

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: OREGON WASTE SYSTEMS, INC., ET AL., Petitioners,  
v. DEPARTMENT OF ENVIRONMENTAL QUALITY OF  
THE STATE OF OREGON, ET AL. and COLUMBIA  
RESOURCE COMPANY, Petitioner v. DEPARTMENT OF  
ENVIRONMENTAL QUALITY OF THE STATE OF  
OREGON

CASE NO: 93-70 and 93-108

PLACE: Washington, D.C.

DATE: Tuesday, January 18, 1994

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   OREGON WASTE SYSTEMS, INC.       :

4       ET AL.,                       :

5                   Petitioners       :

6               v.                     :   No. 93-70

7   DEPARTMENT OF ENVIRONMENTAL     :

8       QUALITY OF THE STATE OF       :

9       OREGON, ET AL.;               :

10   and                               :

11   COLUMBIA RESOURCE COMPANY,       :

12                   Petitioner       :

13               v.                     :   No. 93-108

14   DEPARTMENT OF ENVIRONMENTAL     :

15       QUALITY OF THE STATE OF       :

16       OREGON                        :

17   - - - - -X

18                                       Washington, D.C.

19                                       Tuesday, January 18, 1994

20               The above-entitled matter came on for oral

21   argument before the Supreme Court of the United States at

22   10:02 a.m.

23   APPEARANCES:

24   ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of

25       the Petitioners.

1 THOMAS A. BALMER, ESQ., Deputy Attorney General of Oregon,  
2 Salem, Oregon; on behalf of the Respondent.  
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 93-70, Oregon Waste Systems  
5 v. Department of Environmental Quality, and Number 93-  
6 108, Columbia Resource Company v. the same.

7 Mr. Pincus.

8 ORAL ARGUMENT OF ANDREW J. PINCUS

9 ON BEHALF OF THE PETITIONERS

10 MR. PINCUS: Thank you, Mr. Chief Justice, and  
11 may it please the Court:

12 This case requires the Court once again to  
13 assess the validity under the Commerce Clause of a State  
14 law pertaining to interstate commerce in waste, in  
15 particular, a State tax on waste disposal. Oregon taxes  
16 disposal of waste generated outside its borders at the  
17 rate of \$2.25 per ton. Waste within Oregon, on the other  
18 hand, is taxed at only 85 cents per ton.

19 Less than 2 years ago in Chemical Waste  
20 Management v. Hunt, the Court invalidated an Alabama law  
21 that taxed disposal of interstate waste more heavily than  
22 disposal of Alabama waste. The Court observed that the  
23 tax facially discriminated against interstate commerce and  
24 that Alabama had failed to carry its burden, which the  
25 Court said was to justify the measure both in terms of the

1 local benefits flowing from the statute and the  
2 unavailability of nondiscriminatory alternatives adequate  
3 to preserve the local interest at stake. The Court  
4 accordingly held the tax unconstitutional.

5 Oregon advances three basic reasons why this  
6 case is different from Chemical Waste Management. None  
7 withstand scrutiny.

8 First, Oregon claims that its \$2.25 tax should  
9 be upheld because it is cost-based. The sum purportedly  
10 is derived from costs borne by Oregon and its political  
11 subdivisions from the disposal of a ton of waste, but the  
12 Court repeatedly has stated that cost-based fees, like  
13 other forms of State exactions, may not discriminate  
14 against interstate commerce.

15 The legal rule that Oregon advocates would  
16 permit the very sorts of burdens on interstate commerce  
17 that the court has repeatedly condemned. Highway tolls  
18 could be collected from vehicles engaged in interstate  
19 commerce but not from vehicles engaged in intrastate  
20 commerce. Inspection fees could be levied exclusively on  
21 out-of-State goods.

22 QUESTION: Well, Mr. Pincus, now, in Chemical  
23 Waste Management v. Hunt, I thought we noted that in that  
24 case the State had made no argument that the additional  
25 fee was justified as a compensatory tax of some kind, or

1     that there were other justifications.

2                 MR. PINCUS:  You did, Your Honor.  You noted  
3     that the State had abandoned the arguments on that issue  
4     that it had raised in the State courts.

5                 QUESTION:  Yes, and so I'm not sure that that  
6     case resolved this question, where the State comes in and  
7     says, well, we're charging our in-State citizens these  
8     costs by way of income taxes and so forth.

9                 MR. PINCUS:  No, Your Honor, I don't think  
10    Chemical Waste Management resolved that question, but I  
11    think that several other decisions of this Court did  
12    resolve that question, specifically --

13                QUESTION:  But do you think that we have said  
14    there can't be any compensating tax of a different type by  
15    the State on the in-State people?

16                MR. PINCUS:  No.  The Court has said there may  
17    be a compensating tax, and in fact the Court has said that  
18    it is improper to look only at the particular tax if there  
19    is a compensating tax solely on intrastate commerce that  
20    equalizes the burden on intrastate and interstate  
21    commerce.  The Court has said that, and it has elaborated  
22    a compensatory tax doctrine that sets forth two  
23    requirements that must be satisfied in order for taxes to  
24    be balanced in this way.  The burdens have to be equal,  
25    and they have to be imposed on what the Court has termed

1 substantially equivalent events.

2 QUESTION: Well, certainly the events are  
3 equivalent here, the disposal of solid waste, whether it's  
4 in-State or out-of-State.

5 MR. PINCUS: But, Your Honor, the taxes that the  
6 State points to are not levied on substantially equivalent  
7 events. That's the flaw in their argument, and that's why  
8 they don't even attempt to come within the terms of the  
9 compensatory tax doctrine, because they recognize that  
10 they can't meet that test.

11 In income tax, the tax on out-of-State waste is  
12 levied on the disposal of waste. The income tax is levied  
13 on income. Those two events clearly are not substantially  
14 equivalent, so there's no way that they can bring  
15 themselves within that doctrine.

16 And what they're really arguing, making here is  
17 an argument that the Court squarely rejected in the  
18 Scheiner case, which is that the compensatory tax doctrine  
19 should be broadened tremendously, really, and that a State  
20 should be able to point to any kind of tax, whether it's  
21 on a different group of people, or occasioned by a  
22 different event, and sort of in some way point to those  
23 taxes and say they balance out this tax and everything  
24 sort of comes out in the end, with no real way to be sure  
25 that the burdens on interstate commerce and the burdens on



1 intrastate commerce are the same, and that's the reason  
2 that the compensatory tax doctrine cases have that  
3 requirement in it, is precisely to be sure that the  
4 burdens are the same.

5 QUESTION: But Mr. Pincus, we are not so  
6 demanding in other areas. Under the Privileges and  
7 Immunities Clause, for example, it's certainly perfectly  
8 okay for a State to charge more for hunting licenses to  
9 out-of-States residents, is it not, and the theory is,  
10 well, they pay income taxes and what-not.

11 MR. PINCUS: Well, Your Honor, I don't think the  
12 Court has said one way or another. The cases -- the  
13 Privileges and Immunities cases that Oregon relies on are  
14 cases that struck down disparate fees. The Court has  
15 never said, and in those cases the Court said, disparate  
16 fees are not permissible, at least fees with that  
17 disparity. I don't think the Court has ever said that a  
18 smaller disparity --

19 QUESTION: You think they cannot charge --

20 MR. PINCUS: -- may be okay. I'm not sure, Your  
21 Honor.

22 QUESTION: I'm glad to hear that, but I always  
23 thought that they could do it.

24 MR. PINCUS: Well --

25 QUESTION: Mr. Pincus, what about in-State

1 tuitions, tuitions for in-Staters of State universities  
2 being considerably lower for out-of-Staters on the theory  
3 that the in-Staters pay State income tax and are  
4 supporting --

5 MR. PINCUS: Well, in the State university  
6 context, Your Honor, I think the State there, those types  
7 of disparities I think would fall within the market  
8 participant doctrine that the Court has elaborated under  
9 the Commerce Clause, which is where the State has entered  
10 into the marketplace, where it's not acting as a regulator  
11 but it is acting -- providing services or goods in  
12 competition, really, with the private sector. It can  
13 discriminate in favor of its own citizens, and I think the  
14 colleges and university examples would fit squarely within  
15 that rubric.

16 QUESTION: You think hunting, too, maybe -- it's  
17 providing wild beasts --

18 MR. PINCUS: No, I don't think that hunting  
19 would fit within that. I'm not -- first of all, I don't  
20 think the Court has ever said that the Commerce Clause is  
21 in all respects -- provides protections equivalent to the  
22 Privileges and Immunities Clause or vice versa.

23 I think the Court has been very clear in its  
24 Commerce Clause cases, where it's grappled with this very  
25 precise question, to say that taxes must be equal. It

1 hasn't had to deal with that question in a Privileges and  
2 Immunities context, and it may be that they're different.

3 But in the Commerce Clause context, where the  
4 question is possible competitive disadvantages to out-of-  
5 Staters simply because they're out-of-Staters, and that --  
6 with the very, very significant interest that the Court  
7 has found in maintaining a national economy, I think there  
8 the Court has come down squarely in favor of absolute  
9 equality.

10 And I think it would be a very significant  
11 departure from the Court's Commerce Clause cases, again  
12 where it has specifically addressed this question, to say  
13 that oh, we didn't really mean it, rough equality is okay,  
14 and I think the problem with the argument here is there's  
15 really no way to know how rough the equality is, how  
16 rough -- or whether there's any real equality in what  
17 Oregon has proposed.

18 QUESTION: But if you're going to insist on  
19 absolute equality, that's a test that can never be met. I  
20 mean, you say rough equality is no good at one end of the  
21 spectrum, but certainly absolute equality is just an  
22 impossible standard to meet.

23 MR. PINCUS: I don't think so, Your Honor,  
24 because I think if there was a \$2.25 -- the same \$2.25 tax  
25 on disposal of Oregon-generated waste there would be

1 equality here.

2 QUESTION: Well, yes, but that's the kind of  
3 equality that lets the State do nothing. I thought we  
4 were talking about possible alternates, and that there has  
5 to be equality between the alternate and the tax imposed  
6 on interstate commerce.

7 MR. PINCUS: Well, although, in the compensatory  
8 tax doctrine cases, that's really what the Court has  
9 insisted on, and that's why the issue has come up in four  
10 or five cases.

11 The Court has only found one situation, the  
12 sales and use tax, where there really is -- where the  
13 taxes are so interlocking, and the rates are the same,  
14 that that test is satisfied.

15 But in a case like the Court's Armco case, for  
16 example, where there was an out-of-State tax on  
17 wholesale -- sales at wholesale of goods within the State,  
18 and an in-State tax solely on manufacturing, which was at  
19 a higher level, the Court said we're not going to balance  
20 these two taxes, because we just don't know how much of  
21 the in-State tax, although it's higher, is to make up for  
22 wholesaling, and whether or not it in fact balances the  
23 out-of-State tax, and we're going to insist, because we  
24 want to safeguard this important value of the Commerce  
25 Clause on equality, and the Court has done that --



1           QUESTION: Well, it's one thing to say we just  
2 don't know. It's another thing to say that based on what  
3 we know, absolute equality is required, rather than  
4 something pretty close to it.

5           MR. PINCUS: Well, Your Honor, I don't think  
6 this case requires the Court to come to the sort of --

7           QUESTION: But isn't it your position -- I think  
8 you were candid before when you said, Oregon's got a  
9 charge, \$2.25. They want to give everybody a break, they  
10 could charge .85, but isn't your argument that it's got to  
11 be the same charge for the out-of-Staters --

12          MR. PINCUS: Yes. We think --

13          QUESTION: -- out-of-State garbage as for the  
14 in-State?

15          MR. PINCUS: We think that is the appropriate  
16 result for this case. We think that's --

17          QUESTION: Is there anything in between that you  
18 think is compatible with the Commerce Clause?

19          MR. PINCUS: Well, as we suggest in our reply  
20 brief, if Oregon wants to re-allocate the tax burdens  
21 among in-State people, it can do so through the use of a  
22 subsidy to the people who are paying the \$2.25 tax.

23          The Court made clear, it's made clear in a  
24 number of cases, most recently in the New Energy case,  
25 that subsidies are not reached by the Commerce Clause and

1 States may do things that may have very, very similar  
2 economic effects to discriminatory taxes when they act  
3 through subsidies rather than through taxation.

4 So in this case we think that Oregon could have  
5 an even-handed tax, and to the extent it wanted to  
6 distribute the tax -- the part of the in-State tax among  
7 groups other than the generators of waste, it can do so by  
8 use of a subsidy, and that preserves the value of the  
9 Commerce Clause because the taxes are equal, and it allows  
10 the States --

11 QUESTION: What is the underlying premise for  
12 that distinction? That's just formalism that the law must  
13 accept for simplicity's sake, or --

14 MR. PINCUS: The distinction between those two  
15 alternatives? Well, I think --

16 QUESTION: No, the justification for allowing a  
17 subsidy. Suppose there was a subsidy that precisely  
18 equaled the 85 cent to 25 cent differential to all Oregon  
19 waste disposal companies.

20 MR. PINCUS: I think there are several reasons.  
21 First of all, the subsidy would certainly have to meet a  
22 rational basis. The reason for the subsidy would have to  
23 be rational. It couldn't just be some completely  
24 untenable reason. I think the reason --

25 QUESTION: Well, the reason would be, we like

1 people in the waste business. That almost suffices for a  
2 rational basis for State benefit, doesn't it?

3 MR. PINCUS: But I think the virtue of that is  
4 that it forces -- one of the values that the Court has  
5 recognized underlying the Commerce Clause is the  
6 protection of out-of-State interests who are not  
7 represented within the State's political process, and  
8 that's one of the reasons why the Court has been so strong  
9 in requiring equality.

10 In the subsidy situation, the people whose ox is  
11 being gored, as it were, are the people who are going to  
12 be financing the subsidy, and to the extent those are in-  
13 state interests that have a voice in the political  
14 process, the State will have to face up to the fact -- to  
15 what it's doing, which is reallocating the tax burden away  
16 from generators and to another group of taxpayers, some of  
17 whom will probably be within the State, and that battle  
18 will be fought out in the political process.

19 The problem with allowing the discriminatory tax  
20 is that the people whose ox is gored there are people who  
21 are not -- have no voice in the political process.

22 QUESTION: I would have thought that you'd make  
23 the same argument to invalidate the subsidy. It treats  
24 out-of-Staters unconstitutionally. It discriminates  
25 against them.

1                   MR. PINCUS: Well, it does, Your Honor, but the  
2 Court -- we are faced with the Court's precedents, which  
3 say that subsidies are different, that the Commerce Clause  
4 speaks to the State's exercise of its regulatory  
5 authority, and the Court most recently --

6                   QUESTION: But the theory doesn't hold water  
7 very well, it seems to me. What about States that charge  
8 out-of-State students more tuition than in-State students?  
9 Is that invalid under your theory, under the Commerce  
10 Clause?

11                  MR. PINCUS: No, Your Honor. I think that that  
12 is a situation where the State is not acting as a  
13 regulator. The State is acting as a service provider, a  
14 market participant, and the Court has recognized that when  
15 the State acts as a market participant and not as a  
16 regulator, it may discriminate in favor of its own  
17 citizens, and so I think in that situation, that lesser  
18 charge is completely permissible under the Court's cases  
19 and wouldn't be affected at all by overturning Oregon's  
20 tax in this case, but here Oregon is acting as a  
21 regulator.

22                  QUESTION: What about the Evansville Airport  
23 case? Did that address that aspect?

24                  MR. PINCUS: No. The Court there applied the  
25 full Commerce Clause test in that case, and held that the



1 nondiscrimination requirement was satisfied.

2 QUESTION: It didn't rely on the market  
3 participation theory.

4 MR. PINCUS: It didn't, but that was not -- I  
5 think that the university situation is a clearer  
6 situation, where the State is in the market, competing  
7 with private providers of the same service, and I think  
8 it's quite clear that in that situation the Court has said  
9 the State can discriminate, but when it's acting as a  
10 regulator, it can't.

11 QUESTION: Mr. Pincus, I'm going to ask you a  
12 question about the facts. When you sort of acknowledge  
13 that a subsidy could pretty well accomplish the same  
14 thing, tell me exactly, what does your client do? Is it a  
15 disposal outfit, or --

16 MR. PINCUS: It's a disposal company.

17 QUESTION: And some of the trash that comes to  
18 it comes from in-State and comes from out-State, and  
19 they're fungible as far as the actual process is  
20 concerned, but you pay a different fee to the State on one  
21 source --

22 MR. PINCUS: Right.

23 QUESTION: Now, how does the subsidy work? Do  
24 you mean to say that the State could remedy this by having  
25 you pay the same fee to everybody and then they just

1 rebate on a portion of your disposal an amount equal to  
2 the difference that's now there? You're saying that would  
3 be perfectly all right?

4 MR. PINCUS: Well, Your Honor, exactly -- the  
5 Court has another case, the Westland Creamery case, which  
6 deals with some questions about the linking of taxes and  
7 subsidies, but I think in this case what would happen is  
8 we would -- there would be an even-handed tax to protect  
9 the values of the Commerce Clause -- yes, then the State  
10 could, from its general Treasury, rebate some of that  
11 money.

12 QUESTION: To you.

13 MR. PINCUS: Yes, and we would then be --

14 QUESTION: And you say that's constitutionally  
15 different from what's happening now.

16 MR. PINCUS: Well, we think it is, Your Honor,  
17 because what will happen -- and I think what's interesting  
18 is to look at Oregon's fall-back position in this case,  
19 because its statute contains sort of a fall-back provision  
20 in case this tax is held unconstitutional, and what Oregon  
21 has done is not to raise everybody up to \$2.25, and have  
22 some kind of a subsidy, it's to lower everybody's -- lower  
23 the out-of-State rate to 85 cents, and I think what may  
24 happen, when the rate to be imposed on in-State interests  
25 and out-of-State interests is the same, is that the

1 political process may work to have a lower rate, and I  
2 think --

3 QUESTION: But within the political process what  
4 you'd say is, now look, you voters, this is a win-win  
5 proposition. We're going to charge you a big tax, but  
6 we're going to give it all back --

7 MR. PINCUS: But, Your Honor --

8 QUESTION: -- and that means the out-of-State  
9 people will bear the brunt. You can't lose.

10 MR. PINCUS: But you have to say we're giving it  
11 back from some other pot of money, which is coming from --

12 QUESTION: Well, suppose it's the same --

13 MR. PINCUS: Perhaps from --

14 QUESTION: Suppose it's the same -- suppose it's  
15 the same fund.

16 MR. PINCUS: But it may be coming from different  
17 in-State interests than -- what Oregon wants to do here is  
18 --

19 QUESTION: Well, why would it, if it's just a  
20 rebate of the tax?

21 MR. PINCUS: Well, I --

22 QUESTION: 100 percent of what you pay if you're  
23 in-State goes back to you, or 85 percent, and 100 percent  
24 of what the out-of-State people pay doesn't go back to  
25 them. It's a very tidy scheme.

1 MR. PINCUS: Well, Your Honor, I don't -- I  
2 think --

3 QUESTION: And I don't see --

4 MR. PINCUS: -- one of the things --

5 QUESTION: -- how the political process could  
6 object to that.

7 MR. PINCUS: Well, some people may object to  
8 paying higher taxes because it won't come out in the wash  
9 in terms of where you get the money from. I think that's  
10 the problem.

11 QUESTION: Well, I assume that these taxes are  
12 just imposed on the company that disposes of the garbage,  
13 not on the householder, right?

14 MR. PINCUS: Yes, although they typically are  
15 passed through by --

16 QUESTION: Well, but people don't understand  
17 that. I mean, that's why they talk about free television.  
18 They don't understand that, right? So what you would  
19 propose to the voters of Oregon is that everybody pay more  
20 taxes in order to subsidize Oregon garbage disposers, and  
21 I -- that doesn't sound like a very -- that is not a big  
22 winner --

23 MR. PINCUS: Well, I think that's right, Your  
24 Honor.

25 QUESTION: -- I think.



1           MR. PINCUS: That's why the political system, I  
2 think, will take care of the question. I don't think -- I  
3 don't think it's easy to say this will all come out in the  
4 wash, because one of the things the Commerce Clause  
5 recognizes is that when in-State interests are squarely  
6 confronted with shouldering the burden that is being  
7 imposed on out-of-State interests, that burden may not be  
8 as high as it might otherwise be, and I think that's the  
9 process point that will be accomplished if Oregon is  
10 required to act through even-handed taxes, and that's  
11 something the Court has recognized repeatedly in its  
12 cases.

13           QUESTION: So if the tax just went into a  
14 special fund, the waste disposal fund, and went right  
15 back, it never goes into the general Treasury, everybody  
16 that's in the waste disposing business pays the tax, but  
17 if you're in-State, you get it back. It's all earmarked  
18 as a special fund. Would that be valid?

19           MR. PINCUS: Well, that's --

20           QUESTION: And they call it a subsidy. They  
21 call it a rebate-subsidy.

22           MR. PINCUS: I think one question that the Court  
23 is going to grapple with in Westland Creamery is whether,  
24 in fact, there can be such a tight linkage between an  
25 even-handed tax and a subsidy, or whether in a scheme like

1 that, where the general revenue funds aren't involved,  
2 what you'll have -- what you'll end up with is something  
3 where you netted out that's very close to a discriminatory  
4 tax.

5 But even if that's true, I think there are -- as  
6 Justice Scalia pointed out, it's not that clear that it  
7 would work that way, and second of all, I think another  
8 thing that has to be considered is what Oregon has done  
9 here is to create a tax that recovers "costs," and I think  
10 as it explains in the last footnote of its brief, it  
11 defines costs very broadly. It's not talking simply about  
12 out-of-pocket costs. It's talking about potential costs  
13 that might happen if certain events come to pass, it's  
14 talking about social costs --

15 QUESTION: Well, didn't the supreme court of  
16 Oregon say that some of that material simply couldn't be  
17 looked into in this particular proceeding because of the  
18 nature of the proceeding?

19 MR. PINCUS: It did, Your Honor. It reserved  
20 the excessiveness point, but I think this point also  
21 relates to the possibilities of discrimination if the  
22 Court were to establish a different rule for something  
23 that could be denominated as a user's fee.

24 It puts tremendous pressure on the concept of  
25 costs, because a State if it wants to engage in imposing

1 discriminatory exactions has a tremendous incentive to put  
2 its levy into the user fee box and then to cast its net  
3 very broadly in terms of the costs that it's seeking to  
4 recover.

5 And I think not only the excessiveness prong of  
6 the Court's Commerce Clause doctrine but also the  
7 antidiscrimination prong worked to protect that, because  
8 if the legislature has to impose the same cost recovery  
9 burden on in-Staters as out-of-Staters, it may be a little  
10 reluctant to inflate or cast its net very broadly in  
11 looking for the kinds of costs that can be covered, and I  
12 think exactly the opposite will happen if user fees are  
13 granted some kind of an exemption from the discrimination  
14 prong and the rule simply is you can do whatever you want.

15 Then the problem's going to be that there will  
16 be great pressure to put more fees into that box to avoid  
17 precisely the legal rule that Oregon is seeking to avoid  
18 here, and the legal rule that has tripped up a number of  
19 user fees that the Court has considered.

20 QUESTION: Would it really be appropriate for us  
21 to get into the compensatory tax issue here, because that  
22 isn't the basis for the Oregon ruling. The basis for the  
23 Oregon ruling was simply that there was a relationship  
24 between the tax or the fee charged and State costs, and do  
25 we have any broader issue than simply the sufficiency of

1       that reasoning?

2               MR. PINCUS: Well, as a threshold matter, I  
3       think the question that we raised in the petition is  
4       whether there is this exemption from the discrimination --  
5       antidiscrimination rule for cost-based fees. I think  
6       you're right, Your Honor, and I think that is the question  
7       the Court has to resolve. Oregon I think has raised a  
8       number of alternative arguments -- arguments that I guess  
9       are in the nature of alternative arguments supporting the  
10      judgment.

11              QUESTION: But of course, by the nature of the  
12      record we have, we really couldn't come to any decision on  
13      that, could we?

14              MR. PINCUS: Well, I think you could, Your  
15      Honor, because I think that the compensatory tax argument  
16      that they're making here is a legal argument. What  
17      they're basically saying is, the rules that the Court has  
18      elaborated in the compensatory tax doctrine don't apply,  
19      so I think if they win that legal ruling --

20              QUESTION: Anything goes, yes.

21              MR. PINCUS: I think, if you agree with us that  
22      they do apply, I think it's clear that their argument can  
23      be rejected. If you agree with them that they don't  
24      apply, I think they do have a further factual burden to  
25      carry in terms of meeting whatever the requirements are of

1 the legal standard they are proposing, but I think under  
2 the existing precedent, which is quite clear, they don't  
3 meet that test, and I think the Court can hold that.

4 QUESTION: Your answer, then, to the question  
5 reserved in the footnote in Chemical Waste, your answer  
6 is, no there can't be a cost-justified --

7 MR. PINCUS: No, Your Honor, our answer is that  
8 interstate commerce can be made to pay its way, but the  
9 State can't at the same time allow intrastate commerce to  
10 escape from that burden, that it's a two-way street, and  
11 our answer to the footnote is yes, certainly cost-based  
12 fees can be recovered, as long as they're recovered even-  
13 handedly, but what Oregon has chosen to do here is to  
14 recover the costs only from interstate commerce and to  
15 give -- not to recover them fully from intrastate  
16 commerce, and that we say it can't do.

17 QUESTION: But in this picture it's got to be  
18 initially a uniform fee and then you're reserving the  
19 question of a subsidy, whether the subsidy might be a  
20 subterfuge for the discrimination or whether it was a  
21 legitimate subsidy.

22 MR. PINCUS: Exactly, Your Honor. We think that  
23 really, unless the Court is going to rework significantly  
24 the jurisprudence in this area that the Court has laid  
25 down the clear principle the taxes have to be even-handed.



1 There is an exception to that, the compensatory tax  
2 doctrine, that is hedged with this very -- the  
3 equivalent -- substantial equivalent event requirement.  
4 That clearly isn't met. Oregon recognizes that it's not,  
5 and we think that's the end of their argument here.

6 Unless the Court has any further questions, I'll  
7 reserve my time.

8 QUESTION: That's also the end of my argument.

9 QUESTION: Thank you, Mr. Pincus. We'll hear  
10 argument now from you, Mr. Balmer.

11 ORAL ARGUMENT OF THOMAS A. BALMER

12 ON BEHALF OF THE RESPONDENTS

13 MR. BALMER: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 If Oregon is to recover its actual costs of  
16 regulating its disposal of out-of-State waste that comes  
17 into Oregon, a clearly legitimate State objective, it can  
18 only do so in one way, by imposing a user fee on that  
19 waste when it is dumped.

20 The question in this case is whether Oregon must  
21 recover the costs of in-State waste by imposing an  
22 identical user fee on in-State waste, or whether Oregon  
23 has the flexibility to pay some of those in-State costs  
24 with general fund revenues.

25 In answering this question, I'd like to address

1 three points: first, the way Oregon recovers the cost of  
2 its solid waste program, and why that method is not  
3 facially discriminatory, and second, the reasons Oregon  
4 uses some general funds to pay in-State waste costs, and  
5 third, the absence in this cost-recovery structure of any  
6 economic protectionism or any other impermissible effect  
7 on interstate commerce.

8 First, Oregon's system for recovering the cost  
9 of its solid waste program is not facially discriminatory.  
10 This is a facial challenge, and Oregon's statute says that  
11 "costs to the State of disposing of solid waste generated  
12 out of State which aren't otherwise paid for can be  
13 recovered through a fee, a surcharge on that out-of-State  
14 waste."

15 Thus, the costs paid by out-of-State waste are  
16 limited by statute and that has to be accepted, given the  
17 nature of this proceeding, to the regulatory costs that  
18 are attributable to out-of-State garbage. Out-of-State  
19 waste does not subsidize the costs attributable to Oregon  
20 waste.

21 QUESTION: How do we know that?

22 MR. BALMER: On this record, Your Honor, which  
23 they have expressly said is purely a facial challenge, the  
24 statute says they have to pay their costs. All other  
25 costs, by definition, really, Oregon interests have to

1 pay.

2 QUESTION: Right, but ultimately, a court would  
3 have to examine the calculations that have been made to be  
4 sure that Oregon was telling the truth about what  
5 percentage of all of the trash disposed of in Oregon is  
6 out of State and what percentage of the costs go to that,  
7 right?

8 MR. BALMER: That's absolutely correct, and  
9 they --

10 QUESTION: That's a lot of work, and have courts  
11 traditionally done that in Commerce Clause cases?

12 MR. BALMER: The courts have done that in all  
13 sorts of cases. They've done it -- they do it and the  
14 costs themselves are initial in many kinds of cases.

15 QUESTION: Suppose New York State comes in and  
16 says, we have calculated that of the total amount of  
17 funding for our police and security forces in the State,  
18 10 percent is attributable to protecting interstate  
19 commerce, and therefore we're going to charge all trucks  
20 entering the State a fee that -- the total amount of which  
21 will equal 10 percent of the total State police  
22 protection. Is that okay under your theory?

23 MR. BALMER: I think that's probably okay. I  
24 think that's a tougher case, and this Court has --

25 QUESTION: Well, we'd have to go in and examine

1     whether, indeed, 10 percent of New York's police  
2     protection goes to interstate commerce, right?

3             MR. BALMER: That's right. Out-of-State  
4     interests could sue and claim that we aren't being  
5     assessed the appropriate costs.

6             QUESTION: Wow.

7             QUESTION: And you could do the same thing for  
8     bridges, bridge tolls and highway tolls?

9             MR. BALMER: The reason I'm hedging a little bit  
10    is transportation is a little bit different, frankly. I  
11    think this Court has always recognized that modes of  
12    transportation, because they by definition move in  
13    interstate commerce, that's how that business works, are  
14    particularly susceptible to discriminatory State fees.

15            QUESTION: Well, one thing is to check to see  
16    that the cost calculation, and that's the problem with  
17    this. It would be not an easy check to make, but is your  
18    theory any different? I mean, this trash waste moves in  
19    interstate commerce, too, there's no question about that.

20            MR. BALMER: No question about that.

21            QUESTION: And if the State can figure out what  
22    it costs for out-of-Staters to use its roads or its  
23    bridges, why wouldn't the identical theory apply?

24            MR. BALMER: I think that our basic answer is  
25    that if the costs are reasonable, if they're fairly

1     apportioned, that that theory would apply.

2             QUESTION: And the burden is on the other side  
3     to show that they're not. You say, it's facially okay  
4     unless and until the other side can get some court to  
5     figure out that it's not fairly apportioned, right, isn't  
6     that your theory?

7             MR. BALMER: That's correct.

8             Justice Scalia, you asked Mr. Pincus about any  
9     Commerce Clause cases, and in Dean Milk, the Court  
10    suggested exactly what Oregon does here. They said, as an  
11    alternative to keeping out out-of-State milk that isn't  
12    pasteurized within 5 miles of Madison, you could inspect  
13    the out-of-State milk and charge the out-of-State milk  
14    producers the cost of that regulatory program. That's  
15    really what we're doing here.

16            QUESTION: That's a program that would be  
17    applied only to the out-of-State milk. You're only  
18    setting up the inspection for the out-of-State milk,  
19    because in Dean Milk the in-State processing facilities  
20    were inspected in-State. I mean, that's perfectly --

21            MR. BALMER: Well, but I think they were  
22    inspected in-State, and at least as far as you can tell  
23    from the opinion, the in-State interests were paying in-  
24    State inspection costs. What they're really --

25            QUESTION: Yes, but the dairies weren't. They



1       were out of general revenues in Dean Milk.

2               MR. BALMER: That's right, the dairies were out  
3       of general revenues, and that is really their complaint  
4       here. If they --

5               QUESTION: I've always read Dean Milk as saying  
6       that you could charge for the additional cost of the  
7       inspector to travel. I don't read it as a subvention of  
8       100 percent of the inspection scheme if the locals aren't  
9       paying the same.

10              MR. BALMER: Well, I think that --

11              QUESTION: I think you take Dean Milk somewhat  
12       too far.

13              MR. BALMER: I think that that suggestion's  
14       there. I don't think Dean Milk -- I don't think that's a  
15       necessary part of the holding, but I think that suggestion  
16       is there that those costs could be incurred through a  
17       regulatory fee imposed on out-of-State commerce.

18              What they're really complaining about here is  
19       the fact that we use general funds to pay part of the  
20       Oregon inspection program, and we submit that this cost  
21       recovery structure is consistent with the Commerce Clause  
22       because the structure doesn't discriminate on its face, it  
23       is facially neutral. The appropriate standard here is  
24       that which the Court used in Pike v. Bruce Church and in  
25       the Sporhase case.

1 QUESTION: Why is this facially neutral if the  
2 out-of-State garbage pays one rate and the in-State pays  
3 another? Why isn't that facially discriminatory?

4 MR. BALMER: The costs are imposed in an even-  
5 handed manner. Out-of-State waste, because it's the only  
6 way we can recover that cost from out-of-State waste, pays  
7 a user fee. In-State waste pays through a combination  
8 of -- or in-State interests, I should say, pays the same  
9 costs, the costs that the State incurs in handling in-  
10 State waste through a combination of a user fee and  
11 general taxes.

12 QUESTION: No, but the processing company that's  
13 involved here pays \$2.25 a ton on waste that comes from  
14 out-of-State and 85 cents a ton on waste that's generated  
15 in the State. Maybe it's justified, but at least  
16 facially, there's a disparity there, isn't there?

17 MR. BALMER: Well, the disparity is only if you  
18 look at the user fee portion.

19 QUESTION: Only if you look at the face of the  
20 statute.

21 MR. BALMER: No, if you look at the face of the  
22 statute it says, out-of-State waste pays costs and in-  
23 State waste pays its cost.

24 I think what we have to focus on here --

25 QUESTION: So it's -- so it's facially

1 nondiscriminatory as long as you ignore the amount of the  
2 fee.

3 MR. BALMER: I agree that the fee, the user fee  
4 portion of this is different.

5 QUESTION: No, but that's what you're saying,  
6 isn't it?

7 I mean, we don't judge whether the tax is  
8 facially discriminatory based on whether the State says  
9 we're being fair. We judge it based on what it charges,  
10 don't we?

11 MR. BALMER: And it charges the same amount to  
12 in-State interests.

13 QUESTION: Facially we can't say that.

14 MR. BALMER: Facially, you cannot say that it  
15 charges an in-State waste producer the same as it charges  
16 an out-of-State waste producer, that is true. There's a  
17 facial difference there, but facially it charges the same  
18 costs to in-State interests. We pay some of them through  
19 the general fund --

20 QUESTION: You mean the same claim to  
21 justification is claimed for each fee. That's what it  
22 boils down to.

23 MR. BALMER: That's right, that the fees -- no.  
24 No, the same --

25 QUESTION: That's -- whatever that is, that's

1 not a facial criterion. I mean, that is a facial  
2 criterion so broad as to be meaningless.

3 MR. BALMER: Well, it is -- because all they're  
4 being required to pay are their costs, we are funding --  
5 we are covering all our costs. Now, I think this will  
6 be --

7 QUESTION: To do that, you have to go far, far  
8 beyond the -- behind the face of the tax statute. Maybe  
9 we're just arguing about words here, but it seems to me  
10 that the notion of what is facially discriminatory is not  
11 the notion that you are describing in your answer to  
12 Justice Stevens or your answer to me.

13 MR. BALMER: I think that maybe what we're  
14 missing here is the fact that there is no impermissible  
15 effect on commerce as a result of this differential fee.

16 QUESTION: How did we get into that on a facial  
17 challenge?

18 MR. BALMER: Well, I think --

19 QUESTION: Part of your argument is that the  
20 very scheme under which they brought the challenge limited  
21 it to certain facial characteristics. You look to the  
22 regulation, you look to the statute, and you look to the  
23 State's administrative procedure scheme, and it seems to  
24 me you are now saying well, we're going to justify it on  
25 grounds which could not have in fact even been considered

1 by the State court, given the nature of the challenge  
2 here. Isn't that fair to say?

3 MR. BALMER: I think that when -- if you are  
4 looking just at the fee, that is true, there is a  
5 difference. They brought this challenge in a facial  
6 manner where they had to assume the costs we were  
7 recovering from out-of-State interests are the same as the  
8 costs that are being from in-State interests, and that was  
9 the basis on which the case was reviewed in the Oregon  
10 courts, and the Oregon courts said, we can't tell on this  
11 record that the fee is disproportionate to the services  
12 the State provides. Now, if --

13 QUESTION: There are two different notions of  
14 facial challenge involved. One is on the face of the  
15 statute there are disparate exactions, and therefore, on  
16 the face of it, there is a discrimination, whereas the  
17 Oregon court said, oh, no, that's not what is meant here.  
18 What is meant here is that if on any conceivable set of  
19 facts this might -- this disparate fee scheme might be  
20 sustained, it's constitutional. That's the notion of  
21 facial challenge that you're taking refuge in now, isn't  
22 it, the latter one?

23 MR. BALMER: That's essentially correct. The  
24 reason I think that the Spohr and similar cases apply  
25 is that we are burdening in-State interests in a way that



1 is similar to the way we are burdening out-of-State  
2 interests, and I'll accept that it is true that there is a  
3 difference in the way we collect that fee, but we are  
4 not --

5 QUESTION: There's this difference, too. The  
6 only out-of-State interest -- you say out-of-State  
7 interests. The only out-of-State interest you collected  
8 from are garbage-disposers.

9 MR. BALMER: That's right.

10 QUESTION: Whereas you collected from all in-  
11 State interests, not just garbage disposers.

12 MR. BALMER: That's right.

13 QUESTION: Everybody within the State.

14 MR. BALMER: That's right.

15 QUESTION: Well, that's a wonderful way of  
16 favoring one of your industries to the disadvantage of  
17 out-of-State industries. You are giving that industry a  
18 disproportionate advantage.

19 MR. BALMER: We're -- it's --

20 QUESTION: By charging the out-of-State industry  
21 a higher fee than the in-State industry pays, and it seems  
22 to me no defense to that to say, well, the in-State  
23 industry may not pay those fees, but other "in-State  
24 interests" pay those fees.

25 MR. BALMER: This would be a more difficult case

1 if we were talking about products that actually compete in  
2 a marketplace. Now, garbage is commerce, and there are  
3 markets that are affected by this fee, but I think it  
4 would be a different case if we were charging a different  
5 fee for out-of-State apples that came into Oregon and we  
6 inspected and subsidizing that fee for in-State apples.  
7 There, we're having a direct effect right at the market.

8 QUESTION: You're not selling garbage, you're  
9 selling space. You're selling garbage disposal space.

10 MR. BALMER: Right.

11 QUESTION: I think anybody who thinks this isn't  
12 commerce is --

13 MR. BALMER: No, no, it is commerce, and we're  
14 selling disposal space but we --

15 QUESTION: And you're selling it for in-State  
16 people cheaper than for out-of-State people. You're  
17 making out-of-State people pay a premium.

18 MR. BALMER: Well, there's no -- none of the  
19 petitioners here are really complaining about that aspect  
20 of it. The Oregon Waste Systems wants in-State waste to  
21 come and be dumped in their garbage pit, and --

22 QUESTION: Sure, because it's cheaper. Because  
23 the fee is cheaper.

24 MR. BALMER: Sure.

25 QUESTION: They get 100 tons, half of it from

1 out-of-State and half in-State, the half in-State is more  
2 profitable to them, so they can give a lower price to  
3 those in the State than the people out-of-State will pay  
4 for precisely the same service, so the tendency will be to  
5 have a rate structure that will discourage garbage from  
6 coming across State lines.

7 MR. BALMER: But this Court has always held that  
8 we can recover from out-of-State business the cost that  
9 out-of-State business impose upon the State, and if our  
10 fee is based on cost, then we can do it.

11 Now, the way we finance the in-State portion of  
12 that -- and we finance it over general funds the way  
13 States have traditionally financed essential State  
14 services.

15 QUESTION: But it's your financing argument that  
16 it seems to me makes your premise illogical. You begin by  
17 saying, we're going to compare in-State and out-of-State  
18 garbage processors, but you then say that the in-State  
19 processors are subsidized by the general revenues, and  
20 that takes away the validity of your classification,  
21 because we're no longer comparing in-State and out-of-  
22 State garbage processors. We're comparing out-of-State  
23 garbage processors with the whole State of Oregon, which  
24 gives a definite competitive advantage to the in-state  
25 processor. You've destroyed your classification by the

1 explication you give for the local subvention.

2 MR. BALMER: Well, we are giving in-State  
3 interests, in-State garbage producers -- I'm not sure I  
4 know what you mean when you say, processors. In-State  
5 garbage producers receive some benefit at the expense of  
6 Oregon's general taxpayers, and -- but that is the same  
7 sort of benefit that you get by being a citizen of a State  
8 that has low property tax or finances any other Government  
9 service through general funds as opposed to financing it  
10 exclusively through a user fee.

11 QUESTION: But it seems to me --

12 MR. BALMER: It's like a subsidy.

13 QUESTION: -- at the end of your analysis, your  
14 comparative classes are two: a) out-of-State garbage  
15 collectors, b) everyone in the State of Oregon, and that's  
16 not the basis on which you must make the comparison for  
17 Commerce Clause purposes. You end up at a point different  
18 from where you began, and your whole analysis changes.

19 MR. BALMER: Well, Justice Kennedy, I think that  
20 the -- we cannot -- the only way we can make out-of-State  
21 garbage pay its way is through a user fee. That fee is  
22 imposed in one way or another on the out-of-State waste  
23 generator.

24 Now, I agree, if you compare the out-of-State  
25 waste generator that has to pay, indirectly, \$2.25, with

1 the in-State waste generator, the person that produces the  
2 garbage, there is a difference, but the benefit to the in-  
3 State waste generator is simply an incidental benefit to  
4 Oregon's efforts to 1) collect the costs of out-of-State  
5 garbage, because there's no question on this record that  
6 those are legitimate costs, and 2) to spread the costs of  
7 Oregon's waste reduction efforts over all its citizens.

8 It's certainly a legitimate objective for the  
9 State to say, everybody in Oregon benefits from a clean  
10 environment, and so we're going to make everybody pay some  
11 of the cost. We're not going to make it be borne entirely  
12 by the garbage producer.

13 And it's also legitimate to say, as the States  
14 do in other cases involving essential services, we need to  
15 have a stable funding source. We're going to fund this  
16 through the income tax. We're going to spread it broadly.  
17 We're not going to make it subject to the vagaries of the  
18 user charge.

19 QUESTION: Well, but that's the whole question.  
20 It may not be legitimate under the Commerce Clause.

21 Suppose that, to take the college example --  
22 now, let's see, Reed College is a private college.  
23 Suppose Oregon had a tax on all out-of-State students who  
24 come to Oregon private colleges, and said, well, they've  
25 increased police, and they use public services, and the



1 Oregon students don't have to pay that because it's funded  
2 by everybody. It seems to me that would be clearly  
3 unconstitutional, because it's quite a different class  
4 that is bearing the out-of-State tax that's bearing the  
5 in-State tax.

6 MR. BALMER: I think that example raises some  
7 right-to-travel and other questions, but I think that if  
8 Oregon wanted to impose a cost-based charge on out-of-  
9 State garbage coming in, students coming in -- actually,  
10 when you think about the student example as an individual  
11 coming to the State I think it's a much more complicated  
12 example than we've got here, but if we keep it at the  
13 level of commodities, particularly commodities that don't  
14 compete with each other in the same way, we think that  
15 given the Commerce Clause analysis that ought to be  
16 applied here, which is the more flexible Pike v. Bruce  
17 Church standard, that we should meet that test.

18 QUESTION: May I ask another question? The fees  
19 you're recovering are for the cost of the inspection  
20 primarily, is that right?

21 MR. BALMER: The -- there are inspection costs,  
22 there are landfill siting expenses, post closure  
23 expenses -- essentially it's --

24 QUESTION: What do you mean by siting? What do  
25 you mean, inspecting a new facility? What's a siting

1 cost?

2 MR. BALMER: A siting cost is, if we fill up  
3 these landfills more quickly we're going to have to site  
4 new landfills. That requires engineering studies, it  
5 requires a State to go out and inspect -- what's covered  
6 here is essentially the cost of managing Oregon's solid  
7 waste program, which includes a whole bunch of things.

8 QUESTION: And in each of those functions the  
9 inspector or the person who approves new sites and so  
10 forth doesn't draw any distinction whatsoever based on the  
11 source of the garbage.

12 MR. BALMER: Well, those functions --

13 QUESTION: If he's inspecting a plant that's in  
14 operation, for example, he doesn't say, well, you're going  
15 to use in-State garbage through a certain incinerator and  
16 in-State garbage in a different incinerator. It's all  
17 dumped in the same incinerator, isn't it?

18 MR. BALMER: It's all dumped in the same  
19 incinerator, and the real question is, how many tons are  
20 dumped into it, and if 5 percent of the tons are from out-  
21 of-State interests, then we allocate essentially 5 percent  
22 of the cost to them, because they are benefiting from this  
23 program that we have. They are benefiting from the new  
24 landfill sites that we're going to open up. They benefit  
25 from the inspection --

1           QUESTION: Well, the primary beneficiary, it  
2 seems to me, is the company that's engaged in the business  
3 of disposing this garbage. That's the one that makes the  
4 profit out of it, and they are benefiting both from the  
5 sites, the inspection, the whole program, and they're  
6 Oregon people.

7           MR. BALMER: But petitioners right here, they  
8 are Oregon people, and they are benefiting from that.

9           I'm not sure I see whether your question is  
10 going towards discrimination in favor of the Oregon  
11 landfill versus the Washington landfill --

12           QUESTION: No. No, it's just that the material  
13 that goes through has two different sources, one in-State  
14 and one out-State, and because of your program, those that  
15 come from out-of-State have to pay higher fees.

16           MR. BALMER: Well, the statute says that we can  
17 recover the costs -- what it authorizes us to do is to  
18 recover the cost to Oregon of dealing with out-of-State  
19 waste.

20           If some of those costs are not properly  
21 recoverable, and in the first instance that would be a  
22 matter of State law -- what did the legislature mean when  
23 they said, costs? -- that is the kind of challenge that  
24 the petitioners could bring and they have brought in State  
25 and Federal trial courts, and if they can prove that these

1 are not really costs that are appropriately allocated to  
2 out-of-State commerce, then those costs would probably be  
3 struck down by a trial court at some point after hearing  
4 evidence on the issue.

5 QUESTION: Wasn't there one of our cases -- was  
6 it the Scheiner case? -- there was a concern about  
7 plunging the courts into this morass of checking -- if  
8 you're right that you can -- as a facial matter, this can  
9 go on, and then you reserve the judgment of whether it was  
10 cost-justified or not, that is kind of a morass to put the  
11 courts into, isn't it?

12 MR. BALMER: Well, I think that the question of  
13 what costs are appropriately recovered is the kind of  
14 question the trial courts deal with all the time.

15 In Chemical Waste Management, there was a trial,  
16 and the -- over whether -- over the out-of-State fee that  
17 Alabama imposed on hazardous waste coming in, and the  
18 trial court said, yes, this is too much.

19 QUESTION: Then let's go back to the larger  
20 question, and then I think your answer is -- let's take  
21 what Judge Ripple said in the Seventh Circuit Indiana  
22 case, and he said the problem with the theory is that any  
23 time an entity is involved in interstate commerce, any  
24 time such an entity happens to use facilities supported by  
25 general State tax funds, you can have this, and we gave

1 the specific example of highways and bridges, but one  
2 could conceive of many others.

3 The notion that your theory would apply would  
4 allow the State to tax interstate commerce more heavily  
5 any time there is a facility supported by general tax  
6 funds.

7 MR. BALMER: That is basically our position. As  
8 I said, I think in the transportation area it's a little  
9 bit more difficult, but theoretically the States ought to  
10 be able to recover. Our position is that out-of-State  
11 commerce, as this Court has said, can be made to pay its  
12 own way, and as long as it's not paying more than its own  
13 way, the State has the option, should have the option, of  
14 financing its appropriate share of the cost through a  
15 combination of user fees or general taxes or all general  
16 taxes.

17 Now, again, this case is easier than a case  
18 where you actually have competing goods that are -- that  
19 are competing with one another right in the marketplace  
20 there and the State is giving a benefit, as in the New  
21 Energy Co. case where you give a tax exemption to Ohio-  
22 produced ethanol but not to the Indiana-produced ethanol  
23 that comes right into the State and competes there.

24 Now, in that case, Justice Scalia said Indiana's  
25 subsidy for Indiana ethanol producers is okay. There's no



1 problem with that, but the exemption that Ohio gave for  
2 in-State produced ethanol but not out-of-State produced  
3 ethanol was invalid under the Commerce Clause, and all  
4 that we're doing here is giving a subsidy, if you will, to  
5 in-State garbage producers that is funded not by out-of-  
6 State interests but other in-State interests. We're  
7 making all Oregonians pay a little bit more, and Oregon  
8 garbage producers pay a little bit less.

9 QUESTION: But there may be a difference between  
10 a subsidy given by -- out of general revenues and a  
11 subsidy given by simply charging differential fees. There  
12 may be a difference.

13 MR. BALMER: I think that in each case the court  
14 would -- and in fact the court does look pretty carefully  
15 at what's really happening out there. I think the court  
16 has not taken a really mechanistic approach to these  
17 cases. The court says, where are the economic forces  
18 here, and I think in this case, as you -- in your colloquy  
19 with Mr. Pincus, said what's the difference if we start  
20 out-of-State \$2.25, charge in-State \$2.25, and then rebate  
21 the in-State people \$1.40?

22 They come and dump their garbage in the  
23 landfill, and we take \$2.25 from them, and then we write  
24 them a check from general revenues for \$1.40, the  
25 difference, and it's unclear to me that we should have to

1 go through that administrative process in order to further  
2 a -- sort of a hypothetical or a Commerce Clause interest  
3 that I think is somewhat difficult to define.

4 QUESTION: But it seems to me that the change in  
5 our prior Commerce Clause jurisprudence that you're  
6 proposing is a massive one, and frankly, if we're going to  
7 change that much, I think it might be easier to simply  
8 change and say, you can't subsidize, even out of general  
9 revenues.

10 That would be a lot easier to administer than  
11 what you're proposing to us, which will really be terribly  
12 hard if New York State starts charging every truck that  
13 comes through the State for police protection on the basis  
14 of some percentages that's calculated in Albany and we  
15 have to figure out whether it's true or not.

16 MR. BALMER: But Your Honor, I -- and this is  
17 the point I'd like to close with. What they are  
18 suggesting is also extremely sweeping. Their position  
19 really is that whenever a State uses general funds to pay  
20 for a State program or service, out-of-State business can  
21 come into the State and reap the benefits of that program  
22 without being required to pay their fair share of the  
23 program cost.

24 QUESTION: No, they're not saying that. They're  
25 simply saying that instead of funding it in ways which

1 cannot be traced out of general fund revenue, you've got  
2 to impose an equal fee.

3 MR. BALMER: That's right. They're saying --  
4 they're forcing you -- they're saying, you have a choice,  
5 and to the States that's a very difficult choice. The  
6 choice, they say, is either eliminate the use of general  
7 funds and finance it entirely through user fees, or you  
8 allow all out-of-State interests to come in and pay less  
9 than the full cost, forcing State taxpayers to foot the  
10 entire -- or at least most of the bill, and we would  
11 suggest that nothing in the dormant Commerce Clause  
12 warrants such fundamental interference with traditional  
13 State prerogatives in this area.

14 Thank you.

15 QUESTION: Thank you, Mr. Balmer.

16 Mr. Pincus, you have 6 minutes remaining.

17 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

18 ON BEHALF OF THE PETITIONERS

19 MR. PINCUS: Thank you, Mr. Chief Justice. I  
20 just have a few points.

21 QUESTION: Since you have so much time, Mr.  
22 Pincus, let me ask you a question --

23 (Laughter.)

24 QUESTION: -- before you go on to your point.  
25 I had always thought that our truck cases had

1 assumed that if a State could figure out the exact use of  
2 each out-of-State truck of the highways, and could charge  
3 each out-of-State truck just that amount of use, that you  
4 could charge out-of-State truckers a fee without charging  
5 in-State truckers a fee. That's my recollection of those  
6 cases.

7 We at least speak in those terms, that the  
8 problem with the taxes is if you're an out-of-State  
9 trucker you have to pay this flat fee no matter how much  
10 you use the highways. The implication is, well, if we  
11 could compute how much each out-of-State truck used the  
12 highways, a fee for just that use would be okay, even  
13 though you don't charge in-State truckers, as truckers,  
14 any particular amount.

15 Now, if that's true, how does that apply? Are  
16 highways different from garbage disposal sites?

17 MR. PINCUS: No, Your Honor. I think I'm going  
18 to have to disagree with your premise.

19 QUESTION: All right.

20 MR. PINCUS: What the Court has focused on in  
21 those cases -- the Commerce Clause has two of its four  
22 prongs. One is the fair apportionment test, the other is  
23 antidiscrimination. I think a lot of what you are  
24 discussing is the apportionment problem. There hasn't  
25 been fair apportionment.

1 Flat highway taxes do not effectuate fair  
2 apportionment. That may be related to discrimination in  
3 some situations. Flat highway taxes may not only be  
4 unfairly apportioned, they may also be discriminatory, but  
5 even if they are fairly apportioned, they also could be  
6 discriminatory, and I think that's the problem that we  
7 have here.

8 QUESTION: What's an example of a tax that's  
9 fairly apportioned but is discriminatory?

10 MR. PINCUS: This one is an example.

11 (Laughter.)

12 QUESTION: Take a preceding case, a prior case.

13 MR. PINCUS: I don't -- I think the Court has  
14 found that taxes are also unfairly -- are both unfairly  
15 apportioned and discriminatory. I think in the Guy case  
16 that we cited --

17 QUESTION: But I'm asking you for a case to  
18 illustrate the example you just gave in your answer to  
19 Justice Scalia, where the apportionment is fair, but the  
20 Court nonetheless found it discriminatory.

21 MR. PINCUS: In the Guy case, Guy v. City of  
22 Baltimore, which is an 1880 case that we cite in our  
23 briefs, the question was whether Baltimore's  
24 discriminatory wharfage fee, which was imposed only on  
25 non-Maryland ships, was constitutional, and there was



1     conceded in the case that it was not an excessive fee,  
2     which I think would be a proxy for it was fairly  
3     apportioned and not excessive, but the Court nonetheless  
4     held that because it was imposed only on non-Maryland  
5     ships it was discriminatory.

6             QUESTION: Any other case between 1880 and the  
7     present time?

8             (Laughter.)

9             MR. PINCUS: No, Your Honor. I think this has  
10    not come up that often because I think States have  
11    recognized that the kinds of hypotheticals that have been  
12    discussed here are out-of-bounds under the Commerce  
13    Clause. They're so blatantly discriminatory that States  
14    don't enact them.

15            I think in the Seventh Circuit case that struck  
16    down the Indiana statute similar to the one at issue here,  
17    the Court said of course this is unconstitutional, so I  
18    just don't think it's something that has come up very  
19    often.

20            Let me make a couple of points. I think  
21    Mr. Balmer's argument that this statute is not facially  
22    discriminatory assumes the outcome of the compensatory tax  
23    inquiry. He's assuming that the burden on interstate and  
24    intrastate commerce is the same, but here no one knows,  
25    because the general taxes that Oregon relies on are paid

1 both by in-State interests and out-of-state interests.  
2 Oregon taxes non-Oregonians.

3 QUESTION: I guess your clients chose this kind  
4 of limited administrative proceeding to follow, where the  
5 proof was strictly limited. Now, in that setting, who's  
6 entitled to prevail? Is there no circumstance under which  
7 the State could defend its scheme?

8 MR. PINCUS: Well, Your Honor, I think if the  
9 Court were to agree that legally Oregon -- the rules of  
10 the compensatory tax doctrine don't apply, and as the  
11 Court said in Scheiner and as Justice Ginsburg note the  
12 Court can just balance any kind of taxes in deciding  
13 whether there's equality, then I think the case would go  
14 back and Oregon would try and prove it -- maybe not in  
15 this proceeding but in another one, whether or not that's  
16 true, but I think the Court can, based on its precedents,  
17 rule here that it doesn't even -- that inquiry, factual  
18 inquiry is out of bounds at the outset.

19 QUESTION: That was the case you brought. You  
20 brought a strictly legal case. You can't do it no matter  
21 how cost-justified it is.

22 MR. PINCUS: Exactly, Your Honor, and we think  
23 that the options here are either the tax can be struck  
24 down, or the Court can say there are factual questions  
25 that will --

1           QUESTION: Well, you lose this case and then you  
2 may have another case to say it's not cost-justified.

3           MR. PINCUS: Yes, Your Honor. The excessiveness  
4 issue is open.

5           Let me just add one other point, which is I  
6 think Mr. Balmer conceded that if this case involved  
7 apples or other kinds of commerce it would be a different  
8 case, and this would not be appropriate. He didn't reach  
9 that conclusion, but he certainly said it's different, and  
10 I think the trash-is-different argument is one that the  
11 Court has rejected three times now and squarely rejected  
12 in Fort Gratiot and it seems to me that disposes of their  
13 case.

14           They admit that if this was apples, and the  
15 question was an apple inspection tax, and Oregon was here  
16 saying our apple industry is so great for our State we'd  
17 like to share the cost of inspection and not impose it  
18 solely on the growers but have other taxpayers, which may  
19 include taxpayers engaged in interstate commerce, pick up  
20 the tab, that would be inappropriate. Well, we think the  
21 same result is inappropriate here, because the Court has  
22 repeatedly that the same Commerce Clause rules are going  
23 to apply in the trash context.

24           One last point, in terms of what costs are  
25 covered by this fee, the statute says that the fee can't

1 cover costs that are recovered through other means, and on  
2 page 4 of our opening brief we set forth some other even-  
3 handed taxes that do recover costs such as inspection  
4 costs.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.  
7 The case is submitted.

8 (Whereupon, at 10:59, the argument in the above-  
9 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:*

OREGON WASTE SYSTEMS, INC., et al. v. DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF OREGON, et al. and COLUMBIA RESOURCE CO. v. DEPARTMENT OF

ENVIRONMENTAL QUALITY OF THE STATE OF OREGON CASE NO's: 93-70 and 93-108  
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