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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 08-310, Polar Tankers v. City of Valdez.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONER

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

The Valdez vessel tax violates the Constitution's Tonnage Clause because it operates as a charge on a privilege of trading in Port Valdez, and that tax is apportioned in a way that is guaranteed to tax extraterritorial values and values that do not have a connection to the city. That violates the Due Process and Commerce Clauses.

JUSTICE KENNEDY: It's not often that we have disagreements as to the basic facts. The red brief says that the tax in question constitutes 11 percent of the tax base, and you talk about that in the reply brief. Can you spend just a little bit of time at the outset telling us your views of this tax? And although it's the Respondent's statement, not yours, do you think 11 percent of the tax base means 11 percent of what's

1 collected under this tax or under all taxes imposed by
2 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's useful to
12 focus on the nature of this tax. It is a tax that is
13 directed exclusively at vessels and not at 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 was 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 the -- so far as Valdez is concerned, the
25 vessels we are talking about are subject simply to this

1 property 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 a discriminatory tax and/or
7 on 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 -- 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 to have this case to come back here
9 for a 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. I
16 think the State of Alaska treats oil and gas property as
17 --

18 JUSTICE SCALIA: You are going to get a
19 fragile judgment if -- if we go on those grounds. All
20 it takes is a modification of the -- of the legislation.

21 MR. ROTHFELD: Not so, Your Honor, because
22 State of Alaska takes very seriously its stewardship of
23 oil and gas property. That is something of tremendous
24 fiscal importance to the State of Alaska. I think that
25 there is little practical risk that the State is going

1 to assign the right to tax that property.

2 JUSTICE SOUTER: How about the risk in the
3 other direction, that the State will simply take over
4 this tax and remit the proceeds to the city? Would the
5 result on your view be the same if it did that?

6 MR. ROTHFELD: The -- the result in my view
7 would be the same, but that would be a different and
8 more difficult case. Here, focus on what Valdez is
9 doing: It is -- it has the authority, as I said, to tax
10 the entire universe of personalty in the City of Valdez.
11 It has chosen to tax only particular types of vessels
12 that are used in the export of oil. Imagine, though --

13 JUSTICE GINSBURG: There are some other
14 vessels, too. It's the -- it's the oil tankers, and
15 there are a few other vessels that were included?

16 JUSTICE SCALIA: Including a -- a cruise
17 ship is covered. I --

18 MR. ROTHFELD: There is -- there is one
19 cruise ship, Your Honor, that was caught up in the net
20 in the first year the tax was imposed. Otherwise, the
21 tax falls exclusively on what vessels that are involved
22 in the export of oil -- principally tankers, also
23 service vessels.

24 CHIEF JUSTICE ROBERTS: Why does that -- why
25 does that matter? I mean, do you -- do you concede that

1 if this tax were in some sense nondiscriminatory, you
2 would lose?

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

4 CHIEF JUSTICE ROBERTS: Why are we having
5 all this talk about -- in other words, you think if
6 there was a tonnage tax applicable to everything -- you
7 know, your pickup truck holds two tons; it has got to
8 pay a certain amount or whatever. Then do you lose or
9 win?

10 MR. ROTHFELD: If a -- if a tonnage tax --
11 look at what the tonnage tax was initially designed to
12 do. The Framers chose the term "duty of tonnage"
13 because at the time -- the time this clause was it was
14 written in the late 18th century, tonnage was the
15 ordinary way of valuing the value of a ship and the
16 ordinary way of imposing tax on a ship.

17 If -- if the City of Valdez were to impose a
18 property tax measured by tonnage on everything -- on
19 vans and trucks and refrigerators and ships -- that
20 would be a difficult case for us. But, obviously, it
21 hasn't done that. It has not imposed a tonnage tax or
22 and it has not imposed a property tax on any other type
23 of property except particular types of vessels.

24 I think you apply the duck test: It looks
25 like a duck --

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

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

3 CHIEF JUSTICE ROBERTS: Yes. I think you're
4 giving up an awful lot. I mean, what if the Framers --
5 couldn't they be have been more concerned about making
6 sure that there is a free flow of commerce, that ships
7 go, and the fact that everything is taxed would be less
8 of a concern to them? But you're -- you're willing to
9 say that if it's nondiscriminatory, even if you would
10 call it a "tonnage tax," you lose?

11 MR. ROTHFELD: Well, I -- I was using -- in
12 response to the previous question, imagining that they
13 were imposing a property tax and they were measuring it
14 in an unusual sort of way. And the Court has said that
15 if there's a generally applicable property tax which
16 happens to fall on vessels, the reality of that tax is
17 that it is a tax on property and not a tax on vessels.

18 But here we have quite the opposite. Here
19 we have a tax that falls only on vessels as cargo
20 vessels. And you're quite right: The Framers were
21 concerned with the free movement of commerce. The
22 Tonnage Clause was designed to close the loophole that
23 was thought to be left by the Import-Export Clause,
24 which bars the taxation of imports and exports. Taxing
25 vessels would be a way of circumventing that.

1 JUSTICE SOUTER: Let's -- let's assume that
2 you're -- that a given tanker came into the harbor at
3 Valdez on one occasion and one occasion only. Would the
4 City of Valdez, under its own statutes, by the terms of
5 its own ordinance, tax that ship?

6 MR. ROTHFELD: It would, indeed, because the
7 city in its code creating the tax preclusively presumes
8 that a vessel is subject to the tax so long as it takes
9 on cargo worth a million dollars over the course of a
10 year. Oil tankers --

11 JUSTICE SOUTER: Well, let me -- let me just
12 change the question then. If -- if it came in and sort
13 of took half a tankful that didn't reach the point of a
14 million dollars' value, there would be no tax then. Is
15 that correct?

16 MR. ROTHFELD: Well, it would have to take a
17 lot less than half a tankful. I think --

18 JUSTICE SOUTER: Whatever it would take to
19 get it under the minimum.

20 MR. ROTHFELD: Yes. If -- if it were not --
21 if it visited the port of Valdez once and took on less
22 than a million dollars and never came back to the port
23 of Valdez --

24 JUSTICE SOUTER: Okay. Under the old
25 tonnage laws, wouldn't that ship in the 18th century

1 have been taxed?

2 MR. ROTHFELD: I think that they --
3 jurisdictions impose all kinds of different variations
4 of tonnage duties. And as the Court --

5 JUSTICE SOUTER: Well, the -- the point that
6 I am getting to is -- and I'd -- I'd like you to address
7 this: One of the arguments on the other side is that
8 one reason this should not be treated as a tonnage tax
9 is that it relies upon the concept of a tax situs. And
10 the -- the implication is that not every ship that comes
11 into the harbor is going to be subject to the tax;
12 whereas, under the old tonnage laws, any ship that came
13 in would be. And what is -- what is your response to
14 that argument?

15 MR. ROTHFELD: Well, two responses. First,
16 I think it is not the case that under the old tonnage
17 laws necessarily every ship was subject to tax. Ships
18 could be subject depending upon how -- how large they
19 were, and some ships could be exempted. So I think it's
20 not implicit in -- in the nature of a tonnage duty that
21 it applies to every ship that -- that enters the harbor,
22 but --

23 JUSTICE SOUTER: Where do we -- where do we
24 look to find this out?

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

1 practice in the 18th and 19th centuries. And some of
2 the Court's decisions --

3 JUSTICE SOUTER: Do you know of any source
4 that we could look at to support the proposition that
5 you just made?

6 MR. ROTHFELD: I -- I can't point you to any
7 authority directly addressing that point, but I can
8 point you to the general treatment of what a tonnage
9 duty is. I mean, it's a duty which is imposed on
10 vessels on the basis of tonnage. It -- it does not have
11 to be imposed on every vessel that enters the harbor.
12 But I think probably the more important response to your
13 question is the reality of this tax.

14 Valdez knew what it was doing. It wanted to
15 target -- it was commendably candid in saying what it
16 was doing. It wanted to target the vessels that were
17 engaged in the transport of oil. It knows how big oil
18 tankers are. It knows that the tankers are always full.
19 When they come in, they take a full load of oil. That's
20 -- that is the whole point of --

21 CHIEF JUSTICE ROBERTS: But you don't -- you
22 don't suggest that it matters, right? You -- you have
23 talked to some extent in the briefs about the bad --
24 evil motive.

25 MR. ROTHFELD: No, I --

1 CHIEF JUSTICE ROBERTS: But you are not
2 going to suggest that the same tax could be valid or
3 invalid depending on why it was enacted.

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

5 JUSTICE BREYER: May I ask one other
6 question before you leave this, which is where Justice
7 Kennedy started? Suppose a State says: In our State,
8 we want to tax all oil and gas property, and here's how
9 we do it. We assess the value of all oil and gas
10 property, ships and everything else included. Then we
11 impose a tax of 20 mills per dollar of assessed value,
12 something like that, on all of it.

13 Now, the State will collect all of it, and
14 we make one exception. We define which property the
15 State will directly get the money from, and then the
16 city can do the rest, if it wants. Now, here's what we
17 do with the State money. We give it to the city. So if
18 the city wants to, it can put the same tax on that
19 little bit of property left over, which is a subcategory
20 of oil and gas property. And by the way, the name of
21 that little bit of property left over is called "a
22 ship."

23 Now, is that a tonnage tax, and is that what
24 Alaska has done here?

25 MR. ROTHFELD: If I understand the example,

1 that -- that might be a tonnage tax, depending upon the
2 --

3 JUSTICE BREYER: I described to you the
4 entire tax. We know no more about it.

5 MR. ROTHFELD: Well, if -- if it's a tax on
6 oil and gas property, and that is the definition of the
7 tax and it happens to fall on vessels as part of the --

8 JUSTICE BREYER: The way it does is just as
9 I said. And maybe I was -- it was too much for you to
10 take in. So the point is that it's a tax on oil and gas
11 property. That's Code section 1. Code section 2 is
12 defined subcategories -- (a), (b), (c), (d), (e), (f) --
13 all of that. Code section 3 says (a), (b), (c), (d),
14 and (e). The -- the State government collects and
15 remits it to the city. (G), the city can assess the
16 same tax if it wishes. It doesn't have to -- and keep
17 the money. (G) is ships.

18 And the reason I have asked that question is
19 I read something from -- Alaska Department of Economic
20 and Community Development which suggested to me that
21 that is Alaska's tax. I might have that wrong. I just
22 read a sentence or two, and maybe I am wrong that that's
23 Alaska's tax, and --

24 MR. ROTHFELD: Yes, and --

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

1 MR. ROTHFELD: That's --

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

3 It's a -- it's a tax on all oil and gas property, and
4 all they do is they let the city collect some of that if
5 they want, and they collect the rest of it and give it
6 to the city.

7 MR. ROTHFELD: Well, what's -- what's wrong
8 with what's going on here and -- and I think this is in
9 answer to your question -- the City of Valdez has the
10 authority to tax an entire -- as I said, the entire
11 universe of personalty. And -- and as -- as you
12 described it, the City of Valdez also can impose a tax,
13 although it doesn't have to, on -- on vessels. And the
14 city has chosen to single out vessels out of all the
15 types of property that it could tax, and it imposed a
16 tax on them called a property tax.

17 The reality of it is that it's a tax on
18 vessels.

19 JUSTICE BREYER: What I'd like to know is:
20 Do you think what I said was a misdescription? What's
21 worrying me about this aspect of this case is a possible
22 need to send it back to find out what Alaska's tax
23 system is. Now -- now, if what I just said is a -- is a
24 correct description approximately and if the other side
25 thinks it is, too, then at least I -- I know how to go

1 about deciding it. And if I don't, I don't know quite
2 what to do.

3 MR. ROTHFELD: My -- my understanding of how
4 the tax system works is that this -- this is a State
5 level tax. Alaska determines what are subject to tax,
6 determines the items of property that are subject to
7 tax. It determines which of these vessels are subject
8 to -- to the Alaska tax. It then allows the City of
9 Valdez to collect the tax and to use the tax, but it is
10 a tax imposed by law by the State of Alaska.

11 Valdez has no discretion to tax things that
12 are not oil and gas property, that are not taxed by the
13 -- by -- subject to the tax at the State level by the
14 State.

15 JUSTICE KENNEDY: As you understand it, with
16 reference to the tax base referred to in the red brief
17 at page 14 where it says it's 11 percent of the tax
18 base, is that tax base all city-imposed?

19 MR. ROTHFELD: No. My -- my understanding
20 of what they are referring to is that this includes
21 Alaska-taxed oil and gas property, including the Alaska
22 oil pipeline and the oil terminal in the City of Valdez,
23 which are enormously valuable pieces of property. So I
24 think that -- that we are sort of talking apples and
25 oranges here.

1 JUSTICE SCALIA: Was your answer to the
2 Chief Justice that if there is a tonnage tax imposed on
3 everything including -- including ships, it would still
4 violate the Tonnage Clause. Is that right?

5 MR. ROTHFELD: If it's a -- a literal duty
6 of tonnage on the cubic capacity of the ship, it -- it's
7 difficult to see how that could really be imposed in
8 terms on every other item of property. I suppose if the
9 -- if the --

10 JUSTICE SCALIA: It's my -- it's my
11 hypothetical. I made it up.

12 (Laughter.)

13 MR. ROTHFELD: Well, if the city were --
14 were to say that every transportation -- device of
15 transportation was going to be -- be taxed on the basis
16 of its cubic capacity, you know, vans and railroads --

17 JUSTICE SCALIA: And you think it would be
18 okay?

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

20 JUSTICE SCALIA: It's only discrimination
21 that counts?

22 MR. ROTHFELD: Well, we focus on -- well,
23 no. I would say -- I would not say it's necessarily
24 okay. That would be a different kind of situation than
25 we have here. Here we have the purest case of what's --

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

2 JUSTICE SCALIA: Well, there's some --
3 there's some fight about that, obviously. There --
4 there is no fight about the fact that this tax is based
5 upon how long the ship remains in port, right?

6 MR. ROTHFELD: Well --

7 JUSTICE GINSBURG: How many days.

8 JUSTICE SCALIA: Right. How many days it
9 remains in port.

10 MR. ROTHFELD: Well, there are two --

11 JUSTICE SCALIA: Which means, the argument
12 could go that this is obviously a -- a tax for the use
13 of the port. And that's exactly what the Tonnage Clause
14 was directed against, preventing Philadelphia and New
15 York from taxing the consumers in New Jersey by imposing
16 taxes on ships that bring in goods.

17 MR. ROTHFELD: I -- I agree entirely with
18 that. The -- the effect of this tax is to tax
19 essentially the charge for trading in the Port of
20 Valdez, and that is exactly what the Framers --

21 JUSTICE GINSBURG: And you don't dispute
22 that in light of the benefits provided by Valdez to the
23 shipowners, that there could be a legitimate tax on
24 these vessels?

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

1 right. There -- there --

2 JUSTICE GINSBURG: So could you describe
3 what tax authority you think Valdez has?

4 MR. ROTHFELD: There are two ways that
5 Valdez could go about taxing these vessels. It could
6 impose a user fee, and the Court has recognized in its
7 Tonnage Clause decisions that even a -- a tax on cubic
8 capacity, a tax on weight, would be fine if that is a
9 user fee which is designed to provide -- pay for
10 services that are provided specifically to vessels
11 roughly equivalent to the value of the services
12 provided. So that is one way Valdez could do it.

13 A second way they could do it is to impose a
14 nondiscriminatory property tax. If they imposed a tax
15 on the citizenry of Valdez affecting some broad array of
16 personal property, that would impose the kind of
17 political constraints that would discourage, you know,
18 abusive export of the city's tax burden, which is just
19 what the Framers --

20 JUSTICE GINSBURG: How much property -- you
21 said if they -- if they taxed all moveables, that would
22 be okay. Could they have some exemptions and still --

23 MR. ROTHFELD: It -- it may -- I -- I
24 suppose the test would be if it's predominantly focused
25 on vessels, that would be unconstitutional. This case

1 doesn't provide an opportunity to -- to explore exactly
2 how far that goes because this is, as I say, the purest
3 case of a tax, property tax, all the property tax, which
4 applies only to vessels. And --

5 JUSTICE SCALIA: But you don't think a daily
6 -- a daily charge on vessels for remaining in port
7 violates the Tonnage Clause?

8 MR. ROTHFELD: It would violate the Tonnage
9 Clause.

10 JUSTICE SCALIA: Is this anything else than
11 that?

12 MR. ROTHFELD: I -- I agree with you,
13 Justice Scalia, that however ports, States, or cities go
14 about trying to impose a tax on vessels for the -- I'm
15 calling it the privilege of trading in the port, as
16 distinct from the user fee I discussed with
17 Justice Ginsburg, that would be an unconstitutional
18 tonnage duty. That's what the Court has said --

19 JUSTICE SOUTER: What about a --

20 CHIEF JUSTICE ROBERTS: I was going to say,
21 even if it's a flat fee?

22 MR. ROTHFELD: According --

23 CHIEF JUSTICE ROBERTS: Every vessel has to
24 pay, you know, \$1,000.

25 MR. ROTHFELD: The Court has so held on

1 several occasions that a flat fee violates the Tonnage
2 Clause.

3 JUSTICE STEVENS: Mr. Rothfeld, can I ask
4 you a question, just focusing on the Tonnage Clause, not
5 the elements of discrimination? If you assume that the
6 Tonnage Clause was designed to protect New Jersey from
7 being exploited by New York and perhaps other States
8 because they don't have their own ports, why does that
9 rationale have any application to this case, because the
10 only State that ships oil out of Alaska is Alaska? So
11 there is no other State like New Jersey who could be
12 harmed by the Tonnage Clause.

13 MR. ROTHFELD: Well, the recipients of the
14 property are being harmed. Valdez is taking it -- this
15 is really --

16 JUSTICE STEVENS: But who -- what State is
17 being discriminated against in the scenario we have
18 before us today?

19 MR. ROTHFELD: All of the States that are
20 using the oil shipped through Valdez are paying --
21 ultimately paying this tax. I mean, this is what the
22 Framers were concerned about. The -- the danger that --

23 JUSTICE STEVENS: But you are saying it's an
24 unduly onerous burden on the oil companies and their
25 tankers, and they only ship oil out of Alaska.

1 MR. ROTHFELD: Well, the concern that the
2 Framers had in putting the Tonnage Clause in the
3 Constitution, as with the Import-Export Clause, was that
4 States with favorable port facilities were going to be
5 imposing burdens by taking advantage of their favorable
6 geography to impose burdens that are going to be felt by
7 the other States. That is exactly what Valdez has done.

8 JUSTICE SCALIA: Not felt by the other
9 States, felt by the consumers in other States.
10 Ultimately, it's not going to be the oil companies that
11 pay this tax; it's going to be purchasers of oil.

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

13 JUSTICE SCALIA: All of whom are going to be
14 outside of Alaska, since this oil is leaving Alaska,
15 right?

16 MR. ROTHFELD: That -- that is exactly
17 right.

18 JUSTICE SCALIA: It's a neat tax, you know,
19 get somebody else to pay your taxes.

20 MR. ROTHFELD: That -- that is precisely
21 right, and that's just what the Framers were concerned
22 with, with the Tonnage Clause in the Constitution.

23 If -- if I may, I will move to the
24 apportionment issue in the case. I don't want -- I
25 don't want to -- to leave behind -- the Court had

1 questioned on the Tonnage Clause.

2 CHIEF JUSTICE ROBERTS: Well, but just on
3 a -- maybe this doesn't matter. I have seen the
4 capacity of cargo planes described in terms of tonnage.
5 Does this clause apply to those?

6 MR. ROTHFELD: That -- that is an
7 interesting question. It -- it was written to apply to
8 ships simply because in the late 18th century, the only
9 way of moving substantial amounts of cargo was by -- was
10 by vessel. And I imagine that if the Framers had in
11 mind airplanes and railroads --

12 CHIEF JUSTICE ROBERTS: It is -- we have an
13 evolving Constitution, after all.

14 MR. ROTHFELD: I will leave that one alone,
15 Your Honor.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: Well, then, do you
18 know -- it's not an entirely frivolous point. I mean,
19 do you know if States, localities where airports are
20 located charge things that might be viewed as Tonnage
21 Clauses on airplanes?

22 MR. ROTHFELD: I don't know a definitive
23 answer to that. Generally speaking, airplanes and other
24 types of property are -- are subjected to property taxes
25 on the value, and not on capacity. Although, as I said,

1 the Framers I don't think cared about capacity as such.
2 They just cared about charges that were being imposed
3 upon vessels that were going to be passed through, as
4 Justice Scalia said, to the ultimate purchasers or
5 sellers of the imports and exports that were -- that
6 were in the vessel.

7 JUSTICE SOUTER: I thought you said earlier
8 or implied earlier that we couldn't draw a distinction,
9 really, between capacity and value because tonnage in
10 the 18th century was simply a proxy for the -- for the
11 value of the ship?

12 MR. ROTHFELD: That -- that's right. And I
13 don't -- I hope I didn't --

14 JUSTICE SOUTER: So a value tax is going to
15 run into the same problem --

16 MR. ROTHFELD: That's right.

17 JUSTICE SOUTER: -- as a tonnage tax.

18 MR. ROTHFELD: That's right. And as for the
19 Chief Justice's question, application to moving vans or
20 cargo planes, the Court did not consider that because
21 this is the purest case. It is within the plain terms
22 of the Tonnage Clause, the historical application of the
23 Tonnage Clause. It's the clear intent of the Framers in
24 writing the Tonnage Clause.

25 JUSTICE ALITO: If the amount of the tax

1 were measured by the number of sailors who were going to
2 come ashore and the number of days they would be ashore,
3 and a small port city wanted to recover the costs that
4 they impose on municipal services, would that be --
5 would that be subject to the same flaw that you see
6 here?

7 MR. ROTHFELD: It -- it would, although it
8 might be possible for the city to impose some type of
9 user fee calibrated in that direction. The Court's
10 cases refer to -- the tonnage principle applies to the
11 number of passengers that the ship may carry or the
12 number of crew members on the ship. If -- if it's not a
13 proxy for particular expenses that are imposed on the
14 jurisdiction, as this concededly is not, that was not
15 what the -- Valdez intent in passing this tax, then it
16 would be problematic under the Tonnage Clause.

17 But I say again we have here the clearest,
18 easiest case under the Tonnage Clause. It's a -- it is
19 a tax that is designed exclusively at vessels that trade
20 in the harbor.

21 On the apportionment question -- and I don't
22 want to give short shrift to that, because the Valdez
23 tax is apportioned in a way that is guaranteed to impose
24 a tax on values that are not present in the
25 jurisdiction -- Polar's tankers spend only a small part

1 of the year in Valdez. They spend the rest of the time
2 on the high seas or in other ports either unloading oil
3 or in dry dock. And, therefore, everybody agrees the
4 tax has to be apportioned.

5 The ordinary way and the way that this Court
6 has approved the apportionment of a tax on physical
7 property -- particular physical property -- is
8 straightforward. You would put in the numerator of the
9 tax the number of days with the number of miles they
10 spent in or number of miles traveled in the taxing
11 jurisdiction; you put in the denominator 365, the total
12 number of miles traveled everywhere. You multiply that
13 fraction times the value of the property.

14 And so, for example, if I had a
15 transcontinental passenger train moving from New York to
16 California that spends 20 percent of its time in
17 New York, New York could tax 20 percent of the value of
18 the train.

19 That is not how Valdez does it.

20 JUSTICE GINSBURG: But that's -- the train
21 is going to be some place throughout its trip, unlike
22 the ship that's going to be on the high seas.

23 MR. ROTHFELD: That's right. But the -- the
24 Valdez theory does not depend upon the taxation, the
25 taxability of a ship somewhere else. Valdez is simply

1 saying that we are entitled to tax, you know, not on the
2 basis of physical presence in this jurisdiction at all.
3 We are entitled to tax on some concept of where
4 productive commercial activity takes place.

5 And so it does not apportion on the basis of
6 amount of time spent in the jurisdiction over the course
7 of the year, which is -- which is the approach that the
8 Court ordinarily has used. The Valdez approach is
9 precisely the equivalent of New York saying, in my
10 transcontinental train example, we are going to take
11 into account only time spent in New York and Los Angeles
12 loading and unloading passengers, and we are going to
13 discount all of the rest of the year, all the rest of
14 the time that the train has spent moving the passengers
15 from place to place.

16 JUSTICE GINSBURG: Who can tax for the time
17 on the high seas?

18 MR. ROTHFELD: This Court has held in the
19 Central Railroad case that the taxing authority goes to
20 the domicile. That for time --

21 JUSTICE GINSBURG: And the domicile here is
22 Texas. Is that right?

23 MR. ROTHFELD: The commercial domicile is
24 Texas. The -- the corporation was incorporated in
25 Delaware.

1 JUSTICE GINSBURG: In either case, no ships
2 berth in either Delaware or Texas. Is that right?

3 MR. ROTHFELD: These ships do not -- the
4 ships berth in Texas. The ships do not --

5 JUSTICE GINSBURG: So the home port might
6 have had in the old days the notion that's really where
7 the vessel is berthed. But, nowadays, Delaware has very
8 little to do with where the vessels are berthing and
9 where they are being serviced?

10 MR. ROTHFELD: If I may, Your Honor, I'll --
11 I'll answer that question and sit down to reserve a
12 little bit of time. You are right as to the physical
13 location of the ship, but the -- the jurisdiction, the
14 authority of a non-domicile to tax has always been
15 constrained by -- under the Due Process Clause -- by the
16 physical location of the property.

17 And so, the fact that the property may or
18 may not be subject to tax somewhere else does not give
19 Valdez additional authority to tax property that's not
20 present there.

21 Now, the Court has said that the domicile,
22 whether or not the property is present, is providing
23 benefits to the owner of the property, and it's those
24 benefits that justify the imposition of the tax for
25 periods when it is not in any tax situs subject to tax

1 by anybody else.

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

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Olson.

5 ORAL ARGUMENT OF THEODORE B. OLSON

6 ON BEHALF OF THE RESPONDENT

7 MR. OLSON: Mr. Chief Justice, and may it
8 please the Court:

9 In the Wheeling case, this Court said it is
10 too well settled to question that taxes upon vessels
11 based upon their value as property do not violate the
12 Tonnage Clause. In fact, no ad valorem property tax has
13 ever been held to violate the Tonnage Clause.

14 JUSTICE KENNEDY: Well, it says vessels of
15 all kinds are liable to taxation as property "in the
16 same manner as other personal property."

17 MR. OLSON: Yes, Justice Kennedy, precisely
18 in the same manner as other ad valorem property taxes.
19 Now let me answer the question that both you and Justice
20 Breyer particularly addressed, which was the oil and --
21 and gas tax imposed with respect to much of the property
22 in Valdez. Valdez taxes homes, it taxes oil and gas
23 property, it taxes barges, it taxes cruises, it taxes
24 all sorts of things just like every other jurisdiction
25 does. The oil and gas tax that you ask about,

1 Justice Kennedy, and you did, too, Justice Breyer, is
2 imposed -- and there's no need to remand back this case
3 to address this. It's in Section 43.56 of the Alaska
4 Code. The State of Alaska imposes an oil and gas tax on
5 property used in the oil and gas extraction,
6 transportation, et cetera, business, but it also
7 authorizes a city under Section 43.56 and 29.45 -- the
8 City of Valdez may impose that tax as well. It's two
9 mills, it's just like every other tax that's imposed in
10 Valdez. These are taxes imposed on the same basis. If
11 the city imposes the tax, which the City of Valdez does,
12 then the tax by the State -- that tax paid to Valdez is
13 a direct credit, dollar-for-dollar credit, for the tax
14 that would otherwise have to go to the State.

15 So, in the first place, I think would it
16 make no difference as suggested by your question,
17 Justice Breyer, whether it was the State or the city
18 that imposed the tax. The constitutional provision
19 refers to States. States divide up their taxing
20 authorities in various different ways. The fact is that
21 the State of Alaska through the City of Valdez imposes a
22 tax on lots of different things.

23 This oil and gas tax that we are talking
24 about consists of 60 to 70 percent of the revenue base
25 of taxation for the City of Valdez. The -- the ship

1 tax, the tax on the -- that actually applies to vessels
2 which include the tankers, include barges, include a
3 cruise ship, includes just Alaska ships and -- and
4 ships --

5 JUSTICE SCALIA: Not fishing ships, right?

6 MR. OLSON: The fishing --

7 JUSTICE SCALIA: None of -- none of Valdez's
8 fishermen have to pay this tax at all?

9 MR. OLSON: They don't have to pay this tax,
10 Justice Scalia, but they pay other taxes. There's tax
11 on -- on the weight of fish, and there's tax on the
12 value of fish, and there's tax -- there's -- fees. They
13 use a different dock, and they pay taxes there, too.

14 JUSTICE KENNEDY: But -- but your answer it
15 -- it seems to me does put the issue squarely before us
16 in the terms that the Petitioner has presented, that is
17 to say, sure, suppose you tax the vessel and you tax
18 trailers and small vessels and a lot of other things,
19 but as to all of the latter category, you have -- you
20 have an exemption. So the -- the only people that
21 effectively pay the tax are the tankers.

22 MR. OLSON: No.

23 JUSTICE KENNEDY: And I thought that that
24 was the way the case was presented to us.

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

1 if I understood your -- your statement correctly. This
2 oil and gas property, cranes, heavy equipment, fire
3 engines, motor vehicles, everything else, including the
4 people's homes in Valdez get taxed.

5 JUSTICE GINSBURG: But the people's homes
6 only if they are affixed to the property and they --

7 MR. OLSON: Now, that's with respect to
8 mobile homes.

9 JUSTICE GINSBURG: Yes.

10 MR. OLSON: They are taxed as real property
11 when they are affixed in that way.

12 JUSTICE SCALIA: And nonmobile homes are not
13 taxed as real property?

14 MR. OLSON: The tax -- cities may impose
15 taxes as real property or -- or personal property,
16 Justice Scalia. Some States will tax mobile homes.

17 JUSTICE KENNEDY: Now, the question is,
18 what's imposed here? My understanding from the yellow
19 book -- do you agree that the yellow brief is accurate
20 in its factual descriptions, perhaps not in its
21 conclusions that it draws?

22 MR. OLSON: No, Justice Kennedy. I have --
23 I've given you --

24 JUSTICE KENNEDY: See, we have a problem
25 with the facts here. My understanding of the case, and

1 please correct me if I am wrong, is that, sure, Valdez
2 has tax authority and tax statutes which would cover a
3 considerable amount of personal property on an ad
4 valorem basis. But because of exemptions, only the
5 tankers pay this tax.

6 MR. OLSON: The -- there are various taxes
7 imposed by Valdez on personal property and real
8 property.

9 JUSTICE KENNEDY: Was my statement correct?

10 MR. OLSON: Your statement is correct only
11 with respect to the ordinance that -- that eliminated
12 the exception. These -- these big ships that impose
13 enormous burdens on the municipality -- you can only
14 imagine what 300-400 --

15 JUSTICE BREYER: That's a different
16 argument.

17 MR. OLSON: Yes, I know.

18 JUSTICE BREYER: Can we just get to --

19 MR. OLSON: I know. But these ships were
20 exempt from taxation in Valdez until the year 1999 when
21 that ordinance that you are referring to,
22 Justice Kennedy, was adopted. It eliminated --

23 JUSTICE SCALIA: So was all other personal
24 property exempt from taxation. They didn't have a
25 personal property tax, right?

1 MR. OLSON: Except -- except, under the --
2 to the extent that personal property was covered by the
3 oil and gas tax, the provisions that I have referred to
4 -- Valdez had been imposing that tax --

5 JUSTICE SCALIA: That's nicely targeted as
6 well. But there is no constitutional impediment to --
7 to targeting the people of New Jersey through taxing the
8 oil equipment.

9 MR. OLSON: If the Wheeling case is correct
10 and the other cases that have repeatedly said this,
11 there is no constitutional impediment for a city or a
12 State to impose a property tax on property being
13 used in --

14 JUSTICE GINSBURG: But Wheeling -- Wheeling
15 was -- it was a general property tax, and as I read the
16 case, it said if you are going to tax property, you can
17 include vessels. This statute -- and I think the Alaska
18 Supreme Court treated it discretely -- is a tax on one
19 kind of property only, these vessels. I don't know of
20 any other property tax that is confined to just one type
21 of property. Is there another? Is there a comparable
22 tax that is focused on a single category of property?

23 MR. OLSON: There -- well, I -- I think what
24 my point here with respect to this, Justice Ginsburg, is
25 I don't know the answer specifically to that question,

1 but we are looking at what the bundle of taxes that a
2 community or a State imposes on property used that
3 imposes a burden on the community. Property is taxed
4 for the purpose so that the property owner will bear the
5 burden of the governmental services that a city has to
6 impose. It -- there's no constitutional provision that
7 I am aware of that says that you have to have it all in
8 one statute, collected -- and there is no
9 discrimination --

10 JUSTICE SCALIA: But you can't -- you can't
11 make vessels bear the overall burden of municipal
12 governance. You can make them bear the burden of the
13 services provided to them in harbor. But you cannot
14 make them the instrument of funding all other municipal
15 services. That's what the Tonnage Clause means.

16 MR. OLSON: Well, I disagree in part with
17 what you said, with respect, Justice Scalia; these
18 vessels pay 11 percent of the revenue base for the city;
19 11 percent. This is a city of 4,500 people.

20 JUSTICE KENNEDY: How do you define revenue
21 base?

22 MR. OLSON: This is the amount of tax
23 collected by the City of Valdez with respect to ad
24 valorem taxes in the city, including ships, mobile
25 homes, cranes, barges, appliances, real property, and so

1 forth.

2 JUSTICE SCALIA: You are counting the State
3 tax as well, right?

4 MR. OLSON: Pardon me.

5 JUSTICE SCALIA: You are counting the State
6 tax on oil equipment?

7 MR. OLSON: I am -- I am saying to you that
8 the State imposes a tax but the State specifically
9 allows Valdez to impose that very tax.

10 JUSTICE BREYER: That makes matters worse.

11 MR. OLSON: Valdez imposes that tax as a
12 part of its total taxation package.

13 JUSTICE BREYER: Let's -- let's suppose I
14 accept just what Justice Ginsburg said, and said that
15 it's a hopeless morass if we look at all taxes. Let's
16 look at this tax. This tax you call an ad valorem tax
17 on personal property levied by Valdez, and then on page
18 11 of your brief you say that's not just on ships; it's
19 also on mobile homes, trailers, recreational vehicles,
20 and various types of personal property defined under
21 State law as oil and gas property, motor vehicles,
22 machinery, supplies and maintenance equipment.

23 They come back and they say, as to your
24 mobile homes, trailers, and recreational vehicles, all
25 that's happening there is either you have exempted them

1 or they are fixed in place, and they are like real
2 property, and that's what you are doing.

3 As to the other things, you do not impose a
4 tax on those other things. Rather, the State imposes a
5 tax on those other things. And it may be that you help
6 the State do it by providing them with the assessment,
7 and it may be even that you could do it, but you
8 haven't. And, therefore, the only thing you have
9 imposed this tax on are the ships.

10 Now, I think I have that argument right. If
11 I do, what's the answer to it?

12 MR. OLSON: The answer is --

13 JUSTICE BREYER: If I don't, what's the
14 right argument?

15 MR. OLSON: The answer is section 43.56 that
16 allowed -- the State statute may impose that tax you
17 just described. And it -- and section 29.

18 JUSTICE BREYER: "May impose" doesn't help
19 if you don't do it.

20 MR. OLSON: Yes, it does impose it, and
21 then, Justice Breyer --

22 JUSTICE BREYER: The state imposes it or --

23 MR. OLSON: -- section 29.45.080 says -- I am
24 going to read it exactly; this seems to be an important
25 point. It doesn't seem to me that it ought to make any

1 difference from the Tonnage Clause standpoint whether
2 it's a tax imposed by the State or a subdivision of the
3 State, but this provision specifically says a
4 municipality may levy and collect taxes on taxable
5 property, taxable under AS 43. That's the one. The
6 State does impose this tax, but it also allows the city
7 to impose it.

8 This city does impose it. And when it is
9 paid, that is a credit against what might otherwise be
10 owed to the State. So the city does impose that tax, it
11 does collect that tax, and that tax is not --

12 JUSTICE SCALIA: Wait a minute, owed to the
13 State for what? What would be owed to the State? It's
14 still a State tax, and they are the collection agent,
15 and it's a -- a credit against what they owe for their
16 collections, right?

17 MR. OLSON: A municipality may levy and
18 collect taxes on property under this section. The city
19 levies and collects those taxes. Now --

20 JUSTICE SCALIA: What -- what's it a credit
21 against? I don't understand what it's a credit against.

22 MR. OLSON: The State also imposes the
23 liability. Any individual community in Alaska may
24 impose that tax itself. If it does -- Valdez does --
25 then you don't have to pay it to the State; you pay it

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

2 JUSTICE SCALIA: What does the city get a
3 credit against?

4 MR. OLSON: The --

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

6 MR. OLSON: The taxpayer, once he pays \$10
7 to the city under this tax, doesn't have to pay \$10 to
8 the State under this tax because he gets a credit for --

9 JUSTICE SCALIA: Oh, I thought it was the
10 city that got the credit --

11 MR. OLSON: No, it is the taxpayer that gets
12 the credit. The city levies the tax. The city collects
13 the tax. And then the taxpayer doesn't have to pay the
14 State.

15 JUSTICE BREYER: And that happens with all
16 these other properties? That is, in Valdez, you pay the
17 city -- you pay the city -- for the -- for the taxes on
18 that oil and gas property that isn't shipped?

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

20 JUSTICE BREYER: And you write the check to
21 the city.

22 MR. OLSON: What? Pardon?

23 JUSTICE BREYER: All the things you listed
24 on page 11 --

25 MR. OLSON: Yes.

1 JUSTICE BREYER: The -- the oil and gas,
2 motor vehicles, machinery, appliances, supplies, and
3 maintenance equipment.

4 MR. OLSON: Those are money paid to the
5 city.

6 JUSTICE BREYER: So they write a check to
7 the city. Okay.

8 MR. OLSON: Yes. Now, it shouldn't matter.
9 The Tonnage Clause prohibits States from imposing a
10 tonnage tax.

11 JUSTICE STEVENS: Well, that's exactly the
12 question I wanted to ask you. Supposing the city did
13 not impose any taxes on anybody except the people who
14 pay this tax, and that's all. Would it -- would it be
15 constitutional or unconstitutional?

16 MR. OLSON: No, it would not be. In the
17 first place --

18 JUSTICE STEVENS: It would not be
19 constitutional?

20 MR. OLSON: It would not be -- it would not
21 be unconstitutional, Justice Stevens.

22 JUSTICE STEVENS: Oh, but then why is the --
23 what other people pay on other taxes even relevant?

24 MR. OLSON: I don't think it is relevant.
25 The -- the nondiscrimination issue has been introduced

1 by the Petitioner in this case. It is not in the
2 Tonnage Clause. It is not in any of the cases decided
3 by this Court having to do with the Tonnage Clause,
4 having to do with wharfage fees, pilotage fees, other
5 things having to do with commercial activity in a --

6 JUSTICE STEVENS: So we can take as a -- as
7 a given, for the purpose of analyzing the issue, that
8 this tax is either the only tax that's relevant to our
9 analysis or that it's so much higher than all the other
10 taxes, it should be treated as the functional
11 equivalent, as the only tax we have to look at?

12 MR. OLSON: I'm saying that it would not
13 make any difference if this was the only tax that the
14 city imposed unless it was a tonnage tax, and the
15 tonnage tax -- this Court has repeatedly --

16 JUSTICE KENNEDY: But the answer to
17 Justice Stevens's question is we can take this case as
18 presenting to us the fact that the ships pay more than
19 other property?

20 MR. OLSON: No.

21 JUSTICE KENNEDY: And you say that doesn't
22 make any difference.

23 MR. OLSON: No, the ships do not pay more.
24 I don't think it would make any difference if -- if the
25 city decided to impose a different rate of tax on motor

1 vehicles than it did on homes or -- or vessels, as long
2 as it was an ad valorem property tax, and this one is.

3 The vessels are not based -- the tax is
4 assessed every year on the replacement value of the
5 vessels. A big ship that is worth less money because it
6 would cost less to replace it, because it doesn't have a
7 double hull or a double bottom, will be taxed -- it will
8 be taxed greater in proportion to its value. The value
9 imposed is assessed every year.

10 There's no challenge here -- it's very
11 important to understand that there is no challenge by
12 the Petitioners with respect to the valuations placed on
13 these ships. There's no contention that the value
14 placed upon these ships by this ad valorem property tax
15 is based upon cubic capacity. They have --

16 JUSTICE GINSBURG: But is it -- do you -- do
17 you contest the point that was made in the reply brief
18 that, back at the end of the 18th century, tonnage was
19 considered a proxy for value, that it was the customary
20 mode of measuring the value of a ship?

21 MR. OLSON: I do contest that,
22 Justice Ginsburg. The only citation for that is Justice
23 Miller. Justice Miller is cited for that in a lecture
24 that he gave after he left the Court. He was on the
25 court from 1862 to 1890. He joined the Court in the --

1 in the Inman case, the Wheeling case, the Parkersburg
2 case, and here's the quote from the Inman -- from the
3 Clyde Mallory case in 1935, which is quoting the Inman
4 case from during that period of time. "At the time the
5 Constitution was adopted, 'tonnage' was a
6 well-understood commercial term signifying the internal
7 capacity of the vessel." This Court has said that over
8 and over again. In the Wheeling case, when it said --

9 JUSTICE SCALIA: Which is -- for a
10 commercial vessel, is a rough calculation of how much
11 it's worth.

12 MR. OLSON: It is not --

13 JUSTICE SCALIA: The more cargo you can
14 carry, the more valuable the commercial ship.

15 MR. OLSON: That is not correct,
16 Justice Scalia, and it's -- and it's not correct in this
17 case. Experts put an assessment on these ships based
18 upon their replacement value. It may have -- one factor
19 may be how -- how the ship is constructed, whether it
20 has a double hull. These have to be Jones Act-compliant
21 ships. The newer ones are more valuable. If they move
22 faster, they're more valuable. If they're more
23 efficient, they have more value. One of these ships in
24 this case is valued 10 times more as -- higher value --
25 than a ship that carries more capacity because it's

1 newer.

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

3 MR. OLSON: And --

4 JUSTICE SOUTER: All you're saying is that
5 there are other factors that -- that preclude using
6 tonnage simply as a single crude measure. But isn't it
7 fair to say that, other things being equal -- the engine
8 capacity, the hull construction, et cetera -- the
9 tonnage is a rough measurement of the value of the ship,
10 for just the reason that Justice Scalia gave? It
11 determines the amount of cargo the ship can carry, and
12 what it can charge for it, and that is capitalized into
13 the value of the ship. Isn't that true?

14 MR. OLSON: Well, if -- if everything else
15 was equal, the bigger, the more capacity, the more
16 valuable the vessel might be, that's true. But that --
17 that is not the case. Different ships are different
18 sizes. They are made out of different materials. They
19 have different structural capabilities --

20 JUSTICE GINSBURG: So as long as you are
21 taxing on the basis of the value of the ship, then you
22 have no Tonnage Clause problem. Is that your -- the
23 Tonnage Clause was a specific type of measure, and if
24 you're taxing based on the assessed value of the
25 property, it isn't a Tonnage Clause. Is that your --

1 MR. OLSON: That is what this Court has
2 said. In the Wheeling case, where we were talking about
3 steamships, the Court said that same statement that you
4 just made about an ad valorem tax property tax 10 times.

5 JUSTICE BREYER: What about a porthole tax?

6 MR. OLSON: Pardon me?

7 JUSTICE BREYER: Is a porthole tax in your
8 view okay?

9 MR. OLSON: A what?

10 JUSTICE BREYER: A porthole tax. They
11 charge for portholes. Anyone who has a porthole who
12 comes into our city pays the tax. That's not a tonnage
13 tax.

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

15 JUSTICE BREYER: So, in your view, a masked
16 tax.

17 MR. OLSON: To the extent that the tax is on
18 a vessel as an instrument of commercial conveyance, what
19 this Court has said --

20 JUSTICE BREYER: Oh, but the porthole tax
21 applies, by the way, to that ship's captain who has
22 retired, who has built his house with portholes instead
23 of windows.

24 (Laughter.)

25 MR. OLSON: I have --

1 JUSTICE BREYER: So there are 2 or 3 percent
2 of the -- I mean, it's only 99.9 percent on ships.

3 MR. OLSON: Let's start with -- with the
4 basics.

5 JUSTICE BREYER: Yes.

6 MR. OLSON: When the Constitution was
7 written, the Constitution did not intend to take away
8 the power from the States to impose taxes. The
9 provision on the import-export prohibition on States and
10 Tonnage Clause was an instrument to protect commerce.
11 It wasn't an instrument to reduce the power of States to
12 impose taxes. The baseline is States have the power to
13 impose taxes unless there's an explicit -- and the court
14 has said narrow -- limitation on that tax power in the
15 Constitution.

16 Now, what this Court has said over and over
17 again, Justice Breyer -- it hasn't had a chance to deal
18 with portholes, but it has had a chance to deal with --
19 most of these various earlier cases in the -- in the
20 1860s and '70s had to do with tax on tonnage. And there
21 was one case where New Orleans levied a tax just for the
22 entry and departure of the ship, and the Court said,
23 well, that's -- that's a tax on the ship as a -- as a
24 commercial instrument of commerce, and that would be
25 covered also. But nothing else has been covered.

1 And the Court has gone out of its way to say
2 that communities, States, are entitled to tax people
3 that possess property within their jurisdiction because
4 of --

5 CHIEF JUSTICE ROBERTS: Counsel, if you --
6 if you are right that any type of ad valorem tax is
7 okay, well, then why in the world would the Framers have
8 adopted a -- a prohibition on a tonnage tax, if you
9 could just say it's a tax on value, which is going to
10 have the same impact on commerce?

11 MR. OLSON: Because -- because, if you are
12 taxing -- I think that the Court had reasons for the
13 conclusion it came to. What I'm saying is not what I've
14 invented; it's what the Court has said repeatedly, that
15 because property may be taxed as property because the
16 users and owners of property are the source of revenue
17 for the communities --

18 CHIEF JUSTICE ROBERTS: Well, putting aside
19 what the Court has said, I'm looking at what the Framers
20 have said. What good does a tonnage tax prohibition do
21 --

22 MR. OLSON: It does --

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

24 MR. OLSON: It -- if it's -- if it's a State
25 using a tax on a vessel qua vessel as an -- as an

1 instrument to limit commerce, that is something that the
2 Framers did not want to do. They -- they prohibited
3 taxes --

4 JUSTICE SCALIA: It offended them
5 aesthetically?

6 (Laughter.)

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

8 JUSTICE SCALIA: So all the State has to say
9 is we are not -- we're not taxing you qua vessel.

10 (Laughter.)

11 MR. OLSON: No, Justice Scalia --

12 JUSTICE SCALIA: I mean, what --

13 MR. OLSON: What the Framers were concerned
14 about and what I was trying to say in response to the
15 Chief Justice's question is that there was a limitation
16 on the States' power to tax imports or exports because
17 of the fact that that would put the States on the coast
18 at an advantage, and they would pass those burdens on to
19 the inland States. The Tonnage Clause was put there as
20 a specific provision to implement and -- to prevent
21 circumvention of the export-import prohibition.

22 JUSTICE SCALIA: Mr. Olson --

23 JUSTICE STEVENS: But suppose you could --

24 JUSTICE SCALIA: -- let me ask you something
25 about -- about discrimination. Let's assume that I

1 think it is relevant whether the tax is a discriminatory
2 tax, a property tax just levied on -- on ships or not.

3 If that is my position, why should I count
4 as establishing nondiscrimination the fact that Alaska
5 or Valdez is also taxing -- most of its other property
6 tax revenue comes from taxing oil equipment, right? And
7 the burden of all of that tax, just like the burden of
8 this vessel tax, is paid by people in New Jersey. I
9 mean, you know, that --

10 MR. OLSON: You can --

11 JUSTICE SCALIA: It's getting somebody else
12 to bear the burden of your taxation.

13 MR. OLSON: If you do, it would be --

14 JUSTICE SCALIA: Taxing that equipment
15 raises the price of oil, almost all of which the oil
16 goes out of Alaska and is paid for by people in other
17 States. Why should I count that property tax as proving
18 that either the State of Alaska or Valdez is not being
19 discriminatory? Just because it -- it can't possibly
20 violate the -- the Tonnage Clause doesn't mean that it
21 isn't as much discriminatory against other States.

22 MR. OLSON: That then might -- that might be
23 a Due Process Clause problem --

24 JUSTICE SCALIA: No --

25 MR. OLSON: -- but it wouldn't be a Tonnage

1 Clause problem. I would submit, Justice Scalia, you
2 would be very upset at the -- at Silicon Valley because
3 the -- the property tax imposed on Silicon Valley gets
4 all put on those chips that we used in all of these
5 computers, and everybody else in the country is using
6 those computers, so the property that is taxed in that
7 community is the property that creates the value of that
8 community.

9 JUSTICE SCALIA: And if -- if California
10 taxed vessels, I would not allow California to come in
11 and say, oh, we are just subjecting them to the same tax
12 that our own citizens are subjected to.

13 MR. OLSON: And Justice Scalia --

14 JUSTICE SCALIA: I wouldn't let them point
15 to the Silicon Valley tax.

16 MR. OLSON: You would -- you would, I
17 submit, then, say that vessels are exempt from property
18 tax.

19 JUSTICE SOUTER: That may be the only way
20 they can accomplish what they want to. Because as the
21 Chief Justice's question suggested a moment ago, if in
22 the 18th century the port of Boston said, we are not
23 going to charge tonnage anymore, we are simply going to
24 tax on the value of the ship, that is going to have
25 exactly the same effect that a tonnage tax would have.

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

2 MR. OLSON: Well, it's going to require an
3 amendment to the Constitution because what the Framers
4 talked about was a Tonnage Clause, and they were talking
5 about --

6 JUSTICE GINSBURG: But we have said --

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

8 JUSTICE GINSBURG: Mr. Olson, we -- we have
9 said it's not just tonnage. It said that the clause
10 bars States, we said, from imposing a charge even if not
11 measured by a vessel's tonnage, for the privilege of
12 entering, trading in, or lying in a port. So we have
13 ruled out the position that it's got to be an
14 old-fashioned tonnage charge and can't be based on the
15 assessed value of the property.

16 MR. OLSON: Well, I guess I have to resort
17 to the fact that every time this Court has considered
18 it, or at least in almost every case, the Court has gone
19 out of its way to say: They were not intending to
20 prohibit States from taxing the value of property, if
21 it's an ad valorem tax.

22 JUSTICE GINSBURG: But -- but in all of
23 those cases, the vessels were being taxed as one item of
24 property in a general moveable property, personal
25 property tax. I asked you before, I think, is there any

1 other tax like this, that -- an ad valorem tax that is
2 applied to one single category of property?

3 MR. OLSON: If this -- this is an ad valorem
4 tax, it has various different statutes and ordinances
5 that it comes from, but there's ad valorem taxes in
6 Valdez across the board for all kinds of property.

7 JUSTICE GINSBURG: This statute deals with
8 one category of property. Is there another statute like
9 this one?

10 MR. OLSON: Well, there's -- no. This
11 statute is -- every other statute in the same manner
12 imposes taxes on property based upon their value. This
13 was a separate ordinance that decided to remove an
14 exemption that had existed for 27 years --

15 JUSTICE GINSBURG: That was the other -- the
16 State taxes were no part of the Alaska Supreme Court's
17 decision in this case.

18 MR. OLSON: Well, I think what we are
19 talking about is whether or not this -- this community
20 can impose a tax on the people that own property in this
21 community. There's no denial that there's a property
22 tax situs here. The average length of the time in port
23 of these ships was 45 days. The entire fleet has a tax
24 situs in Valdez. So this property, like other property
25 in the same manner, is being taxed by the City of

1 Valdez.

2 The Wheeling case was a case a little bit
3 like this in the sense that it was West Virginia that
4 passed a statute that allowed Wheeling to impose the tax
5 on steamships.

6 JUSTICE GINSBURG: And on what else? In
7 that -- in that tax that was before the Court, what else
8 did Wheeling tax?

9 MR. OLSON: The only thing that the Court
10 talked about because it was -- like this, it was an
11 as-applied case. The taxpayer was wanting a refund from
12 the taxes and the taxpayer owned steamships that -- that
13 went back and forth from Wheeling. And the Court talked
14 about the fact that this wasn't a Tonnage Clause; this
15 was a state-authorized municipal --

16 JUSTICE BREYER: What about the -- Grier --
17 you haven't mentioned that -- Grier in *Norris v. City of*
18 *Boston*, where he says the tonnage -- you know what he
19 says; it's on the front page of their brief. All right.
20 That seemed to me to say, don't interpret the Tonnage
21 Clause to apply to tonnage. Interpret it as the same
22 thing as if it's mass, it's mariners, power of the steam
23 engine, number of passengers, the master or owner of the
24 vessel -- all those fall within the Tonnage Clause.
25 That's what the paragraph seems to say.

1 MR. OLSON: And what -- what the thrust of
2 the overall bulk of the cases including the language by
3 this Court repeatedly is that property taxation based
4 upon the value of property, not imposing a value -- not
5 imposing a tax on the ship. There are various ways I
6 suppose one could say that every time a ship enters a
7 harbor without developing a tax situs -- I think Justice
8 Alito's question focused on that -- this is not --

9 JUSTICE STEVENS: May I ask a --

10 MR. OLSON: You don't get charged a fee for
11 entering the port. Or one of those cases when --
12 imposed a tax because -- it called it a wharfage tax,
13 but you didn't have to touch the wharf in order to pay
14 the tax.

15 JUSTICE STEVENS: May I ask you a
16 question that I don't think has come up, but I just
17 wondered if anybody has argued this? The duty of
18 tonnage, it seems to me, might refer to the cargo rather
19 than the ship. So that if the ship made 10 voyages it
20 might have 10 times the tonnage of another vessel of
21 exactly the same value. Has anybody argued that that's
22 what the Tonnage Clause refers to?

23 MR. OLSON: I think -- I think you're
24 correct, Justice Stevens, that what the Framers were
25 concerned about was a substitute for an export or import

1 tax by taxing what was in the ship, and that "tonnage"
2 referred to that, but it wasn't the value of the vessel
3 itself because the Court -- the Framers wouldn't have
4 wanted to take away the power of the States to tax
5 commercial activity using property in their communities
6 in the same manner that they taxed other property.

7 JUSTICE SCALIA: If that's all it applied
8 to, then the wharfage tax would have been perfectly
9 okay.

10 MR. OLSON: The wharfage tax --

11 JUSTICE SCALIA: You can't say that was --

12 MR. OLSON: The wharfage tax has been upheld
13 by this Court frequently. The only reason why it was
14 struck down in that case is that you didn't have to put
15 into a wharf. So the Court knew, well, it wasn't really
16 a wharfage tax, but if it was really a wharfage tax, the
17 Court has upheld it.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Rothfeld, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

21 ON BEHALF OF THE PETITIONER

22 MR. ROTHFELD: Thank you, Your Honor. A
23 couple of quick points. First on this confusing
24 question of what the State of Alaska does in the nature
25 of its tax. Mr. Olson began by -- by saying the State

1 of Alaska imposes this tax through the City of Valdez.
2 That is right. It is a tax imposed by the State of
3 Alaska that is collected by the City of Valdez. If the
4 city did not collect the tax, it would go directly to
5 the State of Alaska. It is an Alaska tax.

6 CHIEF JUSTICE ROBERTS: Where -- where does
7 the money go? If the City of Valdez collects it, where
8 does it go?

9 MR. ROTHFELD: If the city collects it, it
10 keeps it, but it has been authorized to do that by the
11 State.

12 CHIEF JUSTICE ROBERTS: Well, then I think
13 we ought to regard it as a city tax, not a State tax.
14 They collect it; they keep it. That sounds like a city
15 tax.

16 MR. ROTHFELD: But it -- it's imposed by the
17 State. The State decides what is subject to tax. It
18 identifies the property that --

19 CHIEF JUSTICE ROBERTS: Well, I suppose the
20 State can regulate what cities and municipalities and
21 counties can do throughout the State. That doesn't make
22 everything those cities and counties do the actions of
23 the State.

24 MR. ROTHFELD: That -- that's true, but this
25 particular tax is a tax that is imposed by the State at

1 the State level. It -- it's notable that Valdez has
2 never before, until we reached this Court, said that
3 this is a -- that it is taxing oil and gas property.
4 The property is subject to tax by the State. The State
5 authorizes Valdez to collect the tax, but it is imposed
6 by the tax -- the city -- the State determines which
7 items are subject to tax. So this is out of Valdez's
8 discretion. Valdez chose to tax only particular types
9 of personal property, and that is vessels.

10 Second, on the question of what the Tonnage
11 Clause was designed to do and -- and the Wheeling case,
12 Wheeling says that a property tax is okay when the tax
13 is imposed on vessels the same as other property owned
14 by its citizens. That is not what is going on here.
15 Contemporaneous understanding of the rule at the time
16 was that taxes that singled out vessels were
17 unconstitutional. We cite authority for this
18 proposition in our reply brief.

19 To -- to address Justice Ginsburg's question
20 as to whether there were other taxes like this, we have
21 not found any other tax anywhere that has been imposed
22 singling out vessels as -- for -- for property taxation.
23 Either now or in the past, we have not found any case
24 addressing that, not only not in this Court, but in any
25 other court.

1 And then finally --

2 JUSTICE SOUTER: What about the -- the
3 broader tax situation at the -- at the -- in -- in 1789?
4 Did -- did ports have sources of -- or exercise the
5 authority at that time to tax property generally, e.g.,
6 real estate in the city to support the activities of the
7 ports, or were they dependent solely upon things like
8 import-export taxes, et cetera?

9 MR. ROTHFELD: My -- my understanding is
10 that real estate certainly was subject to tax and that
11 ports would have the authority to tax other types of
12 property. Vessels were set aside as a particular item
13 by the Tonnage Clause.

14 JUSTICE SOUTER: So -- so that the argument
15 they are taxing other things, therefore it's okay to tax
16 this, would have been an argument just as potent in the
17 18th century or impotent, as the case may be, as it is
18 now?

19 MR. ROTHFELD: That's right.

20 JUSTICE SOUTER: Okay.

21 MR. ROTHFELD: And so setting aside vessels
22 in a -- in a unique category when other things could be
23 taxed would have been problematic --

24 CHIEF JUSTICE ROBERTS: How -- under your
25 view, how is a city supposed to impose a property tax on

1 a vessel?

2 MR. ROTHFELD: It -- it should impose a tax
3 by imposing a tax on personal property generally. And
4 if it does, it would fall on vessels as items of
5 personal property. It -- it is significant -- well, if
6 I may, Your Honor, just to finish, what Valdez has done
7 -- it could have taxed all of the types of -- or it
8 could have taxed particular types of it. But it has
9 seized on only one particular type of personal property
10 to be subject to taxation.

11 CHIEF JUSTICE ROBERTS: So -- so you think
12 we should resolve the tax by seeing how generally
13 applicable property taxes are in Valdez?

14 MR. ROTHFELD: I -- I think it's an easy
15 case when, as in this situation, there is only one item
16 of property that is taxed, and that's a vessel.

17 CHIEF JUSTICE ROBERTS: Well, but your --
18 your brother suggests that other items of property are
19 taxed under other provisions of the tax ordinance.

20 MR. ROTHFELD: Again, Valdez does not. The
21 State does. Valdez does not. And so I think that there
22 is no need for the Court to go beyond and decide how
23 broadly applicable -- as I suggested earlier, our test
24 would be predominantly on vessels it is
25 unconstitutional, and that clearly is the case here.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

3 MR. ROTHFELD: Thank you, Your Honor.

4 (Whereupon at 11:20 a.m., the case in the
5 above-entitled case was submitted.)

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