petitioner.

17   THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf

18   of the Respondent.

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1   C O N T E N T S

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

2   (10:18 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 08-310, Polar Tankers v.

5   City of Valdez.

6   Mr. Rothfeld.

7   ORAL ARGUMENT OF CHARLES A. ROTHFELD

8   ON BEHALF OF THE PETITIONER

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

10   and may it please the Court:

11   The Valdez vessel tax violates the

12   Constitution's Tonnage Clause because it operates as a

13   charge on a privilege of trading in the port of Valdez,

14   and that tax is apportioned in a way that is guaranteed

15   to tax extraterritorial values and values that do not

16   have a connection to the city. That violates the Due

17   Process and Commerce Clauses.

18   JUSTICE KENNEDY: It's not often that we

19   have disagreements as to the basic facts. The red brief

20   says that the tax in question constitutes 11 percent of

21   the tax base, and you talk about that in the reply

22   brief. Can you spend just a little bit of time at the

23   outset telling us your views of this tax? And although

24   it's the Respondent's statement and not yours, do you

25   think 11 percent of the tax base means 11 percent of

1 what's collected under this tax or under all taxes

2 imposed by City of Valdez?

3   MR. ROTHFELD: Well, I think that it means

4 all taxes that are imposed not only by the City of

5 Valdez, but they are including taxes imposed by the

6 State of Alaska that are collected by the City of

7 Valdez. The --

8   JUSTICE KENNEDY: In which case, that seems

9 really quite irrelevant.

10   MR. ROTHFELD: That is our position. We

11 think that's absolutely right. I think it is useful to

12 focus on the nature of this tax. It is a tax that is

13 directed exclusively at vessels and not on all vessels.

14 It's -- by exempting small boats and all boats that are

15 engaged in commercial fishing and all boats that dock

16 exclusively at city-owned harbors. This is a tax, a

17 property -- it's calls a property tax, but it's a tax

18 that falls only on vessels and is directed at those

19 vessels, that --

20   JUSTICE SOUTER: Well, some -- some of those

21 vessels, I take it, are taxed under other statutes. Is

22 that correct?

23   MR. ROTHFELD: I think -- I think not. I

24 think that -- so far as Valdez is concerned, the vessels

25 we are talking about are subject simply to this property

4

1   tax.

2   JUSTICE SOUTER: Well, do you -- do you take

3   the position -- let's say that if the State of Alaska

4   taxed all the other property you had mentioned except

5   for the tankers and the city taxed the tankers, that

6   that would by definition be discriminatory tax and/or on

7   some other basis violate the Tonnage Clause?

8   MR. ROTHFELD: Well, that -- that would be

9   quite a different situation than what we have here.

10   Here, the city --

11   JUSTICE SOUTER: Well, the reason I raised

12   it was that -- in -- in your response to my first

13   question, you said, well, you didn't think the city was

14   taxing these other -- these other pieces of property,

15   and I'm -- I'm not sure why that is significant.

16   MR. ROTHFELD: Well, there are -- there's a

17   huge universe of personal property that could be taxed

18   in the City of Valdez. Valdez has the authority to tax

19   all of this property except for a discrete category of

20   oil and gas property that is subject to taxation by the

21   State. So Valdez can tax all the ordinary kinds of

22   personal property -- movable property, personalty --

23   that any jurisdiction can tax. They can tax cars and

24   trucks and moving vans and refrigerators and jewelry.

25   Of all those innumerable things that they could tax,

1   they have chosen to tax a single item. They have chosen

2   to tax vessels and, as I said, not all vessels.

3   JUSTICE SCALIA: Yes, but you -- you want us

4   to ignore the -- the State tax. Do you really want us

5   to do that? I mean, it would be the easiest thing in

6   the world for the State of Alaska, instead of imposing

7   it at the State level, to authorize the municipality to

8   do it. I don't want this case to come back here for a

9   second time.

10   MR. ROTHFELD: But --

11   JUSTICE SCALIA: Now -- now that the

12   municipality is imposing the taxes that the State used

13   to impose, don't you think you have to count both of

14   them?

15   MR. ROTHFELD: I -- I don't think so. The

16   State of Alaska treats oil and gas property as --

17   JUSTICE SCALIA: You are going to get a

18   fragile judgment if -- if we go on those grounds. All

19   it takes is a modification of the -- of the legislation.

20   MR. ROTHFELD: Not so, Your Honor, because

21   State of Alaska takes very seriously it's stewardship of

22   oil and gas property. That is something of tremendous

23   fiscal importance to the State of Alaska. I think that

24   there is little practical risk that the State is going

25   to assign the right to tax that property.

1   JUSTICE SOUTER: How about the risk in the

2   other direction, that the State will simply take over

3   this tax and remit the proceeds to the city? Would the

4   result on your view be the same if it did that?

5   MR. ROTHFELD: The result in my view would

6   be the same, but that would be a different and more

7   difficult case. Here, focus on what Valdez is doing:

8   It is -- it has the authority, as I said, to tax the

9   universe of personalty in the City of Valdez. It has

10   chosen to tax only particular types of vessels that are

11   used in the export of oil. Imagine, though --

12   JUSTICE GINSBURG: There are other vessels,

13   too. It's the -- it's the oil tankers, and there are a

14   few other vessels that were included?

15   JUSTICE SCALIA: Including a -- a cruise

16   ship is covered. I --

17   MR. ROTHFELD: There is -- there is one

18   cruise ship, Your Honor, that was caught up in the net

19   in the first year the tax was imposed. Otherwise the

20   tax falls exclusively on what vessels that are involved

21   in the export of oil -- principally tankers, also

22   service vessels.

23   CHIEF JUSTICE ROBERTS: Why does that -- why

24   does that matter? I mean, do you concede that if this

25   tax were in some sense nondiscriminatory, you would

1   lose?

2   MR. ROTHFELD: No, I think that --

3   CHIEF JUSTICE ROBERTS: Why are we having

4   all this talk about -- in other words, you think if

5   there was a tonnage tax applicable to everything -- you

6   know, your pickup truck holds two tons; it has got to

7   pay a certain amount or whatever. Then do you lose or

8   win?

9   MR. ROTHFELD: If a -- if a tonnage tax --

10   look at what the tonnage tax was initially designed to

11   do. The Framers chose the term "duty of tonnage"

12   because at the time -- the time this clause was it was

13   written in the late 18th century, tonnage was the

14   ordinary way of valuing the value of a ship and the

15   ordinary way of imposing tax on a ship.

16   If -- if the City of Valdez were to impose a

17   property tax measured by tonnage on everything -- on

18   vans and trucks and refrigerators and ships -- that

19   would be a difficult case for us. But, obviously, it

20   hasn't done that. It has not imposed a tonnage tax or

21   and it has not imposed a property tax on any other type

22   of property except particular types of vessels.

23   I think you apply the duck test: It looks

24   like a duck --

25   CHIEF JUSTICE ROBERTS: I think you're --

1   MR. ROTHFELD: -- it quacks like a duck --

2   CHIEF JUSTICE ROBERTS: Yes. I think you're

3   giving up an awful lot. I mean, what if the Framers --

4   couldn't they be have been more concerned about making

5   sure that there is a free flow of commerce, that ships

6   go, and the fact that everything is taxed would be less

7   of a concern to them? But you're -- you're willing to

8   say that if it's nondiscriminatory, even if you would

9   call it a "tonnage tax," you lose?

10   MR. ROTHFELD: Well, I -- I was using a

11   response to the previous question, and actually they

12   were imposing a property tax and they were measuring it

13   in an unusual sort of way. And the Court has said that

14   if there's a generally applicable property tax which

15   happens to fall on vessels, the reality of that tax is

16   that it is a tax on property and not a tax on vessels.

17   But here we have quite the opposite. Here

18   we have tax that falls only on vessels as cargo --

19   vessels. And you're quite right: The Framers were

20   concerned with the free movement of commerce. The

21   Tonnage Clause was designed to close the loophole that

22   was thought to be left by the Import-Export Clause,

23   which bars the taxation of imports and exports. Taxing

24   vessels would be a way of circumventing that.

25   JUSTICE SOUTER: Let's -- let's assume that

1   you're -- that a given tanker came into the harbor at

2   Valdez on one occasion and one occasion only. Would the

3   City of Valdez, under its own statutes, by the terms of

4   its own ordinance, tax that ship?

5   MR. ROTHFELD: It would, indeed, because the

6   city in its code creating the tax conclusively presumed

7   that a vessel was subject to the tax so long as it takes

8   on cargo worth a million dollars over the course of a

9   year. Oil tankers --

10   JUSTICE SOUTER: Well, let me -- let me just

11   change the question then. If -- if it came in and sort

12   of took half a tankful that didn't reach the point of a

13   million dollars' value, there would be no tax then. Is

14   that correct?

15   MR. ROTHFELD: Well, it would have to take a

16   lot less than half a tankful. I think --

17   JUSTICE SOUTER: Whatever it would take to

18   get it under the minimum.

19   MR. ROTHFELD: Yes. If -- if it were not --

20   if it visited the port of Valdez once and took on less

21   than a million dollars and never came back to the port

22   of Valdez --

23   JUSTICE SOUTER: Okay. Under the old

24   tonnage laws, wouldn't that ship in the 18th century

25   have been taxed?

1   MR. ROTHFELD: I think that they --

2   jurisdictions impose all kinds of different variations

3   of tonnage duties. And as the Court --

4   JUSTICE SOUTER: Well, the -- the point that

5   I am getting to is -- and I'd -- I'd like you to address

6   this -- one of the arguments on the other side is that

7   one reason this should not be treated as a tonnage tax

8   is that it relies upon the concept of a tax situs. And

9   the -- the implication is that not every ship that comes

10   into the harbor is going to be subject to the tax;

11   whereas, under the old tonnage laws, any ship that came

12   in would be. And what is -- what is your response to

13   that argument?

14   MR. ROTHFELD: Well, two responses. First,

15   I think it is not the case that under the old tonnage

16   laws necessarily every ship was subject to tax. Ships

17   could be subject depending upon how -- how large they

18   were, and some ships could be exempted. So I think it's

19   not implicit in -- in the nature of a tonnage duty that

20   it applies to every ship that -- that enters the harbor.

21   JUSTICE SOUTER: Where do we -- where do we

22   look to find this out?

23   MR. ROTHFELD: One would have to look at the

24   practice in the 18th and 19th centuries. And some of

25   the Court's decisions --

11

1   JUSTICE SOUTER: Do you know of any source

2   that we could look at to support the proposition that

3   you just made?

4   MR. ROTHFELD: I -- I can't point you to any

5   authority directly addressing the point, but I can point

6   you to the general treatment of what a tonnage duty is.

7   I mean, it's a duty which is imposed on vessels on the

8   basis of tonnage. It -- it does not have to be imposed

9   on every vessel that enters the harbor. But I think

10   probably the more important response to your question is

11   the reality of this tax.

12   Valdez knew what it was doing. It wanted to

13   target -- it was commendably candid in saying what it

14   was doing. It wanted to target the vessels that were

15   engaged in the transport of oil. It knows how big oil

16   tankers are. It knows that the tankers are always full.

17   When they come in, they take a full load of oil. That's

18   -- that is the whole point of --

19   CHIEF JUSTICE ROBERTS: But you don't -- you

20   don't suggest that it matters, right? You -- you have

21   talked to some extent in the briefs about the bad --

22   evil motive.

23   MR. ROTHFELD: No, I --

24   CHIEF JUSTICE ROBERTS: But you are not

25   going to suggest that the same tax could be valid or

1   invalid depending on why it was enacted.

2   MR. ROTHFELD: No, I -- I don't, but I --

3   JUSTICE BREYER: May I ask one other

4   question before you leave this, which is where Justice

5   Kennedy started? Suppose a State says: In our State,

6   we want to tax all oil and gas property, and here's how

7   we do it. We assess the value of all oil and gas

8   property, ships and everything else included. Then we

9   impose a tax of 20 mills per dollar of assessed value,

10   something like that, on all of it.

11   Now, the State will collect all of it, and

12   we make one exception. We define which property the

13   State will directly get the money from, and then the

14   city can do the rest, if it wants. Now, here's what we

15   do with the State money. We give it to the city. So if

16   the city wants to, it can put the same tax on that

17   little bit of property left over, which is a subcategory

18   of oil and gas property. And by the way, the name of

19   that little bit of property left over is called "a

20   ship."

21   Now, is that a tonnage tax, and is that what

22   Alaska has done here?

23   MR. ROTHFELD: If I understand the example,

24   that -- that might be a tonnage tax, depending upon the

25   --

1   JUSTICE BREYER: I described to you the

2   entire tax. We know no more about it.

3   MR. ROTHFELD: Well, if -- if it's a tax on

4   oil and gas property, and that is the definition of the

5   tax and it happens to fall on vessels as part of the --

6   JUSTICE BREYER: The way it does is just as

7   I said. And maybe I was -- it was too much for you to

8   take in. So the point is that it's a tax on oil and gas

9   property. That's Code section 1. Code section 2 is

10 defined subcategories -- (a), (b), (c), (d, (e), (f) --

11 all of that. Code 3 says (a), (b), (c), (d), and (e).

12 The -- the State government collects and remits it to

13 the city. (G), the city can assess the same tax if it

14 wishes. It doesn't have to -- and keep the money. (G)

15 is ships.

16   And the reason I have asked that question is

17 I read something from a -- Alaska Department of Economic

18 and Community Development which suggested to me that

19 that is Alaska's tax. I might have that wrong. I just

20 read a sentence or two, and maybe I am wrong that that

21 is Alaska's tax, and --

22   MR. ROTHFELD: Yes, and --

23   JUSTICE BREYER: But if it's Alaska's tax --

24   MR. ROTHFELD: That's --

25   JUSTICE BREYER: -- what's wrong with it?

1   It's a -- it's a tax on all oil and gas property, and

2   all they do is they let the city collect some of that if

3   they want, and they collect the rest of it and give it

4   to the city.

5   MR. ROTHFELD: Well, what's -- what's wrong

6   with what's going on here and -- and I think this is an

7   answer to your question -- the City of Valdez has the

8   authority to tax an entire -- as I said, the entire

9   universe of personalty. And -- and as -- as you

10   described it, the City of Valdez also can impose a tax,

11   although it doesn't have to, on -- on vessels. And the

12   city has chosen to single out vessels out of all the

13   types of property that it could tax, and it imposes a

14   tax on them called a property tax.

15   The reality of it is that it's a tax on

16   vessels.

17   JUSTICE BREYER: What I'd like to know is:

18   Do you think what I said was a misdescription? What's

19   worrying me about this aspect of this case is a possible

20   need to send it back to find out what Alaska's tax

21   system is. Now -- now, if what I just said is a -- is a

22   correct description approximately and if the other side

23   thinks it is, too, then at least I -- I know how to go

24   about deciding it. And if I don't, I don't know quite

25   what to do.

1   MR. ROTHFELD: My -- my understanding of how

2   the tax system works is that this -- this is a State

3   level tax. Alaska determines what are subject to tax,

4   determines the items of property that are subject to

5   tax. It determines which of these vessels are subject

6   to -- to the Alaska tax. It then allows the City of

7   Valdez to collect the tax and to use the tax, but it is

8   a tax imposed by law by the State of Alaska.

9   Valdez has no discretion to tax things that

10   are not oil and gas property, that are not taxed by the

11   -- by -- subject to the tax at the State level by the

12   State.

13   JUSTICE KENNEDY: As you understand it, with

14   reference to the tax base referred to in the red brief

15   at page 14 where it says it's 11 percent of the tax

16   base, is that tax base all city-imposed?

17   MR. ROTHFELD: No. My -- my understanding

18   of what they are referring to is that this is -- Alaska

19   tax oil and gas property, including the Alaska oil

20   pipeline and the oil terminal in the City of Valdez,

21   which are enormously valuable pieces of property. So I

22   think that -- that we are sort of talking apples and

23   oranges here.

24   JUSTICE SCALIA: Was your answer to the

25   Chief Justice that if there is a tonnage tax imposed on

1   everything including -- including ships, it would still

2   violate the Tonnage Clause. Is that right?

3   MR. ROTHFELD: If it's a -- a literal duty

4   imposed on the -- the cubic capacity of the ship, it --

5   it's difficult to see how that could really be imposed

6   in terms -- on every other item of property. I suppose

7   if the -- if the --

8   JUSTICE SCALIA: It's my -- it's my

9   hypothetical. I made it up.

10   (Laughter.)

11   MR. ROTHFELD: Well, if the city were --

12   were to say that every transportation -- device of

13   transportation was going to be -- be taxed on the basis

14   of its cubic capacity, you know, vans and railroads --

15   JUSTICE SCALIA: Do you think it would be

16   okay?

17   MR. ROTHFELD: I think that would be --

18   JUSTICE SCALIA: It's only discrimination

19   that counts?

20   MR. ROTHFELD: Well, we focus on -- well,

21   no. I would say -- I would not say it's necessarily

22   okay. That would be a different kind of situation than

23   we have here. Here we have the purest case of what's --

24   of -- of a tax which is focused exclusively on vessels.

25   JUSTICE SCALIA: Well, there's some --

1   there's some fight about that, obviously. There --

2   there is no fight about the fact that this tax is based

3   upon how long the ship remains in port, right?

4   MR. ROTHFELD: Well --

5   JUSTICE GINSBURG: How many days.

6   JUSTICE SCALIA: Right. How many days it

7   remains in port.

8   MR. ROTHFELD: Well, there are two of --

9   JUSTICE SCALIA: Which means, the argument

10   could go that this is obviously a -- a tax for the use

11   of the port. And that's exactly what the Tonnage Clause

12   was directed against, preventing Philadelphia and New

13   York from taxing the consumers in New Jersey by imposing

14   taxes on ships that bring in goods.

15   MR. ROTHFELD: I -- I agree entirely with

16   that. The -- the effect of this tax is to tax

17   essentially the charge for trading in the Port of

18   Valdez, and that is exactly what the Framers --

19   JUSTICE GINSBURG: And you don't dispute

20   that in light of the benefits provided by Valdez to the

21   shipowners, that they could be a legitimate tax on these

22   vessels?

23   MR. ROTHFELD: That is -- that is absolutely

24   right. There -- there --

25   JUSTICE GINSBURG: So could you describe

1   what tax authority you think Valdez has?

2   MR. ROTHFELD: There are two ways that

3   Valdez could go about taxing these vessels. It could

4   impose a user fee, and the Court has recognized in its

5   Tonnage Clause decisions that even a -- a tax on cubic

6   capacity, a tax on weight, would be fine if that is a

7   user fee which is designed to provide -- pay for

8   services that are provided specifically to vessels

9   roughly equivalent to the value of the services

10   provided. So that is one way Valdez could do it.

11   A second way they could do it is to impose a

12   nondiscriminatory property tax. If they imposed a tax

13   on the citizenry of Valdez affecting some broad array of

14   personal property, that would impose the kind of

15   political constraints that would discourage, you know,

16   abusive export of the city's tax burden, which is just

17   what the Framers --

18   JUSTICE GINSBURG: How much property -- you

19   said if they -- if they taxed all moveables, that would

20   be okay. Could they have some exemptions and still --

21   MR. ROTHFELD: It -- it may -- I -- I

22   suppose the test would be if it's predominantly focused

23   on vessels, that would be unconstitutional. This case

24   doesn't provide an opportunity to -- to explore exactly

25   how far that goes because this is, as I say, the purest

1 case of a tax, property tax, all the property tax, which

2 applies only to vessels.

3   JUSTICE SCALIA: But you don't think a daily

4 -- a daily charge on vessels for remaining in port

5 violates the Tonnage Clause?

6   MR. ROTHFELD: It would violate the Tonnage

7 Clause.

8   JUSTICE SCALIA: Is this anything else than

9 that?

10   MR. ROTHFELD: I -- I agree with you,

11 Justice Scalia, that however ports, States, or cities go

12 about trying to impose a tax on vessels for the -- I'm

13 calling it the privilege of trading in the port, as

14 distinct from the user fee I discussed with

15 Justice Ginsburg, that would be an unconstitutional

16 tonnage duty. That's what the Court has said --

17   JUSTICE SOUTER: What about a --

18   CHIEF JUSTICE ROBERTS: I was going to say,

19 even if it's a flat fee?

20   MR. ROTHFELD: According --

21   CHIEF JUSTICE ROBERTS: Every vessel has to

22 pay, you know, $1,000.

23   MR. ROTHFELD: The Court has so held on

24 several occasions that a flat fee violates the Tonnage

25 Clause.

1   JUSTICE STEVENS: Mr. Rothfeld, can I ask

2   you a question, just focusing on the Tonnage Clause, not

3   the elements of discrimination? If you assume that the

4   Tonnage Clause was designed to protect New Jersey from

5   being exploited by New York and perhaps other States

6   because they don't have their own ports, why does that

7   rationale have any application to this case, because the

8   only State ships oil out of Alaska is Alaska? So there

9   is no other State like New Jersey who could be harmed by

10   the Tonnage Clause.

11   MR. ROTHFELD: Well, if the recipients of

12   the property are -- Valdez is taking it -- this is

13   really --

14   JUSTICE STEVENS: What State is being

15   discriminated against in the scenario we have before us

16   today?

17   MR. ROTHFELD: All of the States that are

18   using the oil shipped through Valdez are paying --

19   ultimately paying this tax. I mean, this is what the

20   Framers were concerned about. The -- the danger that --

21   JUSTICE STEVENS: But you are saying it's an

22   unduly onerous burden on the oil companies and their

23   tankers, and they only ship oil out of Alaska.

24   MR. ROTHFELD: Well, the concern that the

25   Framers had in putting the Tonnage Clause in the

1   Constitution, as with the Import-Export Clause, was that

2   States with favorable port facilities were going to be

3   imposing burdens by taking advantage of their favorable

4   geography to impose burdens that are going to be felt by

5   the other States. That is exactly what Valdez has done.

6   JUSTICE SCALIA: Not felt by the other

7   States, felt by the consumers in other States.

8   Ultimately, it's not going to be the oil companies that

9   pay this tax; it's going to be purchasers of oil.

10   MR. ROTHFELD: That -- that's right.

11   JUSTICE SCALIA: All of whom are going to be

12   outside of Alaska, since this oil is leaving Alaska,

13   right?

14   MR. ROTHFELD: That -- that is exactly

15   right.

16   JUSTICE SCALIA: It's a neat tax, you know,

17   get somebody else to pay your taxes.

18   MR. ROTHFELD: That -- that is precisely

19   right, and that's just what the Framers were concerned

20   with, the Tonnage Clause in the Constitution.

21   If -- if I may, I will move to the

22   apportionment issue in the case. I don't want -- I

23   don't want to -- to leave behind -- the Court had

24   questioned on the Tonnage Clause.

25   CHIEF JUSTICE ROBERTS: Well, but just on

22

1   a -- maybe this doesn't matter. I have seen the

2   capacity of cargo planes described in terms of tonnage.

3   Does this clause apply to those?

4   MR. ROTHFELD: That -- that is an

5   interesting question. It -- it was written to apply to

6   ships simply because in the late 18th century, the only

7   way of moving substantial amounts of cargo was by -- was

8   by vessel. And I imagine that if the Framers had in

9   mind airplanes and railroads --

10   CHIEF JUSTICE ROBERTS: It is that we have

11   an evolving Constitution, after all.

12   MR. ROTHFELD: I will leave that one alone,

13   Your Honor.

14   (Laughter.)

15   CHIEF JUSTICE ROBERTS: Well, then, do you

16   know -- it's not an entirely frivolous point. I mean,

17   do you know if States, localities where airports are

18   located charge things that might be viewed as Tonnage

19   Clauses on airplanes?

20   MR. ROTHFELD: I don't know a definitive

21   answer to that. Generally speaking, airplanes and other

22   types of property are -- are subjected to property taxes

23   on the value, and not on capacity. Although, as I said,

24   the Framers, I don't think, cared about capacity as

25   such. They just cared about charges that were being

1   imposed upon vessels that were going to be passed

2   through, as Justice Scalia said, to the ultimate

3   purchasers or sellers of the imports and exports that

4   were -- that were in the vessel.

5   JUSTICE SOUTER: I thought you said earlier

6   or implied earlier that we couldn't draw a distinction,

7   really, between capacity and value because tonnage in

8   the 18th century was simply a proxy for the -- for the

9   value of the ship?

10   MR. ROTHFELD: That -- that's right. And I

11   don't -- I hope I didn't --

12   JUSTICE SOUTER: So a value tax is going to

13   run into the same problem --

14   MR. ROTHFELD: That's right.

15   JUSTICE SOUTER: -- as a tonnage tax.

16   MR. ROTHFELD: That's right. And as for the

17   Chief Justice's question, application to moving vans or

18   cargo planes, the Court did not consider that because

19   this is the purest case. It is within the plain terms

20   of the Tonnage Clause, the historical application of the

21   Tonnage Clause. It's the clear intent of the Framers in

22   writing the Tonnage Clause.

23   JUSTICE ALITO: If the amount of the tax

24   were measured by the number of sailors who were going to

25   come ashore and the number of days they would be ashore,

24

1   and a small port city wanted to recover the costs that

2   they impose on municipal services, would that be --

3   would that be subject to the same flaw that you see

4   here?

5   MR. ROTHFELD: It -- it would, although it

6   might be possible for the city to impose some type of

7   user fee calibrated in that direction. The Court's

8   cases refer to -- the tonnage principle applies to the

9   number of passengers that the ship may carry or the

10   number of crew members on the ship. If -- if it's not a

11   proxy for particular expenses that are imposed on the

12   jurisdiction, as this concededly is not, that was not

13   what the -- Valdez intent in passing this tax, then it

14   would be problematic under the Tonnage Clause.

15   But I say again we have here the clearest,

16   easiest case under the Tonnage Clause. It's a -- it is

17   a tax that is designed exclusively of vessels that trade

18   in the harbor.

19   On the apportionment question -- and I don't

20   want to give short shrift to that, because the Valdez

21   tax is apportioned in a way that is guaranteed to impose

22   a tax on values that are not present in the

23   jurisdiction -- Polar's tankers spend only a small part

24   of the year in Valdez. They spend the rest of the time

25   on the high seas or in other ports either unloading oil

25

1   or in dry dock. And, therefore, everybody agrees the

2   tax has to be apportioned.

3   The ordinary way and the way that this Court

4   has approved the apportionment of a tax on physical

5   property -- physical property is straightforward. You

6   would put in the numerator of the tax the number of days

7   with the number of miles they spent in or number of

8   miles traveled in the taxing jurisdiction; you put in

9   the denominator 365, the total number of miles traveled

10   everywhere. You multiply that fraction times the value

11   of the property.

12   And so, for example, if I have a

13   transcontinental passenger train moving from New York to

14   California that spends 20 percent of its time in

15   New York, New York could tax 20 percent of the value of

16   the train.

17   That is not how Valdez does it.

18   JUSTICE GINSBURG: But that's -- the train

19   is going to be some place throughout its trip, unlike

20   the ship that's going to be on the high seas.

21   MR. ROTHFELD: That's right. But the -- the

22   Valdez theory does not depend upon the taxation, the

23   taxability of a ship somewhere else. Valdez is simply

24   saying that we are entitled to tax, you know, not on the

25   basis of physical presence in this jurisdiction at all.

26

1 We are entitled to tax on some concept of where

2 productive commercial activity takes place.

3   And so it does not apportion on the basis of

4 amount of time spent in the jurisdiction over the course

5 of the year, which is the approach that the Court

6 ordinarily has used. The Valdez approach is precisely

7 the equivalent of New York saying, in my

8 transcontinental train example, we are going to take

9 into account only time spent in New York and Los Angeles

10 loading and unloading passengers, and we are going to

11 discount all of the rest of the year, all the rest of

12 the time that the train has spent moving the passengers

13 from place to place.

14   JUSTICE GINSBURG: Who can tax for the time

15 on the high seas?

16   MR. ROTHFELD: This Court has held in the

17 Central Railroad case that the taxing authority goes to

18 the domicile. That for time --

19   JUSTICE GINSBURG: And the domicile here is

20 Texas. Is that right?

21   MR. ROTHFELD: The commercial domicile is

22 Texas. The corporation is incorporated in Delaware.

23   JUSTICE GINSBURG: In either case, no ships

24 berth in either Delaware or Texas. Is that right?

25   MR. ROTHFELD: These ships do not -- the

1   ships berth in Texas. The ship do not --

2   JUSTICE GINSBURG: So the home port might

3   have had in the old days the notion that's really where

4   the vessel is berthed. But, nowadays, Delaware has very

5   little to do with where the vessels are berthing and

6   where they are being serviced?

7   MR. ROTHFELD: If I may, Your Honor, I'll --

8   I'll answer that question and sit down to reserve a

9   little bit of time. You are right as to the physical

10   location of the ship, but the -- the jurisdiction, the

11   authority of a non-domicile to tax has always been

12   constrained by -- under the Due Process Clause -- by the

13   physical location of the property.

14   And so, the fact that the property may or

15   may not be subject to tax somewhere else does not give

16   Valdez additional authority to tax property that's not

17   present there.

18   Now, the Court has said that the domicile,

19   whether or not the property is present, is providing

20   benefits to the owner of the property, and it's those

21   benefits that justify the imposition of the tax for

22   periods when it is not in any tax situs subject to tax

23   by anybody else.

24   And if I may, Your Honor, I will reserve.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

28

1   Mr. Olson.

2   ORAL ARGUMENT OF THEODORE B. OLSON

3   ON BEHALF OF THE RESPONDENT

4   MR. OLSON: Mr. Chief Justice, and may it

5   please the Court:

6   In the Wheeling case, this Court said it is

7   too well settled to question the taxes upon vessels

8   based upon their value as property do not violate the

9   Tonnage Clause. In fact, no ad valorem property tax has

10   ever been held to violate the Tonnage Clause.

11   JUSTICE KENNEDY: Well, it says "vessels of

12   all kinds are liable to taxation as property in the same

13   manner as other personal property."

14   MR. OLSON: Yes, Justice Kennedy, precisely

15   in the same manner as other ad valorem property taxes.

16   Now let me answer the question that both you and Justice

17   Breyer particularly addressed, which was the oil and --

18   and gas tax imposed with respect to much of the property

19   in Valdez. Valdez taxes homes, it taxes oil and gas

20   property, it taxes barges, it taxes cruises, it taxes

21   all sorts of things just like every other jurisdiction

22   does. The oil and gas tax that you ask about,

23   Justice Kennedy, and you did, too, Justice Breyer, is

24   imposed -- and there is no need to remand this case to

25   address this. It's in Section 43.56 of the Alaska Code.

1   The State of Alaska imposes an oil and gas tax on

2   property used in the oil and gas extraction,

3   transportation, et cetera, business, but it also

4   authorizes a city under Section 43.56 and 29.45 -- the

5   City of Valdez may impose that tax as well. It's two

6   mils, it's just like every other tax that is imposed in

7   Valdez. These are taxes imposed on the same basis. If

8   the city imposes the tax, which the City of Valdez does,

9   then the tax by the State -- that tax paid to Valdez is

10   a direct credit, dollar for dollar credit, for the tax

11   that would otherwise have to go to the State.

12   So, in the first place, I think would it

13   make no difference as suggested by your question,

14   Justice Breyer, whether it was the State or the city

15   that imposed the tax. The constitutional provision

16   refers to states. States divide up their taxing

17   authorities in various different ways. The fact is that

18   the State of Alaska through the City of Valdez imposes a

19   tax on lots of different things.

20   This oil and gas tax that we are talking

21   about consists of 60 to 70 percent of the revenue base

22   of taxation for the City of Valdez. The -- the ship

23   tax, the tax on the -- that actually applies to vessels

24   which include the tankers, include barges, include a

25   cruise ship, includes just Alaska ships and -- and

1 ships --

2   JUSTICE SCALIA: Not fishing ships, right?

3   MR. OLSON: The fishing --

4   JUSTICE SCALIA: None of -- none of Valdez's

5 fishermen have to pay this tax at all?

6   MR. OLSON: They don't have to pay this tax,

7 Justice Scalia, but they pay other taxes. There is tax

8 on -- on the weight of fish and there is tax on the

9 value of fish and there's tax -- there's -- fees, they

10 use a different dock and they pay taxes there, to.

11   JUSTICE KENNEDY: But your answer it seems

12 to me does put the issue squarely before us in the terms

13 that the Petitioner has presented, that is to say, sure,

14 suppose you tax the vessel and you tax trailers and

15 small vessels and a lot of other things, but as to all

16 of the latter category, you have -- you have an

17 exemption. So the -- the only people that effectively

18 pay the tax are the tankers.

19   MR. OLSON: No.

20   JUSTICE KENNEDY: And I thought that that

21 was the way the case was presented.

22   MR. OLSON: No. Well, that is not correct,

23 if I understood your -- your statement correctly. This

24 oil and gas property, cranes, heavy equipment, fire

25 engines, motor vehicles, everything else, including the

1   people's home in Valdez get taxed.

2   JUSTICE GINSBURG: But the people's homes

3   only if they are affixed to the property and they --

4   MR. OLSON: No, that's with respect to

5   mobile homes.

6   JUSTICE GINSBURG: Yes.

7   MR. OLSON: They are taxed as real property

8   when they are affixed in that way.

9   JUSTICE SCALIA: And nonmobile homes are not

10   taxed as real property?

11   MR. OLSON: The tax -- cities may impose

12   taxes as real property or -- or personal property,

13   Justice Scalia. Some states will tax mobile homes.

14   JUSTICE KENNEDY: Now, the question is what

15   is imposed here? My understanding from the yellow

16   book -- do you agree the yellow brief is accurate in its

17   factual descriptions, perhaps not in its conclusions

18   that it draws?

19   MR. OLSON: No, Justice Kennedy. I have --

20   I've given you --

21   JUSTICE KENNEDY: See, we have a problem

22   with the facts here. But my understanding of the case,

23   and please correct me if I am wrong, is that sure,

24   Valdez has tax authority and tax statutes which would

25   cover a considerable amount of personal property on an

1   ad valorem basis. But because of exemptions, only the

2   tankers pay this tax.

3   MR. OLSON: The -- there are various taxes

4   imposed by Valdez on personal property and real

5   property.

6   JUSTICE KENNEDY: Was my statement correct?

7   MR. OLSON: Your statement is correct only

8   with respect to the ordinance that -- that eliminated

9   the exception. These big ships that impose enormous

10   burdens on the municipality, you can only imagine what

11   three, four hundred --

12   JUSTICE BREYER: That's a different

13   argument. Can we just get to --

14   MR. OLSON: Yes, I know. But these ships

15   were exempt from taxation in Valdez until the year 1999

16   when that ordinance that you are referring to,

17   Justice Kennedy, was adopted. It eliminated --

18   JUSTICE SCALIA: So was all other personal

19   property exempt from taxation, they didn't have a

20   personal property tax, right?

21   MR. OLSON: Except -- except, under the --

22   to the extent that that personal property was covered by

23   the oil and gas tax, the provisions that I have referred

24   to, Valdez had been imposing that tax.

25   JUSTICE SCALIA: That's nicely targeted as

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1   well. But there is no constitutional impediment to

2   targeting the people of New Jersey through taxing the

3   oil equipment.

4   MR. OLSON: If the Wheeling case is correct

5   and the other cases that have repeatedly said this,

6   there is no constitutional impediment for a city or a

7   state to impose a property tax on property being

8   used in --

9   JUSTICE GINSBURG: But Wheeling -- Wheeling

10   was, it was a general property tax. And as I read the

11   case, it said if you are going to tax property, you can

12   include vessels. This statute, and I think the Alaska

13   Supreme Court treated it discretely, is a tax on one

14   kind of property only, these vessels. I don't know of

15   any other property tax that is confined to just one type

16   of property. Is there another? Is there a comparable

17   tax that is focused on a single category of property?

18   MR. OLSON: There -- well, I -- I think what

19   my point here with respect to this, Justice Ginsburg, is

20   I don't know the answer specifically to that question,

21   but we are looking at what the bundle of taxes that a

22   community or a state imposes on property used that

23   imposes a burden on the community. Property is taxed

24   for the purpose, so that the property owner will bear

25   the burden of the governmental services that a city has

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1   to impose. It -- there is no constitutional provision

2   that I am aware of that says that you have to have it

3   all in one statute, collected -- and there is no

4   discrimination --

5   JUSTICE SCALIA: But you can't -- you can't

6   make vessels bear the overall burden of municipal

7   governance. You can make them bear the burden of the

8   services provided to them in harbor. But you cannot

9   make them the instrument of funding all other municipal

10   services. That's what the Tonnage Clause means.

11   MR. OLSON: Well, I disagree in part with

12   what you said, with respect, Justice Scalia; these

13   shelves pay 11 percent -- vessels pay 11 percent of the

14   revenue base for the city; 11 percent. This is a city

15   of 4,500 people.

16   JUSTICE KENNEDY: How do you define revenue

17   base?

18   MR. OLSON: This is the amount of tax

19   collected by the City of Valdez with respect to the ad

20   valorem taxes in the city, including ships, mobile

21   homes, cranes, barges, appliances, real property, and so

22   forth.

23   JUSTICE SCALIA: You are counting the state

24   tax as well, right?

25   MR. OLSON: Pardon me.

1   JUSTICE SCALIA: You are counting the state

2   tax on oil equipment?

3   MR. OLSON: I am -- I am saying to you that

4   the State imposes a tax but the State specifically

5   allows valid to impose that very tax.

6   JUSTICE BREYER: That makes matters worse.

7   MR. OLSON: Valdez imposes that tax as a

8   part of its total taxation package.

9   JUSTICE BREYER: Let's suppose I accept just

10   what Justice Ginsburg said, and said it's a hopeless

11   morass if we look at all taxes. Let's look at this tax.

12   This tax you call an ad valorem tax on personal

13   property levied by Valdez, and then on page 11 of your

14   brief you say that's not just on ships, it's also on

15   mobile homes, trailers, recreational vehicles, and

16   various types of personal property defined under State

17   law as oil and gas property, motor vehicle, machinery,

18   supplies and maintenance equipment.

19   They come back and they say, as to your

20   mobile homes, trailers and recreational vehicles, all

21   that's happening there is either you have exempted them

22   or they are fixed in place, and they are like real

23   property and that's what you are doing. As to the other

24   things, you do not impose a tax on those other things.

25   Rather, the State imposes a tax on those other things.

1   And it may be that you help the State do it by providing

2   them with the assessment, and it may be even that you

3   could do it, but you haven't; and therefore, the only

4   thing you have imposed this tax on are the ships.

5   Now I think I have that argument right. If

6   I do, what's the answer to it?

7   MR. OLSON: The answer is --

8   JUSTICE BREYER: If I don't, what's the

9   right argument?

10   MR. OLSON: The answer is Section 43.56 that

11   allows -- the State statute may impose that tax you just

12   described. And it -- and section 29.

13   JUSTICE BREYER: May impose doesn't help if

14   you don't do it.

15   MR. OLSON: Yes, it does impose it, and

16   then, Justice Breyer --

17   JUSTICE BREYER: State imposes it or --

18   MR. OLSON: -- section 29.45.080 says -- I am

19   going to read it exactly; this seems to be an important

20   point. It doesn't seem to me that it ought to make any

21   difference from the Tonnage Clause standpoint whether

22   it's a tax imposed by the State or a subdivision of the

23   State, but this provision specifically says a

24   municipality may levy and collect taxes on taxable

25   property, taxable under AS 43. That's the one. The

1   State does impose this tax but it also allows the city

2   to impose it.

3   This city does impose it. And when it is

4   paid, that is a credit against what might otherwise be

5   owed to the State. So the city does impose that tax, it

6   does collect that tax, and that tax is not --

7   JUSTICE SCALIA: Wait a minute, owed to the

8   State for what? What would be owed to the state? It's

9   still a State tax and they are the collection agent, and

10   it's a -- a credit against what they owe for their

11   collections, right?

12   MR. OLSON: A municipality may levy and

13   collect taxes on property under this section. The city

14   levies and collects those taxes. Now --

15   JUSTICE SCALIA: What -- what's it a credit

16   against? I don't understand what it's a credit against.

17   MR. OLSON: The State also imposes the

18   liability. Any individual community in Alaska may

19   impose that tax itself. If it does -- Valdez does --

20   then you don't have to pay it to the State, you pay it

21   to the city. So it's a city tax. Now --

22   JUSTICE SCALIA: What does the city get a

23   credit against?

24   MR. OLSON: The --

25   JUSTICE SCALIA: -- as referred to in the --

1   MR. OLSON: The taxpayer, once he pays $10

2   to the city under this tax, doesn't have to pay $10 to

3   the State under this tax because he gets a credit for --

4   JUSTICE SCALIA: Oh, I thought it was the

5   city that got the credit --

6   MR. OLSON: No, it is the taxpayer that gets

7   the credit. The city levies the tax. The city collects

8   the tax. And then the taxpayer doesn't have to pay the

9   State.

10   JUSTICE BREYER: And that happens with all

11   these other properties? That is, in Valdez, you pay the

12   city -- you pay the city -- for the -- for the taxes on

13   that oil and gas property that isn't shipped?

14   MR. OLSON: Yes, Justice Breyer. And --

15   JUSTICE BREYER: And you write the check to

16   the city.

17   MR. OLSON: What? Pardon?

18   JUSTICE BREYER: All the things you listed

19   on page 11 --

20   MR. OLSON: Yes.

21   JUSTICE BREYER: The -- the oil and gas,

22   motor vehicles, machinery, appliances, supplies, and

23   maintenance equipment.

24   MR. OLSON: Those are money paid to the

25   city.

1   JUSTICE BREYER: So they write a check to

2   the city. Okay.

3   MR. OLSON: Yes. Now, it shouldn't matter.

4   The Tonnage Clause prohibits States from imposing a

5   tonnage tax.

6   JUSTICE STEVENS: Well, that's exactly the

7   question I wanted to ask you. Supposing the city did

8   not impose any taxes on anybody except the people who

9   pay this tax, and that's all. Would it -- would it be

10   constitutional or unconstitutional?

11   MR. OLSON: No, it would not be. In the

12   first place --

13   JUSTICE STEVENS: It would not be

14   constitutional?

15   MR. OLSON: It would not be -- it would not

16   be unconstitutional, Justice Stevens.

17   JUSTICE STEVENS: Oh, but then why is the --

18   what other people pay on other taxes even relevant?

19   MR. OLSON: I don't think it is relevant.

20   The nondiscrimination issue has been introduced by the

21   Petitioner in this case. It is not in the Tonnage

22   Clause. It is not in any of the cases decided by this

23   Court having to do with the Tonnage Clause, having to do

24   with wharfage fees, pilotage fees, other things having

25   to do with commercial activity in a --

1   JUSTICE STEVENS: So we can take as a -- as

2   a given for the purpose of analyzing the issue, that

3   this tax is either the only tax that's relevant to our

4   analysis or that it's so much higher than all the other

5   taxes, it should be treated as the functional equivalent

6   as the only tax we have to look at?

7   MR. OLSON: I'm saying that it would not

8   make any difference if this was the only tax that the

9   city imposed unless it was a tonnage tax, and the

10   tonnage tax -- this Court has repeatedly --

11   JUSTICE KENNEDY: But the answer to

12   Justice Stevens's question is we can take this case as

13   presenting to us the fact that the ships pay more than

14   other property?

15   MR. OLSON: No.

16   JUSTICE KENNEDY: And you say that doesn't

17   make any difference.

18   MR. OLSON: No, the ships do not pay more.

19   I don't think it would make any difference if -- if the

20   city decided to impose a different rate of tax on motor

21   vehicles than it did on homes or -- or vessels, as long

22   as it was an ad valorem property tax, and this one is.

23   The vessels are not based -- the tax is

24   assessed every year on the replacement value of the

25   vessels. A big ship that is worth less money because it

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1 would cost less to replace it, because it doesn't have a

2 double hull or a double bottom, will be taxed -- it will

3 be taxed greater in proportion to its value. The value

4 imposed is assessed every year.

5   There's no challenge here -- it's very

6 important to understand that there is no challenge by

7 the Petitioners with respect to the valuations placed on

8 these ships. There's no contention that the value

9 placed upon these ships by this ad valorem property tax

10 is based upon cubic capacity. They have --

11   JUSTICE GINSBURG: But is it -- do you -- do

12 you contest the point that was made in the reply brief

13 that back at the end of the 18th century, tonnage was

14 considered a proxy for value, that it was the customary

15 mode of measuring the value of a ship?

16   MR. OLSON: I do contest that,

17 Justice Ginsburg. The only citation for that is Justice

18 Miller. Justice Miller is cited for that in a lecture

19 that he gave after he left the Court. He was on the

20 court from 1862 to 1890. He joined the Court in the --

21 in the Inman case, the Wheeling case, the Parkersburg

22 case, and here's the quote from the Inman -- from the

23 Clyde Mallory case in 1935, which is quoting the Inman

24 case from during that period of time. "At the time the

25 Constitution was adopted, 'tonnage' was a

1   well-understood commercial term signifying the internal

2   capacity of the vessel." This Court has said that over

3   and over again. In the Wheeling case, when it said --

4   JUSTICE SCALIA: Which is -- for a

5   commercial vessel, is a rough calculation of how much

6   it's worth.

7   MR. OLSON: It is not --

8   JUSTICE SCALIA: The more cargo you can

9   carry, the more valuable the commercial ship.

10   MR. OLSON: That is not correct,

11 Justice Scalia, and it's -- and it's not correct in this

12 case. Experts put an assessment on these ships based

13 upon their replacement value. It may have -- one factor

14 may be how -- how the ship is constructed, whether it

15 has a double hull. These have to be Jones Act-compliant

16 ships. The newer ones are more valuable. If they move

17 faster, they're more valuable. If they're more

18 efficient, they have more value. One of these ships in

19 this case is valued 10 times more as -- higher value --

20 than a ship that carries more capacity because it's

21 newer.

22   JUSTICE SOUTER: But all you're saying --

23   MR. OLSON: And --

24   JUSTICE SOUTER: All you're saying is that

25 there are other factors that -- that preclude using

 1   tonnage simply as a single crude measure. But isn't it

 2   fair to say that, other things being equal -- the engine

 3   capacity, the hull construction, et cetera -- the

 4   tonnage is a rough measurement of the value of the ship,

 5   for just the reason that Justice Scalia gave? It

 6   determines the amount of cargo the ship can carry, and

 7   what it can charge for it, and that is capitalized into

 8   the value of the ship. Isn't that true?

 9   MR. OLSON: Well, if -- if everything else

10   was equal, the bigger, the more capacity, the more

11   valuable the vessel might be, that's true. But that --

12   that is not the case. Different ships are different

13   sizes. They are made out of different materials. They

14   have different structural capabilities --

15   JUSTICE GINSBURG: So as long as you are

16   taxing on the basis of the value of the ship, then you

17   have no Tonnage Clause problem. Is that your -- the

18   Tonnage Clause was a specific type of measure, and if

19   you're taxing based on the assessed value of the

20   property, it isn't a Tonnage Clause. Is that your --

21   MR. OLSON: That is what this Court has

22   said. In the Wheeling case, where we were talking about

23   steamships, the Court said that same statement that you

24   just made about an ad valorem tax property tax 10 times.

25   JUSTICE BREYER: What about a porthole tax?

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1   MR. OLSON: Pardon me?

2   JUSTICE BREYER: Is a porthole tax in your

3   view okay?

4   MR. OLSON: A what?

5   JUSTICE BREYER: A porthole tax. They

6   charge for portholes. Anyone who has a porthole who

7   comes into our city pays taxed. That's not a tonnage

8   tax.

9   MR. OLSON: That's not a tonnage tax.

10   JUSTICE BREYER: So, in your view, a masked

11   tax.

12   MR. OLSON: To the extent that the tax is on

13   a vessel as an instrument of commercial conveyance, what

14   this Court has said --

15   JUSTICE BREYER: Oh, but the porthole tax

16   applies, by the way, to that ship's captain who has

17   retired, who has built his house with portholes instead

18   of windows.

19   (Laughter.)

20   MR. OLSON: I have --

21   JUSTICE BREYER: So there are 2 or 3 percent

22   of the -- I mean, it's only 99.9 percent on ships.

23   MR. OLSON: Let's start on the basics.

24   JUSTICE BREYER: Yes.

25   MR. OLSON: When the Constitution was

45

1   written, the Constitution did not intend to take away

2   the power from the States to impose taxes. The

3   provision on the import-export prohibition on the States

4   and Tonnage Clause was an instrument to protect

5   commerce. It wasn't an instrument to reduce the power

6   of States to impose taxes. The baseline is States have

7   the power to impose taxes unless there's an explicit --

8   and the court has said narrow -- limitation on that tax

9   power in the Constitution.

10   Now, what this Court has said over and over

11   again, Justice Breyer -- it hasn't had a chance to deal

12   with portholes -- but it has had a chance to deal with

13   most of these various earlier cases in the -- in the

14   1860s and '70s had to do with tax on tonnage. And there

15   was one case where New Orleans levied a tax just for the

16   entry and departure of the ship, and the Court said,

17   well, that's -- that's a tax on the ship as a -- as a

18   commercial instrument of commerce, and that would be

19   covered also. But nothing else has been covered.

20   And the Court has gone out of its way to say

21   that communities, States, are entitled to tax people

22   that possess property within their jurisdiction because

23   of --

24   CHIEF JUSTICE ROBERTS: Counsel, if you --

25   if you are right that any type of ad valorem tax is

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1   okay, well, then why in the world would the Framers have

2   adopted a prohibition on a tonnage tax, if you could

3   just say it's a tax on value, which is going to have the

4   same impact on commerce?

5   MR. OLSON: Because -- because, if you are

6   taxing -- I think that the Court had reasons for the

7   conclusion it came to. What I'm saying is not what I've

8   invented; it's what the Court has said repeatedly, that

9   because property may be taxed as property because the

10   users and owners of property are the source of revenue

11   for the communities --

12   CHIEF JUSTICE ROBERTS: Well, putting aside

13   what the Court has said, I'm looking at what the Framers

14   have said. What good does a tonnage tax prohibition do

15   --

16   MR. OLSON: It does --

17   CHIEF JUSTICE ROBERTS: -- if you are right?

18   MR. OLSON: It -- if it's -- if it's a State

19   using a tax on a vessel qua vessel as an instrument to

20   limit commerce, that is something that the Framers did

21   not want to do. They -- they prohibited taxes --

22   JUSTICE SCALIA: It offended them

23   aesthetically?

24   (Laughter.)

25   MR. OLSON: No, because -- for --

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1   JUSTICE SCALIA: So all the State has to say

2   is we are not -- we're not taxing you qua vessel.

3   (Laughter.)

4   MR. OLSON: No, Justice Scalia --

5   JUSTICE SCALIA: I mean, what --

6   MR. OLSON: What the Framers were concerned

7   about and what I was trying to say in response to the

8   Chief Justice's question is that there was a limitation

9   on the states' power to tax imports or exports because

10   of the fact that that would put the states on the coast

11   at an advantage and they would pass those burdens on to

12   the inland states. The Tonnage Clause was put there as

13   a specific provision to implement and -- to prevent the

14   circumvention of the export/import prohibition.

15   JUSTICE SCALIA: Mr. Olson --

16   JUSTICE STEVENS: But I suppose you could --

17   JUSTICE SCALIA: -- let me ask you something

18   about -- about discrimination. Let's assume that I

19   think it is relevant whether the tax is a discriminatory

20   tax, property tax just levied on -- on ships or not.

21   If that is my position, why should I count

22   as establishing nondiscrimination the fact that Alaska

23   or Valdez is also taxing -- most of its other property

24   tax revenue comes from taxing oil equipment, right? And

25   the burden of all of that tax, just like the burden of

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1   this vessel tax, is paid by people in New Jersey. I

2   mean, you know, that --

3   MR. OLSON: You can --

4   JUSTICE SCALIA: It's getting somebody else

5   to bear the burden of your taxation.

6   MR. OLSON: If do it would be --

7   JUSTICE SCALIA: Taxing that equipment

8   raises the price of oil, almost all of which the oil

9   goes out of Alaska and is paid for by people in other

10   states. Why should I count that property tax as proving

11   that either the State of Alaska or Valdez is not being

12   discriminatory? Just because it -- it can't possibly

13   violate the -- the Tonnage Clause doesn't mean that it

14   isn't as much discriminatory against other states.

15   MR. OLSON: That then might -- that might be

16   a Due Process Clause problem --

17   JUSTICE SCALIA: No, I --

18   MR. OLSON: But it wouldn't be a Tonnage

19   Clause problem. I would submit, Justice Scalia, you

20   would be very upset at the -- at Silicon Valley because

21   the property tax imposed on Silicon Valley gets all put

22   on those chips that we used in all of these computers,

23   and everybody else in the country is using those

24   computers, so the property that is taxed in that

25   community is the property that creates the value of that

1   community.

2   JUSTICE SCALIA: And if -- if California

3   taxed vessels, I would not allow California to come in

4   and say, oh, we are just subjecting them to the same tax

5   that our own citizens are subjected to.

6   MR. OLSON: And Justice Scalia --

7   JUSTICE SCALIA: I wouldn't let them point

8   to the Silicon Valley tax.

9   MR. OLSON: You would -- you would, I

10   submit, then, say that vessels are exempt from property

11   tax.

12   JUSTICE SOUTER: That may be the only way

13   they can accomplish what they want to. Because as the

14   Chief Justice's question suggested a moment ago, if in

15   the 18th century the port of Boston said, "We are not

16   going to charge tonnage anymore. We are simply going to

17   tax on the value of the ship," that is going to have

18   exactly the same effect that a tonnage tax would have.

19   So maybe exemption is the only way it can be done.

20   MR. OLSON: Well, it's going to require an

21   amendment to the Constitution because what the Framers

22   talked about was a Tonnage Clause, and they were talking

23   about --

24   JUSTICE GINSBURG: But we have said --

25   MR. OLSON: -- and they did not exempt --

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1   JUSTICE GINSBURG: Mr. Olson, we -- we have

2   said it's not just tonnage. It said that the clause

3   bars states, we said, from imposing a charge even if not

4   measured by a vessel's tonnage, for the privilege of

5   entering, trading in or lying in a port. So we have

6   ruled out the position that it's got to be an

7   old-fashioned tonnage charge, and can't be based on the

8   assessed value of the property.

9   MR. OLSON: Well, I guess I have to resort

10   to the fact that every time this Court has considered

11   it, or at least in almost every case, the Court has gone

12   out of its way to say, they were not intending to

13   prohibit states from taxing the value of property, if

14   it's an ad valorem tax.

15   JUSTICE GINSBURG: But -- but in all of

16   those cases the vessels were being taxed as one item of

17   property in a general moveable property, personal

18   property tax. I asked you before, I think, is there any

19   other tax like this, that -- an ad valorem tax that is

20   applied to one single category of property?

21   MR. OLSON: If this -- this is an ad valorem

22   tax, it has various different statutes and ordinances

23   that it comes from, but there's ad valorem taxes in

24   Valdez across the board for all kinds of property.

25   JUSTICE GINSBURG: This statute deals with

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1   one category of property. Is there another statute like

2   this one?

3   MR. OLSON: Well, there -- no. This

4   statute is -- every other statute in the same manner

5   imposes taxes on property based upon their value. This

6   was a separate ordinance that decided to remove an

7   exemption that had existed for 27 years --

8   JUSTICE GINSBURG: That was the other, the

9   State taxes were no part of the Alaska Supreme Court's

10   decision in this case.

11   MR. OLSON: Well, I think what we are

12   talking about is whether or not this community can

13   impose a tax on the people that own property in this

14   community. There's no denial that there is a property

15   tax situs here. The average length of the time in port

16   of these ships was 45 days. The entire fleet has a tax

17   situs in Valdez. So this property, like other property

18   in the same manner, is being taxed by the City of

19   Valdez.

20   The Wheeling case was a case a little bit

21   like this in the sense that it was West Virginia that

22   passed a statute that allowed Wheeling to impose the tax

23   on steam ships.

24   JUSTICE GINSBURG: And on what else? In

25   that -- in that tax that was before the port. What else

1   did Wheeling tax?

2   MR. OLSON: The only thing that the Court

3   talked about because it was -- like this it was an

4   as-applied case, the taxpayer was wanting a refund from

5   the taxes and the taxpayer owned steam ships that --

6   that went back and forth from Wheeling. And the Court

7   talked about the fact that this wasn't a Tonnage Clause,

8   this was a state-authorized municipal -

9   JUSTICE BREYER: What about the Greer? You

10   haven't mentioned that. Greer in Norris v. City of

11   Boston. Where he says the -- you know what it says;

12   it's on the front page of their brief. All right. That

13   seemed to me to say, don't interpret the Tonnage Clause

14   to apply to tonnage. Interpret it, same thing as if it

15   was mass, it's mariners, power of the steam engine,

16   number of passengers, the master or owner of the

17   vessel -- all those fall within the Tonnage Clause.

18   That's what the paragraph seems to say.

19   MR. OLSON: And what -- what the thrust of

20   the overall bulk of the cases including the language by

21   this Court repeatedly is that property taxation based

22   upon the value of property, not imposing a value -- not

23   imposing a tax on the ship. There are various ways I

24   suppose one could say that every time a ship enters a

25   harbor without developing a tax situs -- I think Justice

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1   Alito's question focused on that -- this is not --

2   JUSTICE STEVENS: May I ask a --

3   MR. OLSON: You don't get charged a fee for

4   entering the port. Or one of those cases when --

5   imposes a tax because -- it called it a wharfage tax,

6   but you didn't have to touch the wharf to pay the tax.

7   JUSTICE STEVENS: May I ask you a

8   question that I don't' think has come up, but I just

9   wondered if anybody has argued this. The duty of

10 tonnage, it seems to me, might refer to the cargo rather

11 than the ship. So if the ship made ten voyages it might

12 have ten times the tonnage of another vessel of exactly

13 the same value. Has anybody argued that that's what the

14 Tonnage Clause refers to?

15   MR. OLSON: I think -- I think you're

16 correct, Justice Stevens, that what the Framers were

17 concerned about was a substitute for -- export or import

18 tax by taxing what was in the ship, and that tonnage

19 referred to that, but it wasn't the value of the vessel

20 itself because the Court -- the Framers wouldn't have

21 wanted to take away the power of the states to tax

22 commercial activity using property in their communities

23 in the same manner that they taxed other property.

24   JUSTICE SCALIA: If that's all it applied

25 to, then the wharfage tax would have been perfectly

 1   okay. You can't say that was --

 2   MR. OLSON: The wharfage tax -- the wharfage

 3   tax has been upheld by this Court frequently. The only

 4   reason why it was struck down in that case is that you

 5   didn't have to put into the wharf. So the Court knew it

 6   wasn't really a wharfage tax, but if it was really a

 7   wharfage tax, the Court has upheld it.

 8   CHIEF JUSTICE ROBERTS: Thank you, counsel.

 9   Mr. Rothfeld, you have three minutes

10   remaining.

11   REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

12   ON BEHALF OF THE PETITIONER

13   MR. ROTHFELD: Thank you, Your Honor. A

14   couple of quick points. First on this confusing

15   question of what the State of Alaska does in the nature

16   of its tax. Mr. Olson began by -- by saying the State

17   of Alaska imposes this tax through the City of Valdez.

18   That is right. It is a tax imposed by the State of

19   Alaska that is collected by the City of Valdez. If the

20   city did not collect the tax, it would go directly to

21   the State of Alaska. It is an Alaska tax.

22   CHIEF JUSTICE ROBERTS: Where -- where does

23   the money go? If the City of Valdez collects it, where

24   does it go?

25   MR. ROTHFELD: If the city collects it, it

1   keeps it, but it has been authorized to do that by the

2   State.

3   CHIEF JUSTICE ROBERTS: Well, then I think

4   we ought to regard it as a city tax, not a State tax.

5   MR. ROTHFELD: Uh --

6   CHIEF JUSTICE ROBERTS: They collect it;

7   they keep it; that sounds like a city tax.

8   MR. ROTHFELD: But it -- it is imposed by

9   the State. The State decides decide what subject it

10   has. It identifies the property that --

11   CHIEF JUSTICE ROBERTS: Well, I suppose the

12   State can regulate what cities and municipalities and

13   counties can do throughout the State. That doesn't make

14   everything those cities and counties do the actions of

15   the State.

16   MR. ROTHFELD: That -- that's true, but this

17   particular tax is a tax that is imposed by the State at

18   the State level. It -- it's notable that Valdez has

19   never before, until we reached this Court, said that

20   this is a -- that it is taxing oil and gas property.

21   The property is subject to tax by the State. The State

22   authorizes Valdez to collect the tax, but it is imposed

23   by the tax -- the city -- the State determines which

24   items are subject to tax. So this is out of Valdez's

25   discretion. Valdez chose to tax only particular types

1   of personal property, and that is vessels.

2   Second, on the question of what the Tonnage

3   Clause was designed to do and -- and the Wheeling case,

4   Wheeling says that a property tax is okay when the tax

5   is imposed on vessels the same as other property owned

6   by its citizens. That is not what is going on here.

7   Contemporaneous understanding of the rule at the time

8   was that taxes that singled out vessels were

9   unconstitutional. We cite authority for this

10   proposition in our reply brief.

11   To -- to address Justice Ginsburg's question

12   as to whether there were other taxes like this, we have

13   not found any other tax anywhere that has been imposed

14   singling out vessels as -- for -- for property taxation.

15   Either now or in the past, we have not found any case

16   addressing that, not only not in this Court, but in any

17   other court.

18   And then finally --

19   JUSTICE SOUTER: What about the -- the

20   broader tax situation at the -- at the -- in -- in 1789?

21   Did -- did ports have sources of -- or exercise the

22   authority at that time to tax property generally, e.g.,

23   real estate in the city to support the activities of the

24   ports, or were they dependent solely upon things like

25   import-export taxes, et cetera?

1   MR. ROTHFELD: My -- my understanding is

2   that real estate certainly was subject to tax and that

3   ports would have the authority to tax other types of

4   property. Vessels were set aside as a particular item

5   by the Tonnage Clause.

6   JUSTICE SOUTER: So -- so that the argument

7   they are taxing other things, therefore it's okay to tax

8   this, would have been an argument just as potent in the

9   18th century or impotent, as the case may be, as it is

10   now?

11   MR. ROTHFELD: That's right.

12   JUSTICE SOUTER: Okay.

13   MR. ROTHFELD: And so setting aside vessels

14   in a -- in a unique category when other things could be

15   taxed would have been problematic --

16   CHIEF JUSTICE ROBERTS: How -- under your

17   view, how is a city supposed to impose a property tax on

18   a vessel?

19   MR. ROTHFELD: It -- it should impose a tax

20   by imposing a tax on personal property generally. And

21   if it does, it would fall on vessels as items of

22   personal property. It -- it is significant -- well, if

23   I may, Your Honor, just to finish, what Valdez has -- it

24   could have taxed all of that types of -- or it could

25   have taxed particular types of it. But it has seized on

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1   only one particular type of personal property to be

2   subject to taxation.

3   CHIEF JUSTICE ROBERTS: So -- so you think

4   we should resolve the tax by seeing how generally

5   applicable property taxes are in Valdez?

6   MR. ROTHFELD: I -- I think it's an easy

7   case when, as in this situation, there is only one item

8   of property that is taxed, and that's a vessel.

9   CHIEF JUSTICE ROBERTS: Well, but your --

10   your brother suggests that other items of property are

11   taxed under other provisions of the tax ordinance.

12   MR. ROTHFELD: Again, Valdez does not. The

13   State does. Valdez does not. And so I think that there

14   is no need for the Court to go beyond and decide how

15   broadly applicable -- as I suggested earlier, our test

16   would be predominantly on vessels it is

17   unconstitutional, and that clearly is the case here.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   The case is submitted.

20   MR. ROTHFELD: Thank you, Your Honor.

21   (Whereupon, at 11:20 a.m., the case in the

22   above-entitled case was submitted.)

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