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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION:

JEROME F. GOLDBERG AND ROBERT McTIGUE, Appellants
V. ROGER D. SWEET, DIRECTOR, ILLINOIS DEPARTMENT
OF REVENUE, ET AL.; and
GTE SPRINT COMMUNICATIONS CORPORATION, Appellant
V. ROGER D. SWEET, DIRECTOR, ILLINOIS DEPARTMENT
OF REVENUE, ET AL.

CASE NO:

87-826 & 87-1101

PLACE:

WASHINGTON, D.C.

DATE:

October 12, 1988

PAGES:

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IN THE SUPREME COURT OF THE UNITED STATES

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JEROME F. GOLDBERG AND ROBERT :

McTIGUE, :

Appellants :

v. : No. 87-826

ROGER D. SWEET, DIRECTOR, :

ILLINOIS DEPARTMENT OF REVENUE, :

ET AL.; :

and :

GTE SPRINT COMMUNICATIONS :

CORPORATION, :

Appellant :

v. : No. 87-1101

ROGER D. SWEET, DIRECTOR, :

ILLINOIS DEPARTMENT OF REVENUE, :

ET AL. :

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Washington, D.C.

Wednesday, October 12, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:05 o'clock a.m.

1 APPEARANCES:

2 WALTER A. SMITH, JR., ESQ., Washington, D.C.; on behalf
3 of the Appellants.

4 ANDREW L. FREY, ESQ., Washington, D.C.; on behalf of the
5 Appellees.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

WALTER A. SMITH, JR., ESQ.

On behalf of the Appellants

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ANDREW L. FREY, ESQ.

On behalf of the Appellees

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REBUTTAL ARGUMENT OF

WALTER A. SMITH, JR., ESQ.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-826, Goldberg v. Sweet.

Mr. Smith, we'll wait just a moment --

MR. SMITH: All right.

CHIEF JUSTICE REHNQUIST: -- until some of the people clear out or stop talking.

(Pause.)

CHIEF JUSTICE REHNQUIST: Very well. You may proceed whenever you're ready, Mr. Smith.

ORAL ARGUMENT OF WALTER A. SMITH, JR.

ON BEHALF OF THE APPELLANTS

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

This case involves a State tax on the act or privilege of engaging in interstate phone calls, a form of interstate commerce that by its very nature occurs in more than one State at once, simultaneously, that introduces into two States at once substantial economic activities and involves the delivery of services in two States at once, and in fact can become the subject of a tax in at least two States at once.

Nevertheless, in this case, Illinois has levied a tax on the whole of all interstate phone calls

1 that originate or terminate in Illinois and that are
2 charged to an Illinois service address.

3 The question these circumstances raise, we
4 believe, is whether or not this violates the interstate
5 Commerce Clause. And in our view it does. In fact, it
6 violates all three of the elements of this Court's
7 Complete Auto decision. And what I --

8 QUESTION: Why -- why is it you say that they
9 levy it on the whole of the -- of the service?

10 The initial obstacle I confront is I don't see
11 how this is different from any sales tax, let's say, on
12 a piece of tangible goods that -- that is manufactured
13 in a number of other States. The raw materials come
14 from --from Iowa. The manufacturing is done in Ohio,
15 and whatnot. Yet, the whole value that has been added
16 to that item that's sold is taxed by the State that
17 imposes a sales tax. Why can't you say that -- that
18 that also taxes activities in other States?

19 MR. SMITH: No, Your Honor, because the State
20 courts have held already that the tax is, in fact,
21 levied on the entirety of the call. It is true that the
22 taxable event is the origination or the receipt, but
23 both lower courts have construed the statute to levy the
24 tax on the entirety of the phone call. And unlike a
25 sales tax, which this Court has often reviewed, where it

1 can be isolated in a single taxing jurisdiction, in this
2 particular circumstance, it -- the interstate phone call
3 cannot be isolated in a single taxing jurisdiction
4 because economic activity by definition is occurring in
5 two different States at once.

6 Moreover, unlike a sales tax situation, here
7 the delivery of goods occurs partly outside the State,
8 and by the definition of its own statute whether or not
9 the call is billed for or paid for in Illinois, Illinois
10 nevertheless taxes the call. And the result is we risk
11 multiple taxation.

12 In our view, the tax violates all three of the
13 Complete Auto requirements for slightly different
14 reasons. But at bottom, there's one reason why all
15 three elements are violated, and that is because this
16 tax reaches outside Illinois' borders to tax the whole
17 of the call as both lower courts found when they
18 rejected the proposition that what was being taxed was
19 only in state in commerce.

20 QUESTION: Well, Mr. Smith, to get back to
21 Justice Scalia's question, do you think Illinois could
22 have imposed a gross receipts tax on all of the charges
23 charged in Illinois on the call --

24 MR. SMITH: Well, this --

25 QUESTION: -- the totality of the charge?

1 MR. SMITH: If it had been apportioned, Your
2 Honor. This is not --

3 QUESTION: Don't you think under our
4 precedents, under sales tax generally, that a tax
5 imposed by Illinois on the totality of the charge would
6 be upheld?

7 MR. SMITH: Not whereas here, Your Honor, part
8 of the commerce by definition occurs outside the taxing
9 State. It is true that in a case like Moorman, the
10 Court upheld a gross receipts tax, but that's because an
11 apportionment formula was used. Some methodology was
12 adopted to measure that part of the commerce that had
13 occurred within the taxing State.

14 Here that has not been done. Illinois has
15 elected to tax the entirety of the call even though by
16 definition, a portion of the call necessarily occurs
17 outside the taxing State.

18 QUESTION: It seems to me that everything you
19 have said so far, if you transfer it to our case in D.
20 H. Holmes that we had last year involving the catalogs,
21 means that we were wrong in reaching the decision we
22 reached in the catalog case.

23 MR. SMITH: No, Your Honor, I would say not
24 because --

25 QUESTION: The transaction takes place in part

1 out of state. There is very significant economic
2 activity that's outside the state. And yet, we
3 sustained a tax based wholly on the sales price in the
4 State of, I believe, Mississippi.

5 MR. SMITH: No, Your Honor. The distinction
6 between Holmes and this case is that in Holmes the tax
7 had been apportioned, as the Court pointed out in its
8 opinion. The tax was limited to the in-state
9 distribution of the catalogs, and it very carefully had
10 been done so.

11 In addition, in --

12 QUESTION: Well, but it -- it was a use tax
13 based on the value of the catalogs.

14 MR. SMITH: And the use tax, Your Honor, was
15 levied only upon the in-state distribution of the
16 catalogs. No catalogs that had been distributed outside
17 of the State were subject to the use tax.

18 QUESTION: Well, here no call that's not
19 billed to Illinois is taxed.

20 QUESTION: Mr. -- is -- doesn't the --
21 Illinois taxes any call that's billed there.

22 MR. SMITH: Illinois --

23 QUESTION: But it -- but it -- but -- but
24 --and it -- and it taxes it even though it happens to be
25 paid in another State.

1 MR. SMITH: That's right, Your Honor. Under
2 the language --

3 QUESTION: So, a gross receipts tax would not
4 cover a call that is billed to an Illinois number but
5 sent to Washington and is paid there. Is that right?

6 MR. SMITH: Your Honor, the construction of
7 this statute is that the tax is levied only upon calls
8 that are charged to an Illinois service address --

9 QUESTION: But it may not --

10 MR. SMITH: -- irrespective of -- right
11 --irrespective of where it's --

12 QUESTION: Of where it's paid.

13 MR. SMITH: -- of where it's paid for or where
14 it's billed, which means that another state could also
15 tax the same interstate phone call.

16 For example, Illinois elects to tax the
17 origination of a call, on the whole of the call, because
18 it happens to be charged to an Illinois service address.
19 But another State may choose to tax the termination of
20 the call because it's billed and paid for in that State.

21 QUESTION: Has any State, in fact, done that
22 in this case?

23 MR. SMITH: The Washington State tax, as it
24 reads, Your Honor, suggests that any call that
25 originates or terminates in Washington and is billed and

1 paid there will, in fact, be taxed by the State of
2 Washington.

3 QUESTION: Has that -- has that been applied
4 to some taxpayer in Illinois?

5 MR. SMITH: We're unaware that any particular
6 taxpayer in Illinois has had that tax applied to him,
7 Your Honor, but under this Court's Armco and Container
8 Corporation and Scheiner decisions, it is not our burden
9 to prove that the tax is actually being imposed on an
10 Illinois taxpayer today because, as the Court pointed
11 out, to have such a rule would require the Court to be
12 monitoring what all the other States are doing.

13 And I might add that today the State's taxing
14 of interstate telecommunications is in a state of flux
15 and changing.

16 QUESTION: Well, certainly the States are
17 going to be entitled to tax this sort of activity in
18 some way. I mean, there isn't any doubt about that, is
19 there?

20 MR. SMITH: No doubt about that. No doubt.

21 QUESTION: And so, why isn't the Illinois way
22 a relatively reasonable way to approach it?

23 MR. SMITH: Well because, Your Honor, it
24 violates three of the important Complete Auto
25 requirements.

1 QUESTION: Don't forget that Illinois would
2 allow the credit for the Washington tax.

3 MR. SMITH: Well, that isn't altogether clear,
4 Your Honor, how the credit provision would work. And
5 let me just address that because that's one of the major
6 arguments that the State is making here, that even
7 though we have a completely unapportioned tax, that the
8 credit provision that's in the statute will be effective
9 to set it right and cure it.

10 In our view it will not. Indeed, in our view
11 this Court has never approved a credit provision on the
12 ground that it will say they wholly unapportioned the
13 tax. And in the Holmes case mentioned by Your Honor,
14 that was not the case because the tax was already
15 apportioned when the credit provision was looked to.

16 QUESTION: Well, why shouldn't we approve it
17 now if it accomplishes the same result as apportionment?

18 MR. SMITH: Well, in our view, Your Honor, it
19 couldn't accomplish apportionment for two reasons. One
20 is that it would do so only fortuitously. To tack on a
21 credit provision on a wholly unapportioned tax and hope
22 that the States and the participants -- interstate
23 commerce will be able to sort it out, there's no
24 guarantee that the sorting out will ever occur. And
25 certainly it will not under this credit provision, and

1 let me explain why that's true.

2 In our view there are approximately -- in
3 fact, not approximately -- there are only three
4 circumstances that could occur under this credit
5 provision. One is that no other State will tax the
6 call. Another is that the other State will tax the
7 other end of the call. And the third is that the State
8 will, at the other end of the call, will attempt to tax
9 the Illinois taxpayer. In our view, though, in none of
10 these circumstances will fair apportionment be brought
11 about, and let me explain why that's true.

12 If no other State taxes the call, fair
13 apportionment will not be brought about. Illinois will
14 still have taken more than its fair share of the
15 commerce. And at the same time, it will have subverted
16 and preempted the choice of the State at the other end
17 of the call not to tax the interstate commerce.

18 The second possibility is that the State at
19 the other end of the call will tax its own taxpayer.
20 But by the terms of this statute, its credit provision,
21 no credit will be permitted in that circumstance because
22 this credit provision grants a credit only where
23 Illinois' own taxpayer is taxed twice.

24 So, those are the two -- two of the
25 circumstances, and in neither of those will fair

1 apportionment be brought about.

2 Now, the third circumstance is where the other
3 State attempts to tax the Illinois taxpayer. But in our
4 view, even in that circumstance, fair apportionment will
5 still not be brought about, and there are two reasons
6 for that.

7 First of all, the credit provision by its own
8 terms grants a credit to the Illinois taxpayer only
9 where the other State taxes the same event that Illinois
10 has already taxed. But by the terms of the statute, as
11 construed by the lower court, the event that is taxed is
12 the origination or termination of the call that is
13 charged to an Illinois service address. So that if the
14 other state taxes termination where a call is billed or
15 paid, while Illinois has taxed origination where the
16 call is charged, two different events will be taxed and
17 no credit will be permitted.

18 Furthermore --

19 QUESTION: Mr. Smith, I -- I don't understand
20 the whole need for apportionment. We've required
21 apportionment where -- where what you're taxing is the
22 net income of a -- of a unitary business because there
23 if you -- if -- there's only 100 percent of the net
24 income, and if you allow every -- every State to assume
25 a different percentage attributable to that State, you

1 end up taxing more than the whole. But I'm not aware
2 that we've required apportionment where what is being
3 taxed is not a -- a single event, but two separate
4 events.

5 For example, we allow one State to impose a
6 sales tax and another State to impose a use tax. We
7 don't -- we don't -- they're taxing two separate things.
8 One is taxing the sale; the other is taxing the use.
9 And there's no constitutional requirement that -- that
10 one give a credit for the other. We've explicitly said
11 that there's no such requirement.

12 MR. SMITH: That may be true for the sale-use
13 tax situation, Your Honor.

14 QUESTION: Why is that different from this?

15 MR. SMITH: But here what we have is a -- what
16 you've just called a unitary event. We have an -- a tax
17 being laid on the act or privilege of participating in
18 an interstate phone call. There is simply no doubt that
19 two different States can tax that event. And since that
20 is true, this Court's decisions require that the tax be
21 apportioned so that each State tax that part of the
22 event that's occurring within in its borders because
23 otherwise, if each State says we will tax 100 percent,
24 the result will be -- and I think this is the basis of
25 the apportionment requirement -- multiple taxation on

1 interstate commerce.

2 QUESTION: Why do we have to regard it that
3 way? Why can't we regard the tax as a tax on the
4 placing or receiving of a phone call in -- in Illinois,
5 and another State can place a tax on the -- on the
6 placing or receiving of a phone call in that State?

7 MR. SMITH: Well, you could, Your Honor, but
8 if each tax said -- if each State says we will tax the
9 placing of the call in our State, and then taxes the
10 entirety of the call --

11 QUESTION: That's how they measure the tax.
12 Right? Right?

13 MR. SMITH: -- as the measure of the tax -- as
14 the measure of the tax, it is inevitable that the call
15 will be taxed at least twice, and if there's a third
16 State participating, could be taxed all over again --

17 QUESTION: Just as in the sales and use tax
18 situation. You tax the value of the thing once when
19 it's sold and another time when it's used. So what?

20 MR. SMITH: That is right, Your Honor, and in
21 each case the Court held that only one jurisdiction
22 could levy the sales or the use tax.

23 QUESTION: And -- and here only one
24 jurisdiction is taxing the receipt, and only one
25 jurisdiction will be taxing the placement.

1 MR. SMITH: True. True, Your Honor, but it's
2 measuring the tax by the entirety of the call, including
3 the portion of the call that does not occur within the
4 taxing State's borders which -- let me just add -- which
5 is not the case in a sales-use tax situation. This
6 Court has always held that sales taxes are permitted as
7 an unapportioned tax only where only one jurisdiction
8 could tax the sale. And in Holmes, the Court upheld
9 that use tax because only one jurisdiction could have
10 taxed the unapportioned -- the apportioned amount of the
11 use occurring within Louisiana.

12 QUESTION: Mr. Smith, may -- may I interrupt
13 you and ask you a question?

14 MR. SMITH: Sure.

15 QUESTION: Supposing Illinois charges 5
16 percent on calls within the State of Illinois, and then
17 it charged 2 and a half percent on all calls going
18 across the State line. The 2 and a half percent would
19 apply to every call received whether or not billed
20 within the State and every call originating within the
21 State. Would that be constitutional in your view?

22 MR. SMITH: That would come, in our view, a
23 lot closer to a constitutional --

24 QUESTION: Many of your arguments would apply
25 to that situation too because the 2 and half percent

1 would be on the entire transaction.

2 MR. SMITH: But it would be apportioned. The
3 result, Your Honor, would not be that, in fact, Illinois
4 was taxing commerce outside its borders. The
5 apportionment would have been a way to measure that part
6 of the commerce you've just described that's occurring
7 only within Illinois' borders. Illinois would still not
8 be taxing outside its borders --

9 QUESTION: Let me be sure I -- is your view
10 that that tax would be permissible or not?

11 MR. SMITH: Two and a half percent on all
12 interstate phone calls and 5 percent on intrastate phone
13 calls -- if, Your Honor, the apportionment formulas of
14 the kind we have suggested may be permissible in our
15 brief --

16 QUESTION: Because the reason I ask is that
17 your opponent argues this is the functional equivalent
18 of that tax because although it's 100 percent taxed,
19 they really only tax half the calls because they tax
20 those that are billed in Illinois and those that are not
21 billed in Illinois are just not taxed at all. So,
22 what's the difference between 50 percent of 100 percent
23 of the calls and 100 percent of 50 percent?

24 MR. SMITH: Because that isn't what the State
25 chose to do. Illinois -- the Illinois legislature did

1 not decide to tax all calls within its borders, as your
2 hypothetical just put it. It decided only to tax 100
3 percent of certain calls, those calls that were charged
4 to an Illinois service address. The legislature never
5 decided to use the apportionment formula you just
6 described.

7 QUESTION: No, but if they could demonstrate
8 -- I don't know whether they could or not -- that this
9 resulted in a functional equivalent because the same
10 number of tax dollars would be collected, what's wrong
11 with it in terms of burdening interstate commerce?

12 MR. SMITH: Because, as I think the Scheiner
13 decision illustrates, Your Honor, that would require the
14 netting of taxpayers. The fact that the State might
15 receive the right amount of revenue when all was totaled
16 up, would not mean that individual participants in
17 interstate commerce had been fairly treated. You would
18 have to net transactions. Indeed, you have to net
19 taxpayers in order for that to be the right result. And
20 we submit under the Scheiner decision, that isn't
21 permissible.

22 Let me talk about the fair relation
23 requirement because you've let me touch on some of the
24 other elements that -- that I wanted to talk about. And
25 I -- the reason I was going to start with fair relation

1 is because I think it is simpler than the other matters
2 we've been talking about.

3 The fair relation requirement requires a State
4 to measure its tax according to the contact of the
5 commerce with the taxing State. But, in fact, Illinois
6 has not done that. Indeed, as we've tried to point it
7 out in our brief, Illinois has, in fact, done the
8 reverse of that. It has levied a tax that is inversely
9 proportional to the contact with the taxing State.

10 And that's easy enough to see. You take a
11 single interstate phone call, and the longer is the
12 call, the further away from Illinois it gets and,
13 therefore, the higher is the price of the call and,
14 therefore, the higher is the tax.

15 QUESTION: That therefore does not follow.
16 It's simply not true that the price of an interstate
17 phone call always varies according to its distance, is
18 it? That's just not --

19 MR. SMITH: You're right. It is not always
20 true, Your Honor, but in the vast majority of cases --

21 QUESTION: (Inaudible) true it would be
22 automatically discriminatory. You could say you're
23 discriminating on the basis of distance. But it's not
24 always true. Sometimes a shorter call may cost more
25 than --

1 MR. SMITH: You're right, Your Honor. It is
2 not always true, but in the vast majority of cases, it
3 is true as the data before this Court show and as Mr.
4 Wiley's affidavit before this Court shows.

5 And this Court has held in Maryland v.
6 Louisiana that we don't have to decide how
7 unconstitutional a tax is. The fact that it may be
8 unconstitutional in a majority of the instances before
9 the Court is enough to strike -- to strike the tax down.

10 Illinois had an obligation to draft a tax that
11 would be constitutional in all circumstances, and it has
12 not so. It has not attempted to apportion this tax. It
13 has not attempted to measure it in a way that limits it
14 to the contact within Illinois.

15 QUESTION: Mr. Smith, are you suggesting that
16 any State other than, say, Illinois and Washington could
17 tax a call that originates in Illinois, in Chicago, to
18 somebody in Seattle?

19 MR. SMITH: Your Honor, our argument does not
20 depend on that being so, and the State has misconstrued
21 our position. It is not our view that the State is
22 required on a call-by-call basis to measure how much of
23 each call occurs in each intervening State. Indeed, if
24 you believe the State's position, none of the
25 intervening States, in fact, have nexus to tax the

1 call.

2 But it's enough to sustain our argument that
3 unquestionably in every interstate call, at least two
4 States have nexus and have the constitutional right to
5 tax the call. And if Illinois can tax the whole of the
6 call, as both lower courts have held that it has done,
7 so can the State at the other end of the line, and the
8 inevitable result, we submit to the Court, is multiple
9 taxation.

10 QUESTION: It's taxing the whole of the call
11 by taxing the whole of half of the calls -- roughly
12 half. You have to mix up your callers, but isn't that
13 true, because it doesn't impose any tax on those calls
14 that originate in Illinois and are collect to somebody
15 in Seattle?

16 MR. SMITH: That's right, Your Honor. The
17 statute expressly exempts those calls. So, our view is
18 that Illinois could choose not to tax certain interstate
19 commerce.

20 QUESTION: That's right.

21 MR. SMITH: And that is what it did.

22 QUESTION: If you look at it call by call, it
23 taxes the whole of the call. If you look at the
24 universe of calls, it roughly taxes half of the calls.

25 MR. SMITH: If that had been what this

1 legislature wanted to do, Your Honor --

2 QUESTION: Well, that's what it did.

3 MR. SMITH: Well, I would submit, Your Honor,
4 that it did not. Indeed, if you read the State's own
5 brief, you'll find that it did not. The Illinois
6 legislature made a judgment not to tax certain calls in
7 part because it thought it didn't have nexus to do so.

8 And we would submit this Court should not now
9 rewrite the statute and say what the Illinois
10 legislature really wanted to do was tax every call and
11 apportion it by saying if we tax 100 percent of these
12 calls and none of these calls over here, it will all
13 come in the wash. A, that is not what the Illinois
14 legislature did; and B, even if it had, Your Honor, it
15 is still --

16 QUESTION: I don't understand why you say it's
17 not what they did. It seems to me that's exactly what
18 the statute does. I mean, there's probably a problem
19 with respect to calls from Chicago to Seattle that are
20 billed to somebody in Atlanta. I understand there's a
21 problem there, but leaving that to one side, isn't that
22 exactly what it did? It taxed just those calls that are
23 paid for -- or charged to the number in Illinois, and
24 that's -- we can I think make a reasonable assumption
25 that is roughly half the calls. And you say they didn't

1 do that. Now, explain to me why they didn't do that.

2 MR. SMITH: I would say on the face of the
3 statute, Section 4 of this Act, the Illinois legislature
4 determined to tax only one set of interstate commerce,
5 calls that were charged to an Illinois service address,
6 and by the statute it decided to exempt from taxation
7 altogether the other kinds of calls you're describing.
8 I'm saying that was a judgment the Illinois legislature
9 was entitled to make.

10 If it had wanted to do what you have just
11 said, it would have passed a statute saying we tax all
12 calls that originate and terminate in Illinois
13 irrespective of whether they are charged to an Illinois
14 service address, and we will apportion the tax by
15 levying 100 percent on some calls and zero on others.
16 But that is not the statute the Illinois legislature
17 passed, Your Honor.

18 And further, even if it had, I would submit to
19 you that the fact that the right amount of revenues that
20 are received by the State of Illinois doesn't begin to
21 offer any assurance that individual taxpayers will be
22 fairly treated.

23 QUESTION: Well, unless you make the further
24 assumption that the average individual phone user
25 originates about the same number of calls he receives.

1 MR. SMITH: Exactly, Your Honor. And there's
2 no evidence whatever --

3 QUESTION: But it's not a -- it's not a
4 ridiculous assumption.

5 MR. SMITH: -- (inaudible) support that
6 proposition.

7 QUESTION: In our tax cases, we've talked
8 about a rough approximation being sufficient.

9 MR. SMITH: And we agree a rough approximation
10 would be sufficient, Your Honor, but we would submit
11 that using a service address as a proxy for measuring
12 what part of economic activity occurred in the State is
13 arbitrary. It is not a rough approximation.

14 QUESTION: I -- I don't even think we require
15 a rough approximation. We -- we have -- we have cases
16 that -- that -- that measure the validity of a tax on
17 the basis of whether the thing would be overtaxed if
18 other States adopted the same kind of tax, a reciprocity
19 requirement imagining would the thing be fairly taxed if
20 another State had the same kind of law. But we have
21 never required the other States to have the same kind of
22 law so that in theory, other States could adopt quite
23 different laws and tax the thing quite unfairly. We've
24 never required anything resembling actual equity or even
25 approximate equity in taxation.

1 MR. SMITH: Well, I guess I would suggest,
2 Your Honor, what you have required is fair
3 apportionment. And it's true, as the Chief Justice
4 points out, that fair apportionment can be a rough
5 approximation.

6 But at the very least in drawing a fair
7 apportionment formula, albeit a rough approximation, the
8 Court has always required that whatever formula is used,
9 both on its face and in practice, can be expected to
10 measure the part of interstate commerce that occurs
11 within the taxing State's borders.

12 And this apportionment formula -- and I still
13 beg to differ, Justice Stevens -- a formula not adopted
14 by the State of Illinois, but even if it had, there is
15 nothing to suggest that it will in practice effect an
16 apportionment both for the reason Justice Stevens says
17 that you can't -- I think you cannot assume without some
18 data base to suppose it -- that each caller within
19 Illinois is going to have half of his calls charged to
20 his serve address -- service address and the other half
21 not.

22 Furthermore, there is no reason to suppose
23 that the service address to begin with is going to be
24 some fair method for measuring the economic activity
25 within the State.

1 I think I'll save the rest for rebuttal.

2 QUESTION: Thank you, Mr. Smith.

3 Mr. Frey, we'll hear now from you.

4 ORAL ARGUMENT OF ANDREW L. FREY

5 ON BEHALF OF THE APPELLEES

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

8 I just want to be sure that the Court
9 understands the operation of the tax. And I think from
10 hearing my adversary's argument, I think the Court does,
11 but just to be absolutely certain.

12 First of all, I think it's important that the
13 tax is not facially discriminatory between interstate
14 and intrastate transactions; that is, the same tax rate
15 is applied to either kind of call. The question here is
16 whether it is somehow discriminatory or unlawful in its
17 operation.

18 Now, while Section 4 of the statute says a tax
19 is imposed on the act or privilege of originating in
20 this State or receiving in this State interstate
21 telecommunications -- and it's measured by 5 percent of
22 the gross charge for such a communication. Gross charge
23 is defined as the amount paid for a call charged to an
24 Illinois service address. So, in other words, of the
25 universe of calls -- let's take the typical two-party

1 call -- it could be charged either to the non-Illinois
2 party or to the Illinois party. Illinois taxes it only
3 if it is charged to the Illinois party. It does not tax
4 it if it's charged to the non-Illinois party.

5 QUESTION: Mr. Frey, what about a call from
6 Chicago to Seattle that someone in Florida puts on his
7 Florida credit card -- on his Florida --

8 MR. FREY: You mean charges to his Florida
9 number?

10 QUESTION: Charges to the Florida number, but
11 it's --

12 MR. FREY: It's clearly not taxed by Illinois.

13 QUESTION: It's definitely not taxed.

14 MR. FREY: Definitely not taxed.

15 On the other hand, if an Illinois purchaser,
16 while he's in Florida, calls somebody in Illinois,
17 charges it to his Illinois number, that would be taxed
18 even though the call was placed if the purchaser was
19 outside Illinois when he placed the call.

20 QUESTION: If an Illinois subscriber makes a
21 call from Florida to Seattle, charges it to his Illinois
22 number.

23 MR. FREY: That is not taxed. There have to
24 be two things. There has to be an Illinois party to the
25 call, and it has to be charged to the service address of

1 an Illinois purchaser.

2 QUESTION: But it doesn't have to be paid by
3 anybody by that address. It could be paid from
4 someplace out of state.

5 MR. FREY: The statute expressly says that
6 it's irrelevant where it's billed or paid.

7 QUESTION: Right.

8 MR. FREY: And GTE makes a lot of the fact
9 that it can be billed or paid someplace else, and that
10 that means it's not an Illinois sale, which is obviously
11 I think not the case. If you walk into Garfinkel's and
12 buy a suit and you're a resident of the District of
13 Columbia and you say send the bill to my father in
14 Chicago, that doesn't mean the District of Columbia
15 can't impose a sales tax on it.

16 Now, there's no challenge here to Illinois'
17 nexus. So, I will pass on from that to the question of
18 apportionment.

19 And I think that the Appellants forget
20 conveniently what the purpose is of requiring
21 apportionment. The purpose is that when the State taxes
22 an activity that occurs in more than one State, some
23 measure is needed to ensure that the State is taking
24 only its fair share of the pie. And this is required by
25 due process type nexus requirements because if the State

1 taxes something that is occurring in another State,
2 there may be a nexus problem.

3 Now, the classical situations where
4 apportionment has been required are, for example, in the
5 case of a net income tax on the operations of a unitary
6 multistate business or a property tax on movable
7 property, such as railroad cars, which is used in a
8 number of different States. In those circumstances, the
9 pie that is being taxed -- that is, the tax base to
10 which the tax is being applied -- is activity occurring
11 in multiple States. That pie has to be sliced so that
12 the taxing State gets only its fair share, and normally
13 apportionment is the method that is used to do that.

14 Now, this tax fully satisfies that objective
15 because the pie that is being sliced here is all
16 interstate calls between a party in Illinois and a party
17 outside Illinois. And the way Illinois has sliced this
18 pie -- and I do not understand my friend's suggestion
19 that the legislature didn't make clear what it was doing
20 because I think Justice Stevens is completely right.
21 The statute does what it does, and what it does is to
22 slice the pie by taxing calls charged to an Illinois
23 number and not taxing calls charged to a non-Illinois
24 number.

25 Now, I don't know whether you call this

1 appportionment or you don't call it appportionment. But
2 what you do call it is something that fully satisfies
3 the Commerce Clause purpose of appportionment. So, it
4 seems to me that there is that fundamental fallacy.

5 Now, let me come back to a point that was
6 involved in Justice Scalia's first question because
7 there are sort of two different ways you can look at
8 this tax.

9 We argue that, first of all, you can look at
10 it as being like a sales tax on the purchase of an
11 interstate telephone service in Illinois or like a gross
12 receipts tax on the revenues from interstate carriers
13 doing business in Illinois.

14 Now, I am told, of course, that that is not
15 what this tax is because the Illinois court said it's
16 actually a tax on the interstate phone call. But this
17 Court has made crystal clear in numerous cases that if
18 the tax is exactly equal in its operation to some other
19 kind of clearly lawful tax -- and that's exactly what
20 was involved in Moorman -- it will be upheld; that is,
21 you will look at the economic substance of the tax.

22 Now, what is the economic substance of this
23 tax? The substance is that the Illinois purchaser who
24 purchases a phone call pays a tax of 5 percent of the
25 cost of that purchase charged to his Illinois service

1 address. It sounds a lot like a sales tax for me -- to
2 me, and I think it is quite clear that the fact that it
3 is not technically a sales tax is an effort to throw
4 this Court back to the era of hyper-technical formalism
5 that existed before Complete Auto. In economic
6 substance it is something that happens -- what is being
7 taxed is exactly like a sales tax.

8 It is also exactly like a gross receipts tax;
9 that is, the amount of tax that Illinois collects is
10 exactly the same as if Illinois said we will tax
11 interstate carriers on their gross receipts from
12 interstate phone calls and we will measure that tax by
13 the unapportioned gross receipts that they receive in
14 Illinois.

15 Unapportioned gross receipts taxes have been
16 repeatedly upheld by this Court. They were upheld in
17 Standard Pressed Steel. Moorman said they were good.
18 Tyler Pipe two years ago said they were good. I know
19 that in Moorman, Justice Brennan in his dissent
20 questioned the propriety of unapportioned gross receipts
21 taxes, but in Moorman, the unapportioned gross receipts
22 tax presented a problem of Iowa taking too big a share
23 of the pie, which I hope to demonstrate momentarily does
24 not exist in this case. So, I think even if you didn't
25 approve of unapportioned gross receipts taxes on most

1 interstate sales, they're perfectly all right in the
2 telephone context.

3 Now, the Appellants have argued that a gross
4 receipts tax is different from a tax on the phone call
5 because the incidence of this tax falls on the retail
6 customer rather than on the carrier. But in economic
7 substance, I think it's generally recognized and I think
8 it's obvious that a gross receipts tax has the same
9 economic effect as a sales tax. It's different in form,
10 but not in substance. It has the same economic effect
11 because the cost to the purchaser of purchasing the
12 taxed service will be the same. In the case of a gross
13 receipts tax, the tax will not be separately stated, but
14 it will obviously be incorporated in the price of the
15 good or service that is sold.

16 Now, even if you view it as a tax on the
17 interstate phone call themselves, which we agree one or
18 more States -- other States would have nexus to tax
19 depending on where the other parties, the non-Illinois
20 parties are located -- the Illinois scheme fully
21 satisfies apportionment objectives. And -- and I think
22 I would agree that in the absence of a credit, if
23 Illinois tried to tax 100 percent of all calls to which
24 an Illinois party is a party, there would be a serious
25 problem under the Commerce Clause.

1 QUESTION: Why?

2 MR. FREY: There would be a serious problem
3 because that tax would not pass the internal consistency
4 test because --

5 QUESTION: You mean -- you mean the other --
6 if another State -- it would just be -- what you're
7 saying is it would be double taxation of the same call.
8 Is that it?

9 MR. FREY: There would be the -- at least the
10 potential for double taxation, and there would be actual
11 double taxation with many other States. That is, it
12 seems to me it is critically different -- critical to
13 this case that Illinois is not attempting to tax every
14 call on the full amount of the call. If it did that, I
15 believe there would be a problem.

16 QUESTION: So, as a -- so, with respect to the
17 Washington statute, for example, you think the -- if
18 there's a problem, the credit cures it, or is there a
19 problem at all?

20 MR. FREY: Well, I don't think -- I don't
21 think there's a problem, and I will get in a moment to
22 why I don't think there is any problem at all even
23 though you could hypothesize a particular phone call
24 that might be taxed twice. I don't think that causes a
25 problem.

1 QUESTION: Well, let's say -- let's -- let's
2 suppose -- just suppose a phone call like that. You
3 think the credit would cure it anyway.

4 MR. FREY: The credit would cure it anyway.
5 The credit cures several problems although I have to say
6 that -- that I am confident that this tax is valid even
7 if it did not have a credit provision. I do not think
8 we depend at all on the credit provision. But to the
9 extent there is any residual argument left that some
10 individual taxpayer might find itself in the position of
11 paying double taxes somewhere, the credit provision does
12 take care of it. So, I think the credit provision is a
13 kind of insurance that is not needed, but that is
14 present.

15 Now --

16 QUESTION: I'm told the credit provision only
17 applies if the same taxpayer is asked to pay twice. So,
18 it can -- it can result in calls being taxed in full by
19 the receiving State and the State of origin if paid by
20 different people.

21 MR. FREY: It could, and I don't think that
22 would be a problem for reasons I'll get to. But the
23 credit provision in that respect is the same as the
24 Louisiana credit provision involved in Holmes, which I
25 believe also applied only if the taxpayer had paid a tax

1 outside the State. Yet, the Court found it satisfactory
2 to deal with apportionment requirements.

3 I don't find it as intellectually satisfying
4 as our other arguments, but I think the precedent
5 clearly suggests that it's there. And it does serve a
6 purpose of guarding against multiple taxation by -- to
7 the individual, particular taxpayer.

8 I think the Court should appreciate how
9 inconsistent the Appellants' arguments are because they
10 start off by saying you can't treat this like a sales
11 tax; that is, you can't look only at the transactions
12 that are sold in Illinois because the Illinois Supreme
13 Court said it's a tax on the interstate phone calls, not
14 a tax on the sales. So, you have -- and the interstate
15 phone call, after all, consists of calls that could be
16 taxed by either State. So, you have to look at the
17 universe of calls that could be taxed by either State.

18 And we say, fine, look at the universe of
19 calls that could be taxed by either State. Observe that
20 only half of those calls are taxed by Illinois. So,
21 where's the problem? And they say, oh, no, you can't do
22 that. When you look at the calls that are -- the
23 interstate calls that are taxed, you must look only at
24 the ones that are sold in Illinois. And then you find
25 that those are taxed 100 percent, to which I say, well,

1 then what's wrong with treating this as a sales tax.
2 They have really tried to pull a little shell game on
3 the Court I believe.

4 Now --

5 QUESTION: Before you leave that, Mr. Frey,
6 they -- they -- as I understand your opponent, he said,
7 well, but in order to take that position, you have to
8 mix up your taxpayers and lump them all together in a
9 way that Scheiner prohibits.

10 MR. FREY: I'm -- Scheiner is one of my very
11 favorite cases.

12 QUESTION: Well, I would think it would be.

13 MR. FREY: But I can't say that I'm -- that I
14 understand what it is that he is referring to in
15 Scheiner.

16 In Scheiner, the problem was that the
17 structure of the tax inherently and in empirical
18 experience as well discriminated by causing the
19 out-of-state business to pay more tax -- and remember,
20 Scheiner was a use tax for the use of the State's roads
21 -- than the in-state operator had to pay.

22 I'll note parenthetically that the objection
23 in this tax is -- and this is a little -- perhaps a
24 little bit complicated to understand, but the objection
25 is that the Illinois caller is being discriminated

1 against. It's the Illinois caller who's paying the tax
2 on the full call. The person in Nevada who makes a call
3 to Illinois and charges it to his Nevada number is
4 getting the benefit of the fact that Illinois is not
5 trying to tax that call.

6 So, this is a rather odd Commerce Clause claim
7 because the in-state people are the victims of this
8 discrimination and the out-of-state people are the
9 beneficiaries of this discrimination. I'm not sure that
10 the Commerce Clause reaches that situation.

11 But when you're talking about apportionment --

12 QUESTION: Well, your opponents don't
13 represent callers. They represent -- at least they're
14 people who are operating telephone lines.

15 MR. FREY: They represent residents of
16 Illinois.

17 QUESTION: Well --

18 MR. FREY: Well, GTE is a carrier.

19 QUESTION: Yes.

20 MR. FREY: But the incidence of the tax we are
21 told -- we are told we can't look at this as a gross
22 receipts tax on GTE. It's sort of standing in for its
23 customers because it paid their tax. Now, the customers
24 are all Illinois residents, Illinois businesses, and
25 they're saying they paid to Illinois --

1 QUESTION: Well, I suppose part of the
2 argument is that the -- is that it doesn't make any
3 difference how -- what distance the interstate call
4 covers, and the longer it is, the less connection really
5 that Illinois has for it. And the in-state people --

6 MR. FREY: Let me -- let me say --

7 QUESTION: You can only call in-state between
8 the borders of the State.

9 MR. FREY: I mean, that is true, but I guess
10 there are several things to be said about that.

11 QUESTION: And the carrier says I'm carrying
12 this call from China.

13 MR. FREY: Yes, all right. And there are
14 several things to be said about that. One is it has
15 nothing to do with apportionment. If you apportioned
16 the tax by taxing only half of the call, this objection
17 would still exist exactly the same. So, it doesn't have
18 anything to do with the apportionment issue. It's a
19 totally separate issue.

20 Now, it is, it seems to me, completely
21 indistinguishable from a sales tax; that is, what they
22 are suggesting -- well, first they suggest that it's
23 unrelated to the services that Illinois provides to the
24 telephone caller. And Commonwealth Edison, if it made
25 one thing clear, was that the relationship didn't have

1 to be to the services but to the in-state activity of
2 the taxpayer.

3 Now, what is a better way to measure the
4 in-state activity of making an interstate phone call
5 than the value -- than the price that the taxpayer is
6 willing to pay for the phone call? It seems to me that
7 that is a completely fair way and that the Court should
8 not set foot upon the path of suggesting that you could
9 not measure the tax that a State can impose on a
10 transaction by the amount that the taxpayer paid for the
11 tax transaction. I think you will find yourselves
12 quickly in a quagmire if you start out in that direction.

13 QUESTION: You're saying it's the same price
14 as the ordinary sales tax because a certain portion of
15 the price of any tangible goods has to be attributable
16 to --

17 MR. FREY: It's the point you made in your --

18 QUESTION: -- to the transportation of those
19 goods from elsewhere.

20 MR. FREY: Right.

21 QUESTION: So, every sales tax has that effect.

22 MR. FREY: Yes. I mean, as we said in our
23 brief I believe, if -- if -- if there are two cars
24 manufactured in Michigan and brought into Illinois to
25 the same showroom and sold, and one is a Cadillac and

1 one is a Chevrolet, and the Cadillac costs twice as
2 much, the State of Illinois has done exactly the same
3 thing with respect to both of those cars. Yet, it's
4 unquestioned that it can tax twice as much for the more
5 expensive one.

6 I don't -- I would rather -- although if there
7 are more questions about fair relation, I'll be happy to
8 talk about them, but I think the main thrust of the
9 Appellants' argument is in the apportionment area. I
10 think there's a fundamental point about apportionment,
11 and the Court made this point in the Container Corp.
12 case quite clearly.

13 There are two requirements to satisfy yourself
14 that the State is getting a fair share of the total
15 taxes. The first is what's known as internal
16 consistency. Now, internal consistency is a logical
17 requirement that you determine by looking at the
18 structure of the tax, and what you ask yourself is
19 whether -- if this formula were applied by every
20 jurisdiction, would it result in more than all of the
21 interstate transactions being taxed. It is crystal
22 clear that the Illinois tax passes internal
23 consistency.

24 The only argument I've seen to suggest
25 otherwise is GTE's argument that if other States had

1 different taxes and you put them together with the
2 Illinois tax, there might be a possibility of multiple
3 taxation. But, of course, that would make no tax pass
4 internal consistency. That is, it totally defeats the
5 purpose of the internal consistency inquiry.

6 Now, the internal consistency inquiry is very
7 important because it means that the tax looked at on its
8 own terms does not carry with it any inherent risk of
9 multiple taxation of interstate transactions. Scheiner,
10 of course, was totally different in that regard.

11 Now, there is a second requirement, and that
12 has been called external consistency. And what external
13 consistency means -- and I'm quoting from Container
14 Corp. where it was called the more difficult requirement
15 -- is that "the factor or factors used in the
16 apportionment formula must actually reflect a reasonable
17 sense of how income is generated." That is, when you
18 look at the way the pie has been sliced, you must ask
19 yourself whether the State has taken a slice that
20 reasonably reflects the in-state component of the
21 interstate activity being taxed.

22 But the Court is very hands-off in applying
23 external consistency; that is, the Court has made clear
24 that what you need is a method of allocation or
25 attribution to the State that is -- and I quote -- "out

1 of all appropriate proportion, or that leads to grossly
2 distorted results, or that is outrageous in its
3 application." Now, I defy anybody to say that taxing
4 50 percent of the interstate two-party calls, to take
5 our simple hypothetical, could possibly fit that.

6 There's another important point about
7 Container Corp. and it --

8 QUESTION: Have we ever applied that -- that
9 requirement to a sales tax?

10 MR. FREY: You've never -- a sales tax is an
11 unapportioned tax. Now, in other words, you -- you
12 would not -- you would not apply it to a sales tax.

13 QUESTION: If we regarded this as a sales tax,
14 we wouldn't even have to confront that problem.

15 MR. FREY: I think you would not have to
16 confront that problem. But -- but I am taking the
17 Appellants on their own terms for the purposes of this
18 argument and suggesting that you might choose to regard
19 it, as they insist you must, as a tax on the interstate
20 telephone call itself which I agree to. Two States have
21 nexus to tax.

22 Now, but I wanted to make another point about
23 Container Corp. which is overlooked I think by Mr. Smith
24 in his argument. He -- he says, well, we don't -- how
25 do we know whether half of the calls are likely to be

1 charged to the Illinois caller and half to the
2 non-Illinois party. Well, first of all, I think we know
3 that from common sense it's probably generally going to
4 be the case.

5 But in any event, what is clear is that this
6 factual question -- this is a question about whether
7 external consistency is satisfied, not internal
8 consistency. And in Container Corp., the Court said
9 unequivocally the Appellant has the burden of proof.
10 And there is not one iota of evidence in the record in
11 this case -- there's no attempt to prove that the tax
12 doesn't pass internal consistency. There is only an
13 attempt to force the Court to take this narrow focus and
14 look only at the calls that are actually taxed, but at
15 the same time not treat it as a sales tax or a gross
16 receipts tax.

17 Now, let me turn to something else because the
18 Scheiner case I think is quite helpful to us in a number
19 of respects, and one of the respects in which it's
20 helpful is that it recognizes that where it is
21 administratively difficult or impossible to tax a
22 transaction appropriately by a non-discriminatory tax,
23 maybe a discriminatory tax would be permissible. Now, I
24 don't for a minute agree that this is in the least a
25 discriminatory tax, but any scheme of call-by-call

1 appportionment of the kind that the Appellants suggest is
2 either unconstitutional or wholly unworkable. Now, let
3 me quickly run through the possibilities.

4 If you're going to apportion an individual
5 call, you can apportion it, it seems to me, either
6 --let's take, first, the possibility that you look on
7 the basis of mileage, which has been suggested in their
8 briefs, and each State gets to tax the share that
9 represents the miles through that State that a
10 straight-line signal between the two points would pass.

11 I think it's clear from MCI's brief and from
12 what anybody knows about the telephone business, that
13 this is impossible. There is no record of the signals.
14 There is no way to determine which intervening States
15 are involved. I question whether an intervening State
16 would have nexus simply because the signal passed
17 through its borders or even touched a microwave relay
18 tower that's within its borders, which the State ought
19 to tax through a property tax it seems to me.

20 But even if you could determine this, it would
21 be a nightmare to administer on a call-by-call basis
22 that kind of apportionment. And I -- and I think the
23 Appellants have essentially receded from the suggestion
24 that that should be done.

25 Now, there is a second possibility which is

1 that you can impose -- and this is the -- the only thing
2 that they have alleged they have the technological
3 capacity to do. If I'm in Illinois and I call someone
4 in California, they have suggested that when they send
5 me the bill, they -- they have the capacity to tax half
6 of that call -- to impose the Illinois tax on half of
7 that call, the California tax on half of that call. So,
8 they would -- I'm in Illinois. They would bill me for
9 the California tax and the Illinois tax. They have the
10 technological capacity to do that, but I have two
11 observations.

12 First of all, that's unconstitutional unless
13 you're going to overrule National Bellas Hess. That is,
14 I do not have nexus with California. California cannot
15 tax me simply because I make a phone call from outside
16 California into California. Indeed, it can't tax me if
17 I conduct a mail order business with extensive
18 advertising and so on as long as I don't have a physical
19 presence in California.

20 And the second observation is to what end are
21 we going through this exercise when it is essentially
22 going to end up in the State's getting the same amount
23 of tax dollars and the generality of taxpayers paying
24 the same amount of tax dollars.

25 And I might mention that neither Mr. Goldberg

1 nor Mr. McTigue has suggested that they have paid a
2 penny more in tax than they would pay under any one of
3 their apportionment schemes except --

4 QUESTION: Assuming what you have just said is
5 true, assuming everybody adopts the same scheme, right,
6 as Illinois? Is -- is that -- is that a likelihood?

7 MR. FREY: No, I don't -- I don't care -- let
8 me -- let me get to that because that is a point that
9 has come up several times.

10 First of all, essentially nobody has
11 inconsistent schemes. This Wheat Ridge, Colorado scheme
12 that was mentioned in the Illinois Supreme Court is
13 itself not internally consistent and, therefore,
14 probably unconstitutional. And certainly the Illinois
15 tax can't fall because some other tax is -- is
16 unconstitutional.

17 But beyond that, let's postulate the situation
18 in which a State takes into its head for some reason to
19 tax the party who -- who doesn't pay for the call. So,
20 California says we're going to tax the party who
21 doesn't. If somebody in California doesn't pay for the
22 call, we'll tax them. I wanted to make the point that
23 that is administratively impossible because there's no
24 way of identifying who such a person is.

25 Even if -- even if that were possible and

1 California did it, the result would be that -- that it
2 would be an advantage -- an advantage -- to interstate
3 commerce, not a disadvantage because if the call was
4 billed in California, nobody would pay any tax. The tax
5 would be zero. If the call was billed in Illinois, the
6 tax would be on 200 percent. That would still even out
7 so that the generality of taxpayers would be paying a
8 tax on 100 percent. But people who are in interstate
9 commerce -- if I am calling my branch office in
10 California, I have the choice to charge the call in a
11 way that reduces my tax down to zero in that situation.

12 So, I don't see how the Commerce Clause can be
13 violated when these various schemes actually provide an
14 advantage to interstate callers who -- who would want to
15 arrange their affairs to avoid the tax and for the
16 generality a caller would wash out in the end.

17 Now -- now, suppose some person came along and
18 said, you know, the only long distance calls I make are
19 to my grandchildren and I charge them all to my phone
20 and the result is that I'm paying more than my fair
21 share of tax. I guess I have several observations about
22 that, and I know my time is running out. So, I -- I --
23 I want to remind the Court of something that it said in
24 Moorman. And maybe this is back on this -- on this
25 question of different tax schemes producing multiple

1 burdens.

2 In footnote 12 in Moorman, the Court was
3 concerned with whether the Iowa scheme created multiple
4 tax burdens when it was juxtaposed with the Illinois
5 scheme. And the Court said the simple answer is that
6 whatever disparity may have existed by these
7 inconsistent statutes is not attributable to the Iowa
8 statute which treats both local and foreign concerns
9 with even hand. The disparity can only be the
10 consequence of the combined effect of the Iowa and
11 Illinois statutes, and Iowa is not responsible for the
12 latter. Thus, appellant's discrimination claim is
13 simply a way of describing the potential consequences of
14 the use of different formulas by two States.

15 Now, what could be more apt to the situation
16 that is being postulated here?

17 Now, let me come back to the person who says I
18 only call my grandchildren. First of all, it's not
19 clear that at the joints -- the play at the joints
20 doesn't just subject him to the tax consequences. You
21 don't declare a statute unconstitutional for that.

22 Secondly, there's no showing that anybody has
23 ever paid actual multiple taxes. And with respect to
24 the possibility that potentially such a person would pay
25 tax on more than 100 percent of the calls to his

1 grandchildren, there is the credit provision available
2 if that should happen, if he should be so foolish as to
3 arrange his calls in a way that he does get
4 double-taxed. So, I think the risk of multiple tax
5 burdens is a sham in this case as well.

6 Let -- let me close with -- with an example on
7 the discrimination point. Maybe this point is already
8 clear, but I'm thinking about the case -- I thought of
9 -- if you had two toll bridges, one between Manhattan
10 and Brooklyn and one between Manhattan and New Jersey,
11 and you charged a dollar when you got on the bridge.
12 That was the toll. No toll when you got off the
13 bridge. The result is that the person traveling between
14 Manhattan and Brooklyn, no matter which direction he
15 went in, would have to pay a \$1 toll.

16 A person traveling between Manhattan and New
17 Jersey would pay a \$1 toll when he's going to New
18 Jersey, but returning from New Jersey, New York would
19 collect no toll.

20 Now, if I understand the burden of my
21 opponent's argument, it is that that system is unfair
22 and discriminatory against interstate commerce, that you
23 must apportion the toll that is paid on the trip between
24 New York and New Jersey. You must disregard the fact
25 that the trip in the other direction is not taxed at

1 all. Now, this seems to me the height of formalism, and
2 I think the Court should stay far away from it.

3 If there are no further questions, I thank you.

4 QUESTION: Thank you, Mr. Frey.

5 Mr. Smith, you have four minutes remaining.

6 REBUTTAL ARGUMENT OF WALTER A. SMITH, JR.

7 MR. SMITH: Thank you, Mr. Chief Justice.

8 Our -- our primary answer to I think most of
9 what counsel has been saying is that he's trying to
10 litigate a statute other than the one that's before this
11 Court. The statute that is before this Court has levied
12 a tax on the act or privilege of engaging in an
13 interstate phone call, either the origination or the
14 termination of the phone call. That is the tax, and it
15 has been measured by taxing the Illinois taxpayer on the
16 whole of the gross charge for the call.

17 We would submit there is no question but what
18 the other participating State in such an interstate
19 phone call has nexus and constitutional authority also
20 to tax the call. And if Illinois can tax the whole of
21 the call, so too can the State at the other end of the
22 line.

23 The only explanation, as we understand
24 counsel, that he gives for justifying this risk of
25 multiple taxation is that there is this apportionment

1 formula that I say to you he has created and the State
2 has not written. And even if the legislature had
3 written it, there's absolutely no evidence to show that
4 the netting effect that he talks about is going to
5 produce the correct amount of revenues either as a whole
6 and certainly not in the case of individual taxpayers,
7 including the two plaintiffs before this Court.

8 The other rewriting of the statute that
9 counsel wants to do is to call this a sales tax because
10 he likes the tests for a sales tax much better than he
11 likes the tests for the particular tax before the
12 Court. But this Court has made clear in case after case
13 that an unapportioned sales tax is illegitimate only
14 when the particular event being taxed cannot be taxed by
15 any other jurisdiction. And it is for that reason an
16 unapportioned tax is permitted.

17 But not only is this not a sales tax as
18 written and as construed by the lower courts, but in
19 substance it is not a sales tax. The delivery of all of
20 the goods here being taxed were not delivered in the
21 State of Illinois. Part of the economic activity by
22 definition -- and this underlies our whole argument --
23 occurred outside the State of Illinois. And Illinois
24 did not attempt to tax the purchase here. It taxed only
25 calls that were charged to Illinois irrespective of

1 where the particular call was billed or paid for. So,
2 neither in form nor in substance is this a sales tax.

3 And the final rewriting of the statute he's
4 interested in is to call this a gross receipts tax. And
5 he has told this Court that you have approved
6 unapportioned gross receipts tax on interstate commerce.
7 It is not so. This Court has always required
8 apportionment of any tax that is laid on the entire
9 volume of interstate commerce that occurs in a
10 particular taxing jurisdiction.

11 That is what Illinois has done here. There is
12 no apportionment formula being used here like Moorman or
13 any other formula that this Court has approved.

14 And we urge this Court not to rewrite the
15 statute for the legislature, create an apportionment
16 formula the legislature did not choose to use, make
17 assumptions that every taxpayer in Illinois has 50
18 percent of his calls charged to his service address and
19 50 percent outside.

20 This Court held in the McCloud case and in the
21 Henneford case both you judge the statutes as they come
22 before you. You adjudicate the constitutionality of the
23 tax that the legislature wrote.

24 QUESTION: What's the case that holds that the
25 gross receipts tax must be apportioned?

1 MR. SMITH: Moorman. And the formula used in
2 Moorman was -- as the Court knows, it was a sales
3 formula. The sales in state was the numerator and the
4 sales out of state was the denominator, and that's
5 multiplied by the gross receipts.

6 Whenever this Court has reviewed a gross
7 receipts tax on interstate commerce, only part of which
8 occurred in a particular State, apportionment is
9 required because in the absence of apportionment, the
10 State not only taxes commerce outside its borders, which
11 it cannot do, but it also subjects that -- the
12 particular event in question to multiple taxation.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.
14 The case is submitted.

15 (Whereupon, at 12:04 o'clock p.m., the case in
16 the above-entitled matter was submitted.)
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CERTIFICATION

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

No. 87-826 - JEROME F. GOLDBERG AND ROBERT McTIGUE, Appellants V. ROGER D. SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL., and
No. 87-1101 - GTE SPRINT COMMUNICATIONS CORPORATION, Appellant V. ROGER D. SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.

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

BY alan friedman

(REPORTER)

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