

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ASSOCIATED INDUSTRIES OF MISSOURI, Petitioners
v. JANETTE M. LOHMAN, DIRECTOR OF REVENUE
OF MISSOURI, ET AL.

CASE NO: No. 93-397

PLACE: Washington, D.C.

DATE: Monday, March 28, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ASSOCIATED INDUSTRIES OF :
MISSOURI, :
Petitioners :
v. : No. 93-397
JANETTE M. LOHMAN, DIRECTOR OF :
REVENUE OF MISSOURI, ET AL. :

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Washington, D.C.
Monday, March 28, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:00 a.m.

APPEARANCES:

THOMAS C. WALSH, ESQ., St. Louis, Missouri; on behalf of
the Petitioners.
DON M. DOWNING, ESQ., Deputy Solicitor General of
Missouri, Jefferson City, Missouri; on behalf of the
Respondents.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-397, the Associated Industries of
5 Missouri, v. Janet Lohman.

6 Mr. Walsh.

7 ORAL ARGUMENT OF THOMAS C. WALSH

8 ON BEHALF OF THE PETITIONERS

9 MR. WALSH: Mr. Chief Justice, may it please the
10 Court:

11 This case is a Commerce Clause challenge to
12 section 144.748 of the revised statutes of Missouri, which
13 imposes an additional use tax of 1-1/2 percent on all
14 goods purchased from out of State for use, storage, or
15 consumption in Missouri.

16 Now, the Missouri overall taxing scheme is thus
17 as follows. There is a 4.225 State-wide sales tax. There
18 is a 4.225 equivalent State-wide use tax. The challenged
19 statute adds an additional 1.5 percent use tax to be
20 charged across the State on all transactions from out of
21 State. There is no corresponding additional sales tax
22 State-wide.

23 Cities and counties and other municipalities
24 within the State, however, are authorized to enact local
25 sales taxes with the approval of the voters. There is no

1 authority for any such local use taxes.

2 Now, the result of this unusual statutory scheme
3 is a patchwork taxing scheme within the State of Missouri
4 that has 22 different local sales tax rates, ranging from
5 zero percent in several counties to 3.5 percent in one
6 city, and bear in mind that throughout the whole State,
7 the 1-1/2 percent additional use tax is applicable, so the
8 total use tax applicable throughout the State of Missouri
9 is 5.725 percent.

10 QUESTION: Is there any correspondence, Mr.
11 Walsh, between the size of the local sales tax and the
12 population of the taxing jurisdiction?

13 MR. WALSH: Not directly, Your Honor. Some of
14 the higher sales tax rates are in the larger cities, and
15 some of those that have no additional sales tax are the
16 smaller rural communities, but there's no -- you can't
17 really draw a specific correlation.

18 QUESTION: Mr. Walsh, at one time was there a
19 provision that said if a local community imposes an
20 additional sales tax of its own, that it would impose an
21 equivalent use tax at the same time?

22 MR. WALSH: There was a provision, Justice
23 O'Connor, in 1990, right before this particular law became
24 effective.

25 QUESTION: Had that been adopted by the

1 legislature?

2 MR. WALSH: Yes, it had. It was --

3 QUESTION: Did it ever go into effect?

4 MR. WALSH: Well, it was on the books for about
5 a year, but it was never implemented.

6 QUESTION: Had that been implemented, would you
7 be here?

8 MR. WALSH: Not at all, Your Honor. I -- we
9 have no quarrel with that kind of --

10 QUESTION: Why was it not implemented? Why was
11 this shift made?

12 MR. WALSH: The record doesn't really show that,
13 Your Honor, except that a) the state thought it was
14 easier, apparently, to do it the way that it eventually
15 decided to do it, and b) I think there was probably some
16 concern about whether local voters would actually adopt a
17 local use tax.

18 QUESTION: Is that the method employed in some
19 other States that allow local imposition of additional
20 sales tax?

21 MR. WALSH: The record shows, Your Honor, that
22 there are 28 States that allow local use taxes, and every
23 one of them has some sort of mechanism which prohibits the
24 local use tax from being greater than the local sales tax.

25 Missouri is the only State that has adopted this

1 kind of a scheme, except back in the seventies, Oklahoma
2 tried it, and the Oklahoma statute was invalidated by the
3 Oklahoma supreme court under the Commerce Clause, a scheme
4 very similar to this one, but we did have --

5 QUESTION: But the National Conference of State
6 Legislatures is amicus on the other side. They would
7 like it.

8 MR. WALSH: Very much so, yes, Your Honor. They
9 would like to experiment with use taxes and to avoid the
10 strict rule of equality that has pertained to use taxes
11 since this Court started deciding these kinds of cases.
12 The --

13 QUESTION: Mr. Walsh, I may be repeating what
14 Justice O'Connor asked you, but I want to be sure. You
15 are attacking section 144.748, aren't you?

16 MR. WALSH: Yes, Your Honor.

17 QUESTION: You are not attacking the local
18 delegation power.

19 MR. WALSH: The local delegation of sales
20 taxes --

21 QUESTION: Yes.

22 MR. WALSH: -- Your Honor? No, we're not. No.
23 The statute that we're attacking imposes the
24 additional 1-1/2 percent across-the-board, State-wide use
25 tax. It's contained in a separate --

1 QUESTION: It's the latter that causes the
2 difficulty here.

3 MR. WALSH: That's the statute that causes the
4 difficulty, and it's a self-contained statute. We're not
5 even attacking the basic 4.225, basic use tax, which is
6 equivalent to the State-wide basic sales tax. It's the
7 add-on that causes the problem.

8 QUESTION: It's the combination of the use tax
9 exceeding the sales tax.

10 MR. WALSH: Yes, it is, Your Honor, but the
11 excess 1.5 is in a separate statute, and it could be
12 invalidated without affecting the base.

13 QUESTION: It is true, is it not, that the
14 scheme that you said you would not challenge in response
15 to Justice O'Connor, if all of the local jurisdictions in
16 fact added on a use tax, would have netted more money
17 rather than less. You had a line in your brief about
18 Missouri attempting to swell its coffers at the expense of
19 interstate commerce, and yet the scheme that you say would
20 be constitutional could have netted the State more.

21 MR. WALSH: Well, it could have, if the local
22 municipalities had adopted it. One of our objections to
23 this is that the State tried to preempt the local option
24 by imposing this use tax at the State level, and I think
25 it's just a matter of supposition whether the local

1 municipalities would have gone along with a local use tax
2 in all situations.

3 QUESTION: Well, if we accept your submission,
4 we would not strike down any provision of Missouri law
5 across the board. For instance, you have no grounds of
6 complaint, as I understand it, about the situation in
7 Kansas City, or perhaps Jackson County, or the City of St.
8 Louis.

9 MR. WALSH: Well, the statute, though, that
10 creates the problem, Your Honor, is 144.748. That is a
11 statute applicable State-wide.

12 QUESTION: But --

13 MR. WALSH: It does not produce equality State-
14 wide.

15 QUESTION: Well, but you have to show that it
16 produces a higher use tax than sales tax in a particular
17 jurisdiction. You can't show that with respect to Kansas
18 City or with respect to the City of St. Louis.

19 MR. WALSH: But you can't -- I respectfully
20 submit, Your Honor, you can't take averages, as the State
21 wants to do. You have to look at this tax as it operates
22 in the marketplace --

23 QUESTION: But --

24 MR. WALSH: In all the marketplaces.

25 QUESTION: But you have to look at it with

1 respect to each of the taxing jurisdictions.

2 What complaint do you have about the situation,
3 say, in Jackson County?

4 MR. WALSH: The fact is that this is a State-
5 wide statute.

6 QUESTION: In mean -- but answer my question.

7 MR. WALSH: Well, insofar as --

8 QUESTION: What complaint do you have about the
9 situation in Jackson County?

10 MR. WALSH: Insofar as the -- the sales tax in
11 Jackson County is higher at present time than the use tax,
12 there is arguably no damage from the discrimination in
13 Jackson County.

14 QUESTION: And the same is true in the City of
15 St. Louis, is it not?

16 MR. WALSH: It -- I believe the sales and use
17 tax are equal in the City of St. Louis, but in -- out
18 of -- in 841 out of 1,573 jurisdictions in the State of
19 Missouri, the use tax is higher than the sales tax --

20 QUESTION: Mr. Walsh, why --

21 MR. WALSH: -- and that's because -- excuse me.

22 QUESTION: I agree with you that the State
23 statute appears to be the problem, and perhaps your remedy
24 for the future is that that statute is invalid, but as far
25 as collection of taxes past paid, is it your assertion

1 that anyone, no matter where those taxes were paid,
2 whether in Kansas City or anywhere else, is entitled to a
3 refund?

4 MR. WALSH: Yes, Your Honor, it is, because the
5 State statute has created the discrimination. It can't be
6 severed. It's --

7 QUESTION: Well, why not, Mr. Walsh? Why
8 wouldn't it be an adequate remedy to simply say the
9 Constitution prohibits the enforcement of the statute in
10 those jurisdictions where it produces a higher total than
11 produces any discrimination?

12 MR. WALSH: Well, I guess that would be some
13 sort of a geographical severance type article.

14 QUESTION: Yes, sure.

15 MR. WALSH: But the statute is a -- it imposes a
16 1-1/2 percent use tax in -- everywhere, to every
17 transaction.

18 QUESTION: I understand that, but there's
19 nothing wrong with the collection of it in Jackson County,
20 for example. It's only those jurisdictions in which you
21 have this disparity running in one direction. I don't
22 know why your remedy wouldn't be adequate to just say it
23 cannot be enforced in those jurisdictions.

24 MR. WALSH: But that assumes, I think, that the
25 legislature had some intent that it would apply where it's

1 legal and not apply where it's not legal, and the next --

2 QUESTION: It would assume the Federal
3 Constitution just requires correction of Federal
4 constitutional violations. It doesn't require a windfall.

5 MR. WALSH: But you can't analyze the statute
6 that way, because every year, it changes. Every --

7 QUESTION: Why wouldn't that be a question of
8 State law? I mean, if the -- your argument on Federal
9 constitutionality is you can't have a higher use tax than
10 sales tax. If this Court just says that, then why isn't
11 the State free to say, our statute stands to the extent
12 that it doesn't violate that constitutional requirement?

13 MR. WALSH: Well, I think that -- I think it's
14 primarily, first of all a question of Federal
15 constitutional law, because the --

16 QUESTION: Constitutional law where the use tax
17 higher than a sales tax is no good.

18 MR. WALSH: Right.

19 QUESTION: Once that proposition -- if that
20 proposition is decided in your favor, then why shouldn't
21 the rest -- what happens next, excepting that premise, be
22 for the State to determine?

23 MR. WALSH: Well, I think the Court has to make
24 a determination, looking at this statutory scheme as a
25 whole, whether there is any basis, whether in State or

1 Federal law, for severing offending parts of this statute
2 and salvaging the rest.

3 QUESTION: Yes, but you keep speaking of
4 offending parts of the statute. The question of severance
5 is offending taxing jurisdictions, and how those
6 particular taxing jurisdictions reach the point of
7 offending seems to me is a question of State law. It's
8 the result which is a question of Federal law.

9 Why do we not, in order to rule your way, simply
10 declare the disparity is unconstitutional, leaving it to
11 State law to unscramble the eggs any way it wants to in
12 order to get the required result?

13 MR. WALSH: Because I think that the issue of
14 facial discrimination here makes the entire scheme
15 unconstitutional.

16 QUESTION: The facial discrimination is -- I was
17 going to say the bottom line. I guess it's the top line.
18 That's where the discrimination is. I don't see where it
19 becomes a Federal question to identify whether one element
20 of a complex State tax scheme is the particular culprit as
21 distinct from the unconstitutional result that all of
22 those elements produce.

23 MR. WALSH: When you have a 1-1/2 percent
24 across-the-board additional use tax that is applied by the
25 State in every situation, that offends the Commerce

1 Clause, because --

2 QUESTION: No. It only offends the Commerce
3 Clause because it's being added on to two other layers of
4 tax, one of which is within the control of particular
5 counties and municipalities.

6 MR. WALSH: But at the State level you have
7 4.225 sales tax, you have 5.725 use tax, and that is --
8 that is the scheme that is being delivered to the
9 counties, the municipalities, the cities, and --

10 QUESTION: Are you telling us that in order for
11 you to win your case we have in fact got to, as it were,
12 tell the State how to unscramble the causes that bring
13 about this top line violation?

14 MR. WALSH: Our position is that within --

15 QUESTION: Well, yes or no. Yes or no.

16 MR. WALSH: Yes, because -- because our position
17 is that within a single taxing jurisdiction, within any
18 State, if a use tax exceeds a sales tax, that violates the
19 Commerce Clause. That inhibits interstate commerce.

20 QUESTION: Yes, but you mention the word
21 severability. I don't understand why the severability
22 question isn't for the State to decide. If it were a
23 Federal law, yes, it would be for this Court to decide.

24 MR. WALSH: But the disparity is created by the
25 facial difference at the State level between sales tax and

1 use tax.

2 QUESTION: Suppose that every county were like
3 Kansas City and Jefferson County, and that there were no
4 disparities because the counties in every instance
5 adjusted their laws so that the sales and use tax were
6 equal. Would there be a violation of the Constitution?

7 MR. WALSH: That would be statistically
8 improbable, but the facial problem that exists with regard
9 to the overall statute would still exist. There might not
10 be any discrimination in fact.

11 QUESTION: Well, could you bring a suit in those
12 circumstances?

13 MR. WALSH: I might not have any injury, but
14 I -- no, I probably couldn't.

15 QUESTION: So if one county, or one
16 municipality, then deviates, then the entire statutory
17 scheme falls?

18 MR. WALSH: No. The problem is that there's no
19 compensation. There's no compensatory tax rate in the
20 sales tax area that you can point to for which this use
21 tax supposedly compensates.

22 Now, the theory -- the only theory that the
23 State has here is that this is a complementary,
24 compensatory use tax, but where is the tax for which it
25 compensates? It's not at the State level, and I don't

1 think this Court has ever upheld a system whereby one
2 sovereign can enact a tax, pass a tax that discriminates
3 against interstate commerce and rely on some other
4 sovereign --

5 QUESTION: But you're assuming that we're
6 deciding a question of State sovereignty. Isn't it the
7 State's business to decide how it's going to, as it were,
8 allocate its governmental taxing power? Don't we simply
9 look to the State as a whole and ask what the result is?

10 MR. WALSH: The State may allocate taxing
11 responsibility, but it's our position that if the State is
12 going to create a compensatory use tax system, then either
13 it has to do so at the State level, or it has to do so --
14 it has to delegate to the municipalities the right to do
15 so, and require that any use tax be no greater than any
16 sales tax.

17 QUESTION: Well, what's your authority for that
18 proposition, Mr. Walsh? Now, it would be something about
19 the structure of State Government. It certainly has
20 nothing to do with interstate commerce.

21 MR. WALSH: Well, it has to do with the
22 requirement of Halliburton, of Silas Marner, that -- Silas
23 Mason.

24 (Laughter.)

25 MR. WALSH: Silas Mason --

1 QUESTION: Good book.

2 MR. WALSH: -- that the use tax, because of its
3 inherently discriminatory and protectionist nature is
4 allowed, but only under very restricted circumstances, and
5 the law is that you must -- in building in a use tax you
6 must provide that local and out-of-State sellers are
7 treated equally, local and out-of-State goods are treated
8 equally, and, as the Court said in Boston Stock Exchange,
9 a use tax is only valid if a purchaser, looking at the
10 options between buying in-State and buying out-of-State
11 can make that decision without regard to the tax
12 consequences.

13 QUESTION: Now, those are all Commerce Clause
14 principles.

15 MR. WALSH: Yes.

16 QUESTION: But you're urging here something that
17 I don't think has ever emerged in any of our commerce
18 cases or any other case, and that is that somehow the
19 State has to handle it all itself, and you don't look at
20 the net result between taxing authorities and the State,
21 but there's some principle that requires the State to do
22 certain parts of it and the counties to do a certain part
23 of it, and we have many cases saying that the State can
24 divide up its authority the way it wants to.

25 MR. WALSH: The question -- the ultimate

1 question in the case, Your Honor, is, is this a
2 compensatory tax, because a use tax, if it's not a
3 compensatory tax, is prima facie violative of the Commerce
4 Clause.

5 Its only purpose is to protect local industry
6 and, by definition -- by definition it discriminates
7 against interstate commerce, so where is the compensating
8 sales tax that this act is designed to protect local
9 merchants against, and at --

10 QUESTION: It's in St. Louis, certainly, and
11 it's in Jackson County. You've agreed to both of those.

12 MR. WALSH: But it's a lot of places -- there's
13 a lot of places where it isn't, and it isn't a tax that
14 compensates for the use tax. It is a range of 22
15 different -- a hodge podge of 22 different local sales
16 taxes.

17 QUESTION: Well, but that's true in lots of
18 jurisdictions, that you have a State sales tax, and then
19 you have also a local sales tax.

20 MR. WALSH: No --

21 QUESTION: Certainly you're not attacking that
22 principle.

23 MR. WALSH: No sales tax -- no use tax, sales
24 tax arrangement has every been upheld, to my knowledge,
25 where there was a difference within a taxing

1 jurisdiction -- any taxing jurisdiction --

2 QUESTION: But wouldn't you agree that you would
3 have no constitutional claim if the cities were all
4 allowed to impose sales taxes of at least 1-1/2 percent,
5 and there was a hodge podge of those from 1-1/2 percent to
6 5 percent? Then you wouldn't have any claim, would you?

7 MR. WALSH: If they were required to, as --

8 QUESTION: Required to have a minimum of 1-1/2
9 percent.

10 MR. WALSH: And you had an across-the-board use
11 tax --

12 QUESTION: But a hodge podge above 1-1/2
13 percent, and the hodge podge does not mean anything, does
14 it?a

15 MR. WALSH: Well, it means that within 841
16 jurisdictions in the State of Missouri, the use tax is
17 higher than the sales tax.

18 QUESTION: No, no, no, I'm assuming that it
19 can't be, that you have a 1-1/2 percent --

20 MR. WALSH: If you mandated a minimum of sales
21 tax --

22 QUESTION: On the sales tax, yes, of 1-1/2
23 percent.

24 MR. WALSH: Then I think you could point to that
25 use tax as compensating for that minimum.

1 QUESTION: For the minimum, and the hodge podge
2 and the excess would be constitutionally irrelevant. If
3 there's a hodge podge all by itself, it doesn't mean
4 anything. It's just that there is some jurisdictions in
5 which that there is a lack of total compensation.

6 MR. WALSH: Well, the gross disparity from
7 jurisdiction to jurisdiction is unprecedented. It's --

8 QUESTION: I understand it's unprecedented, but
9 you seem to agree -- at least, I think you do -- that if
10 you had the same gross disparity but the minimum of 1-
11 1/2 percent, there would be no problem.

12 MR. WALSH: I think an argument could be made
13 under those circumstances that that was a compensating use
14 tax, but I don't find in this case anything that can be
15 pointed to as a compensating sales tax, the tax for
16 which --

17 QUESTION: Well, it compensates for 1-1/2
18 percent in Jackson County and St. Louis.

19 MR. WALSH: But that's not what this use tax was
20 designed to compensate for.

21 QUESTION: Well --

22 MR. WALSH: The State just decided they wanted
23 to do it a different way, and there isn't any reason they
24 couldn't have done it the right way.

25 As a result, there are 26 percent of Missouri

1 citizens who live in areas where the use tax is greater
2 than the sales tax, and that's because of this statute.
3 That's 1,300,000 people, who when they decide to buy an
4 appliance from the J. C. Penney catalogue store are going
5 to pay a higher use tax than if they went down to the
6 corner and bought the same --

7 QUESTION: So your proposition is that a use tax
8 discriminates against interstate commerce unless in all
9 instances it compensates for a State sales tax.

10 MR. WALSH: For a sales tax, yes and that's what
11 this Court has held, Justice Kennedy. That -- Silas Mason
12 said, equality is the theme that permeates this --

13 QUESTION: Even though in some cases, in some
14 counties, where there's a larger population, larger
15 percent sales, interstate sales can be said to be
16 preferred because the total tax burden on them will be
17 less.

18 MR. WALSH: There is a -- in some counties there
19 is a higher sales tax than a use tax, that's correct.

20 QUESTION: Though in those cases you can say the
21 discrimination is in favor of interstate sales.

22 MR. WALSH: That's what the State argues, but
23 I -- you can't discriminate in some areas of the State and
24 say, well, we're sorry about that, but we're making it up
25 over here in Kansas City.

1 QUESTION: Well, that's the question.

2 MR. WALSH: Well, yes, and I don't think --

3 QUESTION: If you say, can you -- if you look at
4 it, the whole picture, interstate sales are being favored,
5 but in particular counties in-State sales are favored.

6 MR. WALSH: Well -- and I don't know that
7 they're being favored, but there are more sales taxes
8 being collected than if the uniform sales tax rate were
9 1.5 percent, but the State says, well, we have the right
10 to charge more over here and less over here, but that
11 leads to exactly the kind of trade, or potentially to the
12 kind of trade wars that the Commerce Clause is designed to
13 prevent.

14 What, for instance, would prevent the State of
15 Missouri from enacting large use taxes around the
16 perimeter of the State to frustrate citizens from going
17 across the border and buying goods and having no use taxes
18 in the center of the State? That's what they want the
19 right to do.

20 They even would support by their argument a
21 State statute which authorized the enactment of local
22 sales and use taxes by the local municipalities with no
23 correlation to each other. They would say that any
24 municipality could have a sales tax here --

25 QUESTION: Well, you're saying a lot of things

1 that they would say, but I haven't heard it from them. I
2 thought their whole point was, it's the collection of this
3 is a nightmare if we do it by how much each locality puts
4 on, so we're trying to make it simple, and we're
5 simplifying it in a way that overall interstate commerce
6 is not being disadvantaged. If anything, the
7 interstate -- doing -- looking at the whole picture, the
8 interstate sales are being taxed less.

9 MR. WALSH: Well, first of all, Justice
10 Ginsburg, administrative convenience is not an excuse for
11 a violation of the Commerce Clause, and the courts have
12 been uniform in holding that, but you can't look at
13 averages around the State and say, it comes out with more
14 sales tax than use tax.

15 Commerce is conducted in the local marketplace,
16 in the counties, in the cities, and the highways and
17 byways, where individuals are making decisions about what
18 goods to buy and from where, and where merchants are being
19 required to compete against people from out of State, and
20 the State of Missouri has created a situation whereby in
21 more than half of the areas of the State, the interstate
22 vendors are being disadvantaged.

23 QUESTION: Well, Mr. Walsh, you say half the
24 areas of the State. Now, the respondents in their brief
25 say that 92 percent of all taxable transactions in the

1 State carry a sales tax rate equal to or greater than the
2 average use tax rate. Do you disagree with that?

3 MR. WALSH: That -- no. That number was found
4 by the trial court, but that relates to the sales being
5 made in-State, not to the use tax analysis, which frankly
6 isn't developed in the record, but what is developed is
7 that 26 percent of the population live in areas where they
8 pay higher use tax than sales tax, and that's not
9 anybody's fault except the State of Missouri.

10 QUESTION: I guess what you're saying is that a
11 more relevant figure is what percentage of out-of-State
12 sales are made in jurisdictions that charge less than the
13 offsetting sales tax.

14 MR. WALSH: Yes, and --

15 QUESTION: And we don't know that.

16 MR. WALSH: We don't know that, but we know that
17 1,300,000 people live in areas where, if they buy from out
18 of State, they're going to pay more.

19 QUESTION: Do you have any answer, other than
20 administrative inconvenience is no excuse, to the argument
21 that, well, if you do this to us as a practical matter, we
22 can't leave it to local option? Is there any convenient
23 way to allow local option?

24 MR. WALSH: Oh, absolutely.

25 QUESTION: And you collect the tax.

1 MR. WALSH: Absolutely. Section 144.747, the
2 repealed statute that Justice O'Connor questioned me
3 about, did it the way that every other State in the Union
4 does it. That is, it says -- the State says to the local
5 municipality, you may enact a sales tax. You may also, at
6 the same time, enact a use tax.

7 QUESTION: But what you have to do is restrict
8 local option to this extent. Sales and use tax have to go
9 hand-in-hand?

10 MR. WALSH: Yes, unless you impose them both at
11 the State level. Yes, Your Honor.

12 I'd like to reserve the rest of my time, please.

13 QUESTION: Very well, Mr. Walsh.

14 Mr. Downing, we'll hear from you.

15 ORAL ARGUMENT OF DON M. DOWNING

16 ON BEHALF OF THE RESPONDENTS

17 MR. DOWNING: Mr. Chief Justice, and may it
18 please the Court:

19 What petitioners would have this Court do is
20 invalidate a State compensatory tax system that
21 substantially favors interstate commerce overall. Well,
22 this Court's never been willing to do that, for good
23 reason. To do so --

24 QUESTION: Wait, I'm not sure that that's true.
25 Do you mean that a State can have a blatantly

1 unconstitutional tax upon interstate commerce coming into
2 one county and the State say no, but anybody who does
3 business in this county from out of State shall pay \$1,000
4 a day, so long as that is offset by beneficence to
5 interstate commerce in other sections of the State, and
6 you look on the balance and say, well, on balance, you
7 know, the business in this county is being discriminated
8 against, but they're really good to interstate commerce
9 elsewhere. Is that the argument you say we --

10 MR. DOWNING: Your Honor, certainly there's
11 ample precedent in this Court's cases -- the Bacchus case,
12 for example.

13 QUESTION: For that, you say yes, that's okay.

14 MR. DOWNING: No -- Your Honor, I'm saying in
15 terms of, if the purpose for that county's action was to
16 protect the local market segment, or an industry, if we're
17 getting into the Bacchus situation where there's an
18 identifiable market segment, that's one issue, but this
19 Court's Commerce Clause cases have looked historically at
20 the overall effect of State regulation on the national
21 economy.

22 As the Court said in the Exxon case, the
23 Commerce Clause is designed to protect the interstate
24 market, not particular interstate firms.

25 QUESTION: So you -- does that mean your answer

1 to my question is, that is okay?

2 MR. DOWNING: If one county enacted a -- decided
3 to have no sales tax in order to benefit local businesses,
4 that would be okay, as long as the overall effect of State
5 regulation on the national economy was either neutral or
6 pro interstate commerce, like it is here.

7 QUESTION: One county can impose a \$100 fee on
8 people doing business in that county from out of State, so
9 long as other counties give people doing business a
10 rebate, in equivalent dollar amount?

11 MR. DOWNING: I think that's a different
12 situation, Your Honor, because that's not a compensatory
13 tax case.

14 In the compensatory tax area, this case is
15 analyzed differently from -- for example, I think the
16 hypothetical you're talking about is somewhat similar to
17 the Fort Gratiot case the Court decided 2 years ago, where
18 a local county had an environmental regulation in which it
19 decided it was not going to accept out-of-State waste.

20 Well, all the other counties in the State
21 treated out-of-State waste evenhandedly. They treated
22 them just like it was in-State waste, so the net effect of
23 Fort Gratiot, just like I think in the hypothetical you're
24 pointing out, the net effect was an overall burden to
25 interstate commerce. Every county was treated equally.

1 One county was discriminating -- net, overall burden.

2 Well, here, the parallel to this case --

3 QUESTION: Wait, before you get off that one,
4 what you're saying is, if the other counties had favored
5 out-of-State waste, that would be okay, So a State can
6 pass a law saying, the eastern half of our State, no out-
7 of-State waste is allowed. The western half, we favor
8 out-of-State waste, so all out-of-State waste has to go
9 into the western half, and none of it can go into the
10 eastern half. A State can say that --

11 MR. DOWNING: I think that --

12 QUESTION: -- so long as the net effect is
13 pretty good.

14 MR. DOWNING: I think the Court could conclude,
15 certainly, that that was not isolationist, that the State
16 was trying to -- not to --

17 QUESTION: Oh, we could conclude anything we
18 want. I'm asking you, is it constitutional or not?

19 (Laughter.)

20 MR. DOWNING: Well, it's not a compensatory tax
21 case. Environmental cases, the Philadelphia v. New
22 Jersey --

23 QUESTION: Is it constitutional or not?

24 MR. DOWNING: Yes, I think it could be. I think
25 it could be, under the Philadelphia v. New Jersey case,

1 and under the Chemical Waste case and Fort Gratiot.

2 Environmental regulations have been treated
3 differently by this Court than compensatory tax cases.

4 QUESTION: We can split up a national market.
5 We just have to do it in a checkerboard pattern, with each
6 square on the checkerboard being less than an entire
7 State.

8 MR. DOWNING: Your Honor, as long as this
9 Court -- the Court 2 years ago pointed out in Quill that
10 unlike the Due Process Clause which is concerned with the
11 effect on individuals and particular firms, the Commerce
12 Clause is not concerned about particular interstate firms,
13 it's concerned about the overall effect of State
14 regulation on the national economy. Here, interstate --

15 QUESTION: Why do you say that? What is your
16 support for that? We don't care what you do to any
17 individual in interstate commerce so long as the overall
18 effect isn't bad. What is your authority for that?

19 MR. DOWNING: Well, the Exxon --

20 QUESTION: I find that astounding proposition.

21 MR. DOWNING: The Exxon case specifically held
22 that. It was a situation in which you had three
23 interstate firms that were petroleum refiners, and the
24 State there prohibited petroleum refiners from having a
25 gasoline station in their State, allegedly to protect

1 local gasoline dealers.

2 They didn't want the Exxons and the Amocos
3 coming into their State, and the Court held in Exxon that
4 the mere fact that three interstate firms suffered a net
5 competitive disadvantage as a result of the State statute
6 doesn't matter under the Commerce Clause, because it said,
7 and I quote, "The Commerce Clause protects the interstate
8 market, not particular interstate firms."

9 QUESTION: But you're dealing with a provision
10 that is not facially discriminatory there. The examples
11 I've been giving you are examples where on its face the
12 statute discriminates against interstate commerce. I want
13 a case like that, in which where there is such facial
14 discrimination we say, that's okay, so long as somewhere
15 else it's balanced off.

16 MR. DOWNING: Well, Your Honor, I think it turns
17 on how you define what discrimination against interstate
18 commerce is. Here, Missouri's system substantially favors
19 interstate commerce overall. If you define discrimination
20 on a transaction-by-transaction or firm-by-firm approach,
21 I would agree with you. If you define it on an overall
22 level --

23 QUESTION: Well, how about county-by-county or
24 city-by-city, and clearly, in a good many communities
25 there, there is facial discrimination. I mean, there it

1 is. You have to accept the case on that theory and then
2 tell us how we deal with it and what you rely on, other
3 than that general acceptance case.

4 MR. DOWNING: Well, in terms of a compensatory
5 tax, the State was attempting to compensate. Mr. Walsh
6 raised that there was nothing for the State to compensate
7 for. Well, in Maryland v. Louisiana, and Tyler Pike, the
8 analysis for a compensatory tax, you look at -- you try --
9 the first step is to identify the burden. Not the tax,
10 but the burden for which the State is attempting to
11 compensate.

12 Well, here it's plain. The State was attempting
13 to compensate for the effect of the varying local taxes
14 upon intrastate commerce. It did that by setting a use
15 tax rate, State-wide, which is 20 percent less than the
16 average local tax rate. In Missouri, Missouri businesses
17 are at a 20-percent net competitive disadvantage to
18 interstate firms selling to Missouri residents.

19 QUESTION: You had a scheme in 1990, one that
20 Justice O'Connor mentioned at the outset of this argument,
21 that wouldn't raise any constitutional questions but it
22 was never implemented. Can you tell us why that scheme
23 was abandoned and this uncommon one adopted in its place?

24 MR. DOWNING: Your Honor, I think Missouri found
25 a better way to accommodate the practical needs of

1 interstate sellers.

2 Interstate sellers -- as this Court is well
3 aware from the Quill case, interstate sellers don't like
4 the varying local rate solution, because it is extremely
5 burdensome for them. To determine for every transaction
6 they sell into the State of Missouri, there are over 1,000
7 taxable jurisdictions. They would have to determine for
8 each transaction the applicable current use tax rate for
9 that transaction.

10 . So that's one reason, and it wasn't -- Missouri
11 didn't do this out of an altruistic sense to benefit
12 interstate sellers. I don't want to make that claim. But
13 States realized that, to the extent a tax is easy to
14 comply with by a taxpayer, it's more efficient to collect.

15 We get a greater -- we can collect a greater
16 percentage of our taxes by setting a State-wide rate,
17 because all interstate sellers now selling into Missouri
18 know exactly what their tax is on a use tax basis, so
19 that's one of the reasons.

20 Another reason is, the identical use and tax
21 rates in each jurisdiction approach, well, it doesn't
22 solve the constitutional problem that Mr. Walsh has tried
23 to point out. It doesn't guarantee equal treatment in
24 each and every instance.

25 For example, suppose Missouri adopted that

1 system, and you had a resident of a local jurisdiction who
2 wanted to purchase a washing machine. He happened to live
3 in a jurisdiction where the local use tax rates and sales
4 tax rates were high.

5 Well, he would have essentially three options.
6 He could purchase from a local vendor and pay a high local
7 sales tax rate, or he could purchase from an out-of-State
8 vendor and pay the equally high local use tax rate, or he
9 could travel to another local jurisdiction in Missouri and
10 pay a low sales tax rate.

11 Well, from the out-of-State seller's
12 perspective, that out-of-State seller is at the precise
13 competitive disadvantage in that situation as he is under
14 our present system, so Missouri recognized that going to
15 this identical rate in each jurisdiction solution doesn't
16 cure any supposed inequality that might exist.

17 So to accommodate the needs of interstate
18 sellers, and to make it more practical, admittedly, also
19 from the State's perspective, it's easier for the State to
20 administer on a State-wide basis, so those are the reasons
21 Missouri went to that system.

22 QUESTION: Well, you say easier to administer.
23 Don't you mean easier, in a way, to legislate, because I
24 take it the tax is actually paid to the county or the
25 municipality. It's not paid to the State, and then the

1 municipalities and counties remit the State portion to it,
2 is that correct?

3 MR. DOWNING: No, Your Honor, it's paid to the
4 State, and then the State remits to the local Governments.
5 It keeps a 1 percent administration fee, in essence, and
6 then remits the remainder to local Governments.

7 QUESTION: And you say in the age of computers
8 it's really a lot of trouble to figure out?

9 MR. DOWNING: Your Honor, that's -- that's --

10 QUESTION: In the various counties, you have --
11 you know where it's being sold into, and you know what the
12 tax rate is there. It doesn't seem to me like a whole lot
13 of trouble.

14 MR. DOWNING: Your Honor, as a matter of fact,
15 the Court pointed out in Quill that very point, that even
16 in the age of computers, the ease with which interstate
17 sellers can calculate -- you see, within various counties,
18 you have different taxable jurisdictions. You can't just
19 go by the county. You can't just go by the city. You
20 can't even go by the zip code.

21 QUESTION: You know what I would tell those -- I
22 would tell those sellers, well, just -- if it's a whole
23 lot of trouble, just pay 1-1/2 percent and you'll be sure
24 always to be giving enough, which is what you're making
25 them do. They could do that voluntarily, if it was really

1 a lot of trouble to figure out what the proper rate was.

2 MR. DOWNING: Well, Your Honor, it's interesting
3 that you mention that, because currently pending before
4 Congress, Congress in response to this Court's decision in
5 Quill is actively considering this session a bill which
6 would enable -- and essentially adopt the Missouri system,
7 which would allow States to set, on a State-wide basis, a
8 State-wide use tax rate based on their local sales tax
9 rates.

10 And my point is not that this Court should
11 necessarily defer to Congress, but that in these difficult
12 practical issues of State taxation -- the Court in Quill
13 expressly recognized that Congress may well be better
14 equipped to address some of these issues than this Court,
15 and that was one of the reasons the Quill court chose not
16 to overrule the Bellas Hess case. That case provided a
17 bright line rule that States could use in devising their
18 tax systems.

19 Well, that's the situation here. The bright
20 line rule that General American and this Court's cases
21 have devised in this area is that if the tax that the
22 State imposes on in-State sales, if the average tax is
23 greater than or equal to the tax on interstate sales, then
24 there's no Commerce Clause concern.

25 QUESTION: Well, I thought the bright line rule

1 was no facial discrimination.

2 MR. DOWNING: Well, Your Honor, again that gets
3 to the issue, do you measure discrimination on a
4 transaction-by-transaction approach, or do you measure it
5 on an overall State-wide basis?

6 QUESTION: Jurisdiction by jurisdiction, I
7 suppose.

8 MR. DOWNING: Well, again, I would submit that
9 this Court has never invalidated a State tax, compensatory
10 tax, that on an overall basis is favorable to interstate
11 commerce like Missouri's is here.

12 QUESTION: But have we ever distinguished
13 between -- have we ever, rather, ignored jurisdictions in
14 the way that you are asking us to ignore jurisdictions,
15 because what the State is doing, as you described to me a
16 moment ago, is becoming a collection agent for the various
17 sub-State jurisdictions, but the tax -- to the extent that
18 there is a differential, the tax is a tax of that sub-
19 State jurisdiction, and you are in effect saying, ignore
20 the actual taxing jurisdiction in this case. Have we ever
21 done that?

22 MR. DOWNING: Yes, Your Honor, on at least three
23 occasions I can think of. The General American case is
24 one which is discussed extensively in the briefs. That
25 case plainly involved, just like here, a State which had

1 varying local tax rates, and a State-wide rate that was
2 set to compensate for those varying local rates.

3 QUESTION: So that the rate for any given
4 transaction was going to be the same, isn't that correct?

5 MR. DOWNING: No --

6 QUESTION: -- and that's not so here.

7 MR. DOWNING: That's not -- that system plainly
8 allowed for the same possible instances of unequal
9 treatment that our system -- just like here. In that
10 case, Louisiana parishes had varying local rates that
11 applied in-State, and a State-wide rate that applied to
12 nonresident railroad companies, so it plainly -- just like
13 here, it allowed for possible instances --

14 QUESTION: But that wasn't a Commerce Clause
15 case.

16 MR. DOWNING: Your Honor, I would beg to differ,
17 with all due respect.

18 QUESTION: Wasn't that an equal protection case?

19 MR. DOWNING: Justice Cardozo believed it was a
20 Commerce Clause case, in the Silas Mason case, and
21 Professors Hellerstein and Hartman in their treatises in
22 this area, respected commentators, both analyzed that case
23 as a Commerce Clause case.

24 I would grant you there is some ambiguity in the
25 language --

1 QUESTION: Unfavorably, as I recall, in the case
2 of Hellerstein. He thought it was a Commerce Clause case
3 that was decided wrong, or at least wouldn't be decided
4 that way today.

5 MR. DOWNING: He indicated something to that
6 effect, Your Honor, I would grant you that, but again --

7 QUESTION: Let me --

8 MR. DOWNING: -- Professor Hellerstein --

9 QUESTION: Oh, go ahead, finish your answer. I
10 didn't mean --

11 MR. DOWNING: No -- I was going to another
12 thought.

13 QUESTION: Would you just comment on one point
14 that it's hard for me to get out of my mind? If the law
15 has been as clear as it has been since 1926 with the
16 General American tax case, and if the advantages of your
17 system are so obvious, why do you suppose you're a
18 pioneer?

19 MR. DOWNING: Well, Your Honor, I think in large
20 part the States -- for example, the equal use tax and
21 sales tax rate in every jurisdiction States, well, that
22 has some superficial appeal to it from a Commerce Clause
23 perspective, I would grant you that, but Missouri was
24 aware of the practical needs of interstate sellers.

25 I mean, it was fully aware of the Quill case, as

1 it was going up through the courts to this Court, and
2 there the interstate commerce and the interstate sellers
3 came into Missouri and said, listen, there's a problem
4 here. We've got a practical problem of State taxation.
5 We want to comply with your tax, but it's very difficult
6 for us to do that. Can you help us?

7 Missouri sets a State-wide rate that makes it
8 very easy for them to comply, and I might add that the
9 interstate sellers are the ones in favor of the pending
10 congressional legislation. They're the ones who want
11 State-wide rates, even though there might be possible
12 instances in which there could be inequality.

13 QUESTION: Mr. Downing, can I ask you to imagine
14 for a moment the unlikely and horrible event that we don't
15 agree with you on the constitutionality of this scheme. I
16 assume you would prefer that we not say that all of the
17 imposed taxes are unconstitutional, but rather, only those
18 that exceed the local rates in the counties affected. I
19 assume you would prefer that outcome to --

20 MR. DOWNING: Absolutely, Your Honor.

21 QUESTION: Why? Why is that a proper way to do
22 it?

23 MR. DOWNING: Well, Your Honor, there's
24 certainly no unconstitutionality under the Commerce Clause
25 for a State in any local jurisdiction to have a use tax

1 rate that's lower or equal to its sales tax rate.

2 QUESTION: All right, but --

3 MR. DOWNING: I think Mr. Walsh concedes that.

4 QUESTION: Suppose a State just passes a general
5 law saying all out-of-State sales shall pay -- all out-
6 of-State sellers shall pay \$500 a year to the State, all
7 right. Now, would we analyze the constitutionality of
8 that by going case-by-case to find out whether in fact for
9 this particular seller the sales taxes that that seller
10 avoided offset the \$500 and say only those who ended up
11 paying more than would have been taken out of their hides
12 in sales tax, only those have been treated
13 unconstitutionally? We wouldn't do that, would we?

14 MR. DOWNING: No, Your Honor. Under this
15 Court's cases the compensatory tax has to reach
16 substantially equivalent events. There, I don't think you
17 would have any events that the \$500 flat rate fee were
18 taxing, so under the Court's precedents, no, that would
19 not be analyzed as a compensatory tax case.

20 QUESTION: So you say once you're taxing
21 substantially equivalent events, then it's only where
22 there are differences at most, where there are differences
23 that we would require the funds to be refunded.

24 MR. DOWNING: Absolutely.

25 I'd like to move on to a different subject.

1 Even if this Court were to require the transaction-by-
2 transaction or firm-by-firm approach advanced by the
3 petitioners, the respondents nonetheless should prevail in
4 this case. They haven't provided any evidence in the
5 record at all that any interstate firm has suffered any
6 competitive disadvantage when attempting to sell to
7 Missouri residents.

8 Now, even if they had -- even if they had
9 pointed to and produced evidence that there is an
10 interstate seller that competed in a local jurisdiction
11 where the use tax rate was higher than the sales tax rate,
12 and competed in that local jurisdiction with a Missouri
13 business, well, that wouldn't end the analysis, because
14 then one would have to focus --

15 QUESTION: Well, but may I just interrupt you?
16 Your whole argument, I take it here, is rejecting the
17 notion that there is a facial discrimination, so on this
18 argument, it's a pure allocation of burden argument, is
19 that right? If we say there is a facial discrimination,
20 then I take it this argument would not have any
21 application.

22 MR. DOWNING: If you conclude, under the Court's
23 cases, it's a facial discrimination because the
24 transaction-by-transaction approach is the approach the
25 Court wants to adopt --

1 QUESTION: Or taxing jurisdiction by taxing
2 jurisdiction approach, but in any event, if we -- to the
3 extent that we say there's a facial discrimination, I take
4 it this argument would not be inappropriate, right?

5 MR. DOWNING: The lack of injury argument? I
6 think --

7 QUESTION: Yes.

8 MR. DOWNING: I think you're right. I think the
9 Court's cases on a facial challenge do not require
10 petitioners to show injury, but I would submit to you --

11 QUESTION: I don't think that's entirely
12 correct. You're suggesting, and you suggest you're in
13 agreement with Justice Souter, that someone can come in
14 and attack a tax that he claims discriminates against
15 interest -- even though he has suffered no injury from the
16 thing?

17 MR. DOWNING: No, Your Honor, I didn't mean to
18 say that. What I -- that's a standing question.

19 QUESTION: Well, that's what I would have
20 thought.

21 MR. DOWNING: What I was addressing was the
22 injury in fact, and I'll move right to the standing
23 question, then.

24 Petitioners themselves have shown that they have
25 suffered no injury in fact. As this Court pointed out

1 2 years ago in the Lujan case, in order to show injury in
2 fact, a plaintiff must plead and prove -- to show
3 standing, excuse me -- a petitioner must plead and prove
4 that there's an injury in fact that's both concrete and
5 particularized, and that is fairly traceable to the
6 alleged unconstitutionality that he claims.

7 QUESTION: Now, the State and the petitioner
8 stipulated here, didn't they, on some facts?

9 MR. DOWNING: The only record of stipulation is
10 that they would -- the petitioners would have significant
11 administrative costs of compliance with the system.

12 QUESTION: There was no stipulation that
13 governed whether any particular plaintiff suffered injury
14 as a result of the operation of the Missouri --

15 MR. DOWNING: Not at all, Your Honor, not any
16 injury that's fairly traceable to the unconstitutionality
17 of the system. The fact that there are differing use
18 rate, or higher use tax rates in certain jurisdictions
19 than sales tax rates, that's the unconstitutionality they
20 claim that's in our system. They haven't claimed any
21 injury as a result of that.

22 QUESTION: They haven't even claimed paying --
23 they haven't even claimed paying the use tax in a
24 jurisdiction that has a lower sales tax? If they've
25 claimed that, they've claimed injury.

1 MR. DOWNING: They have not claimed that.
2 There's no evidence in the record that they've claimed
3 that. The only transaction that is in the record is
4 petitioner Alumax Foils made a purchase in St. Francis
5 County, where the use tax rate is higher than the sales
6 tax rate. Well, they paid sales tax. That was an in-
7 State transaction. They paid sales tax on that
8 transaction.

9 Well, under their system, if the sales tax rates
10 had been moved up to be equal to the use tax rate, they
11 would have paid more sales tax, so they haven't been
12 injured by any unconstitutionality in the system.

13 Let's look at Alumax Foils where they're based.
14 They're based in St. Louis, where the use tax rate and the
15 sales tax rates are identical. They certainly haven't
16 shown any injury in fact in those counties. They don't
17 claim there's any constitutional problem in those
18 counties.

19 QUESTION: Do you really want to win this case
20 on that ground so we can do it again another day?

21 MR. DOWNING: Well, Your Honor -- no.
22 Certainly, I would prefer that this Court say that you
23 must look at the overall effect of State regulation on the
24 national economy, just like you did in Quill 2 years ago.
25 I would prefer the Court to say it's the interstate market

1 that's protected by the Commerce Clause, not particular
2 interstate firms.

3 QUESTION: But if we have a facial
4 discrimination and there is a transaction that is taxed,
5 the party -- the seller to that transaction would pass
6 your test, would he not?

7 MR. DOWNING: I'm sorry, I need to hear the
8 hypothetical again.

9 QUESTION: If we have a facial discrimination,
10 and one of the petitioners --

11 MR. DOWNING: In a particular local
12 jurisdiction --

13 QUESTION: And one of the petitioners here is an
14 interstate seller whose transaction was taxed at the
15 facially discriminatory rate, that's enough, isn't it?

16 MR. DOWNING: Right. There's no evidence of
17 that here, Your Honor. There's no evidence in the record
18 at all that any -- let me move on to the other petitioner,
19 which is Associated Industries, which has both in-State
20 members and out-of-State members.

21 As to their in-State members, there's no
22 evidence in the record that any in-State member is located
23 in a jurisdiction where the use tax rate is higher than
24 the sales tax rate. There's no evidence in the record --

25 QUESTION: No allegation, either?

1 MR. DOWNING: No allegation. No allegation
2 whatsoever. There's no evidence in the record that they
3 had any transactions in any jurisdiction in which the use
4 tax rate is higher than the sales tax rate, and moving on
5 to their out-of-State members, there's no evidence in the
6 record that any out-of-State member of Associated
7 Industries competes with any Missouri business in any
8 local jurisdiction in which the use tax rate is higher
9 than the sales tax rate.

10 QUESTION: No allegation that any of them paid
11 the use tax in the juris --

12 MR. DOWNING: Oh, to be sure, they paid the tax,
13 but that's --

14 QUESTION: In a jurisdiction that had a lower
15 sales tax.

16 MR. DOWNING: No. No, there's no allegation to
17 that effect at all in the record, Your Honor. They have
18 alleged simply that they paid the use tax. That's the
19 extent. There's no allegation they paid it in a local
20 jurisdiction where the use tax is higher than the sales
21 tax.

22 QUESTION: Well, but now, wait a minute, in the
23 supreme court of Missouri opinion on page A-2 of the
24 petition, the opinion says "The parties, however, have
25 stipulated that appellants pay sales taxes in geographical

1 areas where the aggregate sales tax is less than the
2 aggregate use tax.

3 MR. DOWNING: Your Honor, that may be in the
4 Missouri supreme court's opinion, but it's not in the
5 record.

6 QUESTION: Well, we take a care pretty much the
7 way the State supreme court gives it to us on factual
8 matters.

9 MR. DOWNING: Well, Your Honor, I don't -- I'm
10 not precisely sure what the Missouri supreme court meant
11 by that, but if they meant to say that there's stipulation
12 in the record that Associated Industries does business in
13 a local jurisdiction where the use tax rate is higher than
14 the sales tax rate, I don't think there's anything in the
15 record about that. That's my point.

16 So neither --

17 QUESTION: Do you make this point in your brief
18 in opposition?

19 MR. DOWNING: Your Honor, we had it in our
20 brief, and one of our amicus made the argument, frankly we
21 thought in a very good fashion. We didn't want to have
22 this Court read duplicate points on that, so we adopted it
23 in a footnote in our brief. I can point that out to you
24 if you'd like me to show you where we --

25 QUESTION: Well, no I accept that. Just tell

1 me.

2 MR. DOWNING: Okay. We did. We thought it was
3 a very important argument, because it's jurisdictional to
4 this Court.

5 Finally, I'd like to make -- really, I'd just
6 like to say, really what we have here in this case is a
7 group of local Missouri businesses who don't like section
8 144.748 simply because it represents a tax increase to
9 them. They're not concerned about any supposed undue
10 burdens or unequal treatment on interstate commerce. If
11 there were such burdens, they're not the victims of it.

12 Rather, they've lost in the Missouri political
13 process, of which they are a part. They are Missouri
14 businesses, and they want this Court to overturn the sound
15 judgment of the Missouri legislature, a judgment which I
16 might add goes further to accommodate the practical needs
17 of interstate sellers than Missouri was required to go, so
18 I would just respectfully submit to this Court that it not
19 allow petitioner's feigned concern for any supposed burden
20 on interstate commerce which doesn't exist here to
21 transform what is essentially a local political
22 question -- a local political issue into a Federal
23 constitutional question, which we don't think is presented
24 here.

25 Finally, I'd like to offer just a couple of --

1 QUESTION: I just had one other question on the
2 basic standing. If their challenge is to the entire
3 statute, then they wouldn't have to allege, which I think
4 your opponent argues, rather than just to the
5 jurisdictions where there's a disparity. They do have
6 standing to make that challenge, don't they?

7 MR. DOWNING: Standing to make the challenge
8 that it's -- as applied in every case it's
9 unconstitutional?

10 QUESTION: Yes. They're claiming a total refund
11 of the whole -- so that much is at least before us.

12 MR. DOWNING: If they could succeed in their
13 argument as applied in every case --

14 QUESTION: Yes.

15 MR. DOWNING: Absolutely, I agree with you.

16 Finally, I want to make three observations that
17 this Court made 2 years ago in the Quill case, which was
18 the last time this Court had an opportunity to analyze the
19 Commerce Clause issues raised by sales and use taxes.

20 First, the Court observed and reaffirmed the
21 Bellas Hess case in large part because it viewed Bellas
22 Hess as providing a bright line rule here. As I mentioned
23 before, the Court now has an opportunity to provide
24 another bright line rule that would greatly aid States in
25 devising tax systems that they could be sure would satisfy

1 the Commerce Clause.

2 The identical treatment in each and every
3 instance approach, the problem, from the State's
4 perspective, of that approach is the State would have to
5 be clairvoyant and try to imagine a possible contingency.
6 Well, could we have any possible area of unequal
7 treatment?

8 I dare say that the States that have adopted the
9 identical use and sales tax rates in each local
10 jurisdiction probably thought that they had solved the
11 constitutional problem of -- that if there was a
12 constitutional problem, they have outlawed any unequal
13 treatment.

14 Well, the example that I gave you a few minutes
15 ago shows that that system can result in the same kind of
16 instances of unequal treatment that our system has, so it
17 would be much easier for the State to say, listen, we have
18 a tax on interstate commerce, we have a tax on intrastate
19 commerce. As long as the tax on interstate commerce is
20 not greater than the tax on local commerce, on an average
21 basis, the tax is constitutional.

22 Unless, of course, as Justice Scalia pointed
23 to -- unless, of course, there was an identifiable market
24 segment or industry that was singled out for special
25 protection, as was the case in the Bacchus case.

1 QUESTION: How does it work in States that have
2 the county option? Does the State also collect and remit
3 to the individual county, depending on what that county's
4 tax rate is?

5 MR. DOWNING: Your Honor, I'm no certain of how
6 various other States perform the task of collection. I'm
7 not certain whether it goes to the county or the State,
8 like it does in our system.

9 QUESTION: Your system, you were the innovator
10 of it.

11 MR. DOWNING: It's -- you're right, Your Honor.
12 we had the benefit of looking at what other States have
13 done, and also the input from the interstate firms that
14 were involved in the Quill case, so we were fully
15 cognizant of what other States had done when we devised
16 our system.

17 The second point I'd like to make from the Quill
18 case is, the Court recognized that the critical importance
19 of the doctrine of stare decisis in the area of State
20 taxation, for at least 67 years, the overall burden
21 approach has been firmly embedded in this Court's
22 precedents.

23 For the Court now to change that rule would
24 raise all sorts of new questions and undoubtedly engender
25 substantial litigation over the validity of a whole host

1 of State taxes that had been enacted during that time
2 period. I would submit that the Court need not open that
3 can of worms here.

4 The third point I wanted to make about Quill is
5 the point I made before. Congress has plenary power in
6 this area, as the Court recognized in Quill. If it wanted
7 to, it could outlaw the Missouri system. It has chosen
8 not to for the last 67 years -- the overall burden
9 approach -- and so therefore I would respectfully submit
10 that unless there is a clear, adverse effect on interstate
11 commerce overall, the Court should be hesitant to exercise
12 its jurisdiction in this area.

13 QUESTION: Thank you, Mr. Downing.

14 Mr. Walsh, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF THOMAS C. WALSH

16 ON BEHALF OF THE PETITIONERS

17 MR. WALSH: Thank you, Your Honor.

18 This is a discriminatory tax case. This is not
19 a burden case like Exxon, this is not a health or safety
20 measure, it's not economic regulation, it's not
21 environmental. It's a discriminatory tax case, and it's
22 guided by the Court's opinion in Complete Auto Transit,
23 and the third element of Complete Auto Transit is, no
24 discrimination against interstate commerce.

25 This Court has decided three use tax cases since

1 use taxes came into being back in the thirties. The first
2 was the Silas Mason case -- strict equality. The second
3 was the Halliburton case in 1963, where Chief Justice
4 Warren struck down for the Court a use tax which did not
5 provide strict equality. There was a differential in the
6 basis between the way the use tax and the sales taxes were
7 calculated.

8 QUESTION: Excuse me just a moment. I hate to
9 interrupt you when you're on your final thing. Are you
10 going to address standing at all?

11 MR. WALSH: Your Honor, as, I think Justice
12 Stevens said, we are attacking the statute on its face.
13 It is stipulated all of the members of our organization
14 and the individual petitioner here have paid the use tax
15 since it went into effect, so the facial validity is
16 challenged by us for having paid the use tax, and --

17 QUESTION: Is it also stipulated that you paid
18 it in jurisdictions where the use tax was higher than the
19 sales tax?

20 MR. WALSH: Not expressly, no, but we have paid
21 the tax. We are attacking 144.748 on its face. We're not
22 asking the Court to carve it up and uphold part of it
23 where it's legal and part of it where it's not legal,
24 because we don't think the statute is susceptible --

25 QUESTION: Obviously not. You don't want any of

1 it.

2 MR. WALSH: Well, but the statute isn't
3 susceptible to that, Your Honor. I mean, you'd have to
4 seriously rewrite this statute, which is a State
5 enactment, in order to come up with that sort of --

6 QUESTION: Oh, we wouldn't have to do anything
7 except say what the principle is, and the rest is for
8 State law.

9 MR. WALSH: Well, the principle is that a taxing
10 system that treats a use tax and a sales tax differently
11 is now and forever discriminatory and facially invalid,
12 and it's not General American that controls that. General
13 American was not a use tax case, was not even a modern
14 type of compensatory tax case. It was more an equal
15 protection case than a Commerce Clause case.

16 The law in this area, if you want to talk about
17 stare decisis and the bright line, the stare decisis and
18 the bright line come from Silas Mason and the Halliburton
19 case, and in Halliburton the Court said, "The conclusion
20 is inescapable. Equal treatment for in-State and out-of-
21 State taxpayers similarly situated is the condition
22 precedent for a valid use tax on goods imported from out
23 of State."

24 That's a bright line. That's the line that the
25 State of Missouri for its own reasons decided to cross in

1 this case and experiment with a new type of taxation
2 which, if permitted by this Court, I suggest could lead to
3 all sorts of abuses and, in fact, some of the amici are
4 sort of champing at the bit to see whether the opinion of
5 the Court in this case will open some new loopholes in use
6 tax regulation which, since 1937 in the Silas Mason case,
7 have been closed.

8 The bright line is desirable. The bright line
9 is equality. The State of Missouri either can enact
10 either local sales and use taxes at the State level, or it
11 can delegate to the States -- to the subdivisions the
12 right to enact local sales and use taxes, as 28 States,
13 other than Missouri, have done.

14 You're right, Justice Souter, they are a
15 pioneer -- I guess, Justice Scalia -- they are trying to
16 be a pioneer here. We think that's illegal.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walsh.

18 The case is submitted.

19 (Whereupon, at 12:00 noon, the case in the
20 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:

ASSOCIATED INDUSTRIES OF MISSOURI, Petitioners v. JANETTE M. LOHMAN, DIRECTOR OF REVENUE OF MISSOURI, ET AL.

CASE NO.: 93-397

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

BY *Don Mani Federico*

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