

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

ORIGINAL

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: CAMPS NEWFOUND/OWATONNA, INC., Petitioner v.

TOWN OF HARRISON, MAINE, ET AL.

CASE NO: 94-1988

PLACE: Washington, D.C.

DATE: Wednesday, October 9, 1996

PAGES: 1-54

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

MAR 27 1997

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'97 MAR 27 P2:53

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 CAMPS NEWFOUND/OWATONNA, INC., :

4 Petitioner :

5 v. : No. 94-1988

6 TOWN OF HARRISON, MAINE, :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, October 9, 1996

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:04 a.m.

14 APPEARANCES:

15 WILLIAM H. DEMPSEY, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 WILLIAM L. PLOUFFE, ESQ., Portland, Maine; on behalf of
18 the Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM H. DEMPSEY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	WILLIAM L. PLOUFFE, ESQ.	
7	On behalf of the Respondents	29
8	REBUTTAL ARGUMENT OF	
9	WILLIAM H. DEMPSEY, ESQ.	
10	On behalf of the Petitioner	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1988, Camp Newfound Owatonna, Inc. v.
5 the Town of Harrison, Maine.

6 Mr. Dempsey.

7 ORAL ARGUMENT OF WILLIAM H. DEMPSEY

8 ON BEHALF OF THE PETITIONER

9 MR. DEMPSEY: Mr. Chief Justice and may it
10 please the Court:

11 The question that is raised in this case is
12 whether a particular provision in a Maine statute dealing
13 with property tax exemptions for charitable organizations
14 is or is not constitutional.

15 The challenge to the statute is laid upon the
16 commerce Clause in its dormant or negative aspect, that
17 is, without the existence of any relevant congressional
18 action under the proviso a charity that is otherwise
19 entitled to receive the exemption is denied that exemption
20 if, to use the words of the statute, it is conducted or
21 operated principally for the benefit of persons who are
22 not residents of Maine.

23 Now, the petitioner is such a charity. It was
24 denied the exemption on those grounds, and that really is
25 the core of the case.

1 Now, the remaining facts are simple. They're
2 not contested. I can summarize them quite swiftly. The
3 matter was disposed of on summary judgment below. The
4 petitioner is a Maine corporation. Its only activity is
5 to conduct a summer camp for children in the town that is
6 now Harrison that is the respondent in this case.

7 It is dedicated to serving Christian Science
8 families. There are not a great many Christian Science
9 families in the State of Maine, and accordingly it
10 recruits and advertises outside the State broadly, and it
11 serves principally people, children who are not residents
12 of the State of Maine. Indeed, during the three tax years
13 in question about 95 percent of the campers that were
14 served at the camp came to the camp from other States,
15 States other than Maine.

16 QUESTION: Why should the taxpayers of Maine
17 subsidize charity to people outside of Maine? I don't
18 know why they should be compelled to do that --

19 MR. DEMPSEY: Well, they're not --

20 QUESTION: -- by the Commerce Clause.

21 MR. DEMPSEY: Surely. The purpose, Justice
22 Scalia, which is asserted -- and let me go directly to
23 that. The purpose that is asserted to be the purpose on
24 the face of this statute is a quite reasonable purpose.
25 It is to confine the dedication of the resources of the

1 State, of the community, to the benefit in these
2 particular areas of residence of that State.

3 Now, that purpose is as legitimate as the
4 purposes that were served in the waste disposal cases that
5 you've had before you, the purposes of encouraging private
6 industry, all the purposes that are listed in the opinion
7 of the courts in Chemical Waste, for example. There's
8 nothing at all sinister about the purpose.

9 The question, as in almost all of these cases,
10 is whether or not the means that were adopted to achieve
11 that purpose impacted improperly upon interstate commerce.

12 QUESTION: Do those other cases -- those other
13 cases don't involve as proximately as this one does the --
14 in effect the expenditure of State money. It seems to me
15 that this -- that is, the granting of a tax deduction to
16 charities, it's just like giving charities the State
17 money. I don't know that those other States involve --
18 those other cases involve that.

19 MR. DEMPSEY: Well --

20 QUESTION: It seems to me this is closer to the
21 situation in which the State is a market participant, and
22 the State chooses to purchase its goods only from in-
23 State companies.

24 MR. DEMPSEY: Well --

25 QUESTION: Which it's entitled to do.

1 MR. DEMPSEY: Let me try to address that
2 question in the two aspects in which I understand it. In
3 terms of its being a -- the equivalent of a tax
4 expenditure, your first point, that, as I believe you
5 yourself have indicated in your concurring opinion in the
6 West Lynn Creamery case, is true of all exemption and
7 credit cases, and the Court, as you pointed out, has
8 always regarded tax exemptions and credits as being the
9 equivalent of taxes themselves.

10 So that if you take a case that I think is
11 closely on point, the Darnell case, involving a property
12 tax again, exemption upon lumber that was produced in the
13 State that was involved, an exemption for that lumber but
14 not for others, that amounts to a tax expenditure, or, if
15 you wish, a subsidy.

16 In the Bacchus case, the exemptions that were
17 granted there to the liquors that were produced in the
18 State of Hawaii were in effect tax expenditures on behalf
19 of those people, of those manufacturers.

20 QUESTION: Well, logically there's -- it's hard
21 to see a difference between a tax exemption and a direct
22 subsidy, isn't there?

23 MR. DEMPSEY: That's precisely what I'm trying
24 to say.

25 QUESTION: But you say the Court has drawn that

1 distinction.

2 MR. DEMPSEY: I'm sorry, Justice O'Connor.

3 QUESTION: But you say the Court has treated
4 them differently.

5 MR. DEMPSEY: This Court has treated them the
6 same.

7 QUESTION: I mean, what if it were a direct
8 subsidy of cash to a Maine charity --

9 MR. DEMPSEY: Right.

10 QUESTION: -- based on how many Maine residents
11 were served by the charity.

12 MR. DEMPSEY: Precisely.

13 QUESTION: Would that be all right for Maine?

14 MR. DEMPSEY: That's a very interesting
15 question. Let me try to move into it more gradually, if
16 you will, and I want to come back to the market
17 participation question that Justice Scalia raised, because
18 these are really the dual, dual justifications that the
19 State advances in this case. Either it's like market
20 subsidy -- market participation, or it's like subsidy, or
21 both.

22 Now, let me just preliminarily, though, note a
23 problem with that argument. The State, as you know, is
24 not here. The State participated -- it intervened as a
25 defendant in the trial court, but when it lost it did not

1 pursue its appeal to the Maine law court, and it has not
2 taken advantage of its opportunity to participate in this
3 proceeding, so the defense of the State statute is left to
4 the town of Harrison.

5 Excuse me, Justice --

6 QUESTION: That's because the tax goes to the
7 county, not the State, this real property tax?

8 MR. DEMPSEY: I -- yes, I'm sure that's right,
9 but -- in terms of fact, but the reason for the State's
10 participating at the trial court level and not appealing
11 is a matter that I am in no position to comment on at all.
12 There may be precedent for that in this Court, but I've
13 not seen a case in which a State statute has been attacked
14 as unconstitutional in which the State participated in
15 the -- at the trial court level and then abandoned the
16 case coming before you, but I --

17 QUESTION: But the tax -- the tax in this case
18 was the town's tax --

19 MR. DEMPSEY: Town's tax.

20 QUESTION: -- that was authorized by State law.

21 MR. DEMPSEY: Yes. Yes, correct, Justice
22 Ginsburg. Yes, so you could --

23 QUESTION: And while you were outlining the, is
24 it like a subsidy, is it like a participant in the market,
25 it's -- is it at all relevant that real estate -- taxes on

1 real estate go back a pretty long way, and I thought that
2 the original -- that that thought had little to do with
3 commerce, but had to do very much with the public service
4 that the charity, or most traditionally the church, was
5 supplying for the local community.

6 MR. DEMPSEY: Yes.

7 QUESTION: And not some notion of worldwide
8 benefit.

9 MR. DEMPSEY: Well, I -- let me make sure that I
10 understand your question correctly, Justice Ginsburg.

11 QUESTION: I'm asking you to -- whether this --
12 we can say real estate taxes originate -- exemptions from
13 real estate taxes --

14 MR. DEMPSEY: Yes.

15 QUESTION: -- you don't tax the church
16 property -- from something that had to do with benefiting
17 locals, and that's why we -- that's why these exemptions
18 from the real estate -- real estate doesn't move from one
19 State to another like lumber does.

20 MR. DEMPSEY: No.

21 QUESTION: Is there something special about real
22 estate where an exemption from the tax might be
23 supportable in that area and not in others?

24 MR. DEMPSEY: Well, let me put it this way. If
25 you were to take that view and distinguish between the

1 real estate and personal property taxes, for example,
2 because after all personal property does move, then you
3 would have an awkward situation here, because part of this
4 tax was personal property, and part was realty. My first
5 point is that that makes an awkward distinction in this
6 particular case, as it would in any case.

7 My second response would be that, consider
8 Darnell. That was a personal property tax on lumber that
9 was brought into the State from another State, the
10 exemption being given to lumber that was produced in the
11 State of Tennessee.

12 Now, if they could escape the effect of Darnell
13 simply by transforming the form of the tax, they could
14 then levy the tax on the real property, the warehouse in
15 which the lumber was stored. Now, I'm suggesting that if
16 that kind of an exception is made, it would open the door
17 to all kinds of manipulation of taxes in order to take
18 advantage of that single loophole.

19 QUESTION: Not if it's limited to charity.

20 MR. DEMPSEY: Now -- yes.

21 QUESTION: Before you can decide that there's
22 been discrimination against out-of-State commerce, you
23 have to decide that you're dealing with two taxpayers who
24 are similarly situated, and why isn't it entirely
25 reasonable to say that they are not similarly situated

1 where a charitable -- where this deduction is at issue
2 where one of the taxpayer provides charity to the citizens
3 of Maine --

4 MR. DEMPSEY: Right.

5 QUESTION: -- and the other one does not.

6 MR. DEMPSEY: Right. Well --

7 QUESTION: Why are they similarly situated? I
8 don't think you can run that argument in the normal
9 commercial case where all you can say is that one is an
10 outlander, the other one isn't.

11 MR. DEMPSEY: All right --

12 QUESTION: But here one is giving something --

13 MR. DEMPSEY: Yes.

14 QUESTION: -- gratis to the citizens of Maine.
15 Why doesn't that make that taxpayer different?

16 MR. DEMPSEY: I understand -- I understand,
17 Justice Scalia, the force of that reaction to the case.
18 Now, let me try to catch up with the strands of questions
19 that I have, because they're all related, and I don't want
20 to lose track of any one of them.

21 Let me go to the church support by property tax,
22 because that's in a way related to the very last question
23 you asked, Justice Scalia. I suggest to you that -- and
24 the market dominant, market participation and the subsidy
25 issue. I suggest that if the State were here, it would be

1 very, very reluctant to make the market participation or
2 subsidy argument.

3 There are in every State -- I'm sure there are
4 statutes, exemption statutes for church property. Now,
5 if, as the respondent argues, what the State is doing here
6 by virtue of market participation is somehow purchasing
7 camping services for the benefit of its residents, or
8 subsidizing the camps for the benefit of its residents,
9 then, by parity of reasoning, it is somehow purchasing
10 religious services from the churches.

11 QUESTION: No, but isn't the answer to that that
12 it's purchasing a great number of other things, too, and
13 for that reason it doesn't fall afoul -- I mean, it's
14 purchasing all sorts of secular benefits on the same
15 ground for that reason it doesn't fall afoul of
16 establishment.

17 MR. DEMPSEY: Oh, I'm sure it doesn't fall afoul
18 of establishment, Justice Souter, but the reason it
19 doesn't is because it's not market participation. The
20 State, as Justice Scalia, as in the New Energy-Limbach
21 case, the State here is not purchasing anything from
22 anyone.

23 QUESTION: I don't think the argument is that
24 the State is a market participant. I was just arguing
25 that by analogy to the reason we think market

1 participation is okay --

2 MR. DEMPSEY: Right.

3 QUESTION: -- and you can discriminate against
4 your out-of-State citizens when you're a market
5 participant --

6 MR. DEMPSEY: Right.

7 QUESTION: -- so also you can do it in this
8 situation, where you're dealing with someone who is
9 providing a -- you know, a service gratis --

10 MR. DEMPSEY: A service gratis, yes.

11 QUESTION: -- to the State.

12 MR. DEMPSEY: All right, well let me address --
13 but just before I forget, Justice O'Connor, on the subsidy
14 question, of course, the subsidy defense does not have the
15 same quality of imprimatur from this Court as yet as the
16 market participation test does, but as I've indicated, for
17 my purposes I'm perfectly willing to assume, arguendo, that
18 any sort of a subsidy is immune from the dormant Commerce
19 Clause just -- because this just isn't subsidy, that's
20 all. It's, as in Limbach, it's a tax, as Justice Scalia
21 said. It's the primeval function of the Government in
22 laying and collecting taxes.

23 Now, what is suggested is that -- and I really
24 thought from the start that this is the way in which this
25 case might develop. It really hasn't developed this way

1 until right now, and that is to suggest that there is some
2 sort of an exception for charities that is analogous to
3 the market participation, or the subsidy of that, indeed,
4 as an exception.

5 Now, the respondent abstains from making that
6 argument. That doesn't mean that it's not a good
7 argument, but I point out that we did say at the outset
8 well, let's consider this issue, and the respondent says
9 no, we're not trying to draw that distinction.

10 I think myself that the respondent is correct in
11 doing that, because it seems to me it can't possibly -- or
12 shouldn't, anyway, make a difference whether you're
13 dealing with a nonprofit or a profit. Let me just start
14 at that sort of primitive -- on that primitive basis.

15 Nonprofits in this country, and that's what
16 we're talking about, are big business in every sense of
17 the word, except that they don't make a profit. In terms
18 of their employment, in their purchases, in their
19 interstate commerce that they affect, they are big
20 business.

21 Now, instead of taking camps for a moment -- but
22 they're in business. They're in business in the State of
23 Maine, as Justice Souter, I'm sure, is aware.

24 QUESTION: Before you go too far down that
25 road --

1 MR. DEMPSEY: Yes.

2 QUESTION: -- as I understand this law, it
3 doesn't apply to all nonprofits.

4 MR. DEMPSEY: Correct.

5 QUESTION: It applies to only those -- they have
6 to sell their services for no more than \$30 a week,
7 isn't --

8 MR. DEMPSEY: No. Well, yes. Excuse me. No,
9 you're quite right.

10 QUESTION: Do you know any

11 MR. DEMPSEY: If they have a modest charge then
12 they get a modest exemption, but if they charge more than
13 \$30 then they lose the exemption entirely.

14 QUESTION: Then they lose the exemption.

15 MR. DEMPSEY: Right.

16 QUESTION: Now, do you know anybody that can
17 possibly run a camp for \$30 a week without giving a lot of
18 that away for free?

19 MR. DEMPSEY: Well --

20 QUESTION: So you're not just talking about
21 "nonprofits," you're talking in every case under this law
22 about companies who are giving away stuff free to
23 residents of Maine.

24 MR. DEMPSEY: No, we're talking about nonprofits
25 here who serve primarily citizens of Maine whom they

1 charge \$1,000 a week, who get the exemption.

2 QUESTION: That applies only to when they're
3 serving out-of-State people, and it's under \$30.

4 MR. DEMPSEY: If they're serving primarily or
5 principally Maine citizens, then they may charge \$1,000
6 dollars a week or \$2,000 dollars a week and they get the
7 exemption.

8 QUESTION: I see, and the \$30 applies only to
9 out-of-Staters?

10 MR. DEMPSEY: No. If you serve primarily out-
11 of-State citizens but only charge \$30 a week, then you
12 lose only part of your exemption.

13 QUESTION: I see.

14 MR. DEMPSEY: So --

15 QUESTION: Fifty thousand, which might not be
16 the lion's share of the tax anyway, right?

17 MR. DEMPSEY: The -- oh, the tax in this -- if
18 you're asking about the --

19 QUESTION: Well, it depends on what is the value
20 of the property.

21 MR. DEMPSEY: What is the value of the property.
22 In this case, the tax in each of the tax years in question
23 averaged about \$22,000, so it does depend entirely on
24 the -- so what you have --

25 QUESTION: I'm glad you clarified that.

1 MR. DEMPSEY: Yes. So what you have --

2 QUESTION: So we really are talking --

3 MR. DEMPSEY: Right. You have --

4 QUESTION: -- just about charitable
5 organizations.

6 MR. DEMPSEY: -- a protected relationship with
7 the State, nursing homes, camps, some of which are -- many
8 of which are nonprofit, but they are in competition
9 directly with these charities, so-called charities, and
10 these people lose the exemption, and they lose the
11 exemption because they serve too many people from out of
12 State.

13 QUESTION: Would a hospital lose its exemption
14 if it took a lot of out-of-State patients?

15 MR. DEMPSEY: The hospitals are not covered by
16 this provision of the statute, Justice Stevens, and I
17 should point that out. This proviso applies only to
18 the -- now, I'm saying that without really being certain,
19 and I'm going to consult, when I sit down with my
20 colleague, Mr. Dale from -- because what we have in the
21 State of Maine, and it's not my field, goodness knows, is
22 a statutory system in which a number of different
23 categories fall under different provisions.

24 So that, for example, Bates and Bowden and
25 Colby, who serve, certainly, more nonresidents than they

1 do residents, don't -- are not subject to this proviso
2 because that provision of the statute does not burden with
3 this proviso, so it's only this section which deals with
4 so-called benevolent and charitable organizations, a
5 catchall, but does identify with particularity some types,
6 camps, nursing homes, boarding homes, and mental health
7 treatment facilities of communities, and then whatever
8 else falls within the catchall, and I've got to get the
9 answer as to whether hospitals do or not.

10 QUESTION: Well, at least you've given me the
11 answer for a mental institution. If they took too many
12 out-of-State patients they would lose --

13 MR. DEMPSEY: Mental -- community mental
14 treatment centers, so it would not be a mental hospital.
15 But take a nursing home. Now, nursing homes, obviously,
16 there are private, there are profit-making nursing homes,
17 there are nonprofit nursing homes.

18 If you're on -- close to the border of whatever
19 State you're close to the border of and you serve more
20 than half -- now, the division as to what is principally
21 and what is not has not been made, but let's say it's more
22 than half people from the other State, you lose your
23 exemption, and you're in competition with those other
24 nonprofit nursing homes.

25 QUESTION: And that's true --

1 QUESTION: If it were pro rata, would you have
2 the same -- would you have a constitutional objection?
3 Suppose it said to the extent that you serve people from
4 out of State you don't get the exemption, but to the
5 extent that you serve, so in your case you could get 5
6 percent exemption because you have 5 percent from in-
7 State.

8 MR. DEMPSEY: No. My argument would be the
9 same, because my argument has to do, when they're getting
10 to interstate commerce, you can approach that problem in
11 different ways, as I indicate. We focused on the impact
12 on interstate commerce because of *Edwards v. California*
13 and a long line of cases bringing it within the
14 affirmative and the dormant Commerce Clause interstate
15 transportation and the effect of statutes on it, but the
16 effect would be there anyway.

17 QUESTION: Well, what is the effect, the harm
18 that you're complaining about? Can you be precise about
19 that?

20 MR. DEMPSEY: Yes. Yes. Well, what you have
21 here is a plain incentive to these organizations to limit
22 the number of nonresidents that they serve.

23 Now, they can do that in order to get the tax
24 exemption if they're close to the edge. They can do it
25 by -- yes.

1 QUESTION: But your camp isn't even within that
2 range.

3 MR. DEMPSEY: We're not close.

4 QUESTION: I mean, you describe some things,
5 this will give camps like yours an incentive to take
6 people only from in the State, but it's -- your camp can't
7 operate -- that's not what it is.

8 MR. DEMPSEY: Not without a massive conversion
9 to Christian Science in the State. We're in great
10 difficulty, yes.

11 (Laughter.)

12 QUESTION: So it's not going to have that
13 impact.

14 MR. DEMPSEY: It is not.

15 QUESTION: What is the impact that you have?

16 MR. DEMPSEY: All right -- but I don't want to
17 leave that, because I think the statute is attacked on its
18 face, and surely you must contemplate in judging the
19 probable impact of the statute situations in which by
20 imposing a quota, or imposing a differential fee schedule,
21 a camp, or a nursing home, or whatever, could qualify,
22 so --

23 QUESTION: Do we know, in fact, that there is
24 any such camp in the entire State of Maine --

25 MR. DEMPSEY: That's --

1 QUESTION: -- where there would be that -- they
2 say, gee, we're pretty close to the 50 percent mark so we
3 have to serve in-State people not out-of-State?

4 MR. DEMPSEY: No. The record does not
5 disclose -- the record -- all that the record shows is
6 that there are some camps that qualify for the exemption
7 and some that don't, and that's all.

8 QUESTION: What if the statute granted a
9 charitable exemption only to charities domiciled or
10 headquartered in the State of Maine?

11 MR. DEMPSEY: Absolutely, without any question
12 in my judgment that is perfectly all right, and indeed, I
13 think it is natural, normal, to be expected, proper, in
14 every way reasonable for a State to say we're not going to
15 grant a charitable property tax exemption unless this
16 charity is here, doing work to benefit the people of this
17 State.

18 QUESTION: Well, why?

19 QUESTION: I don't have any problem with that at
20 all.

21 QUESTION: I mean, you can be there without
22 doing work to benefit the people of the State. Your
23 domicile can be there --

24 MR. DEMPSEY: Right.

25 QUESTION: -- and all of your charity can be

1 expended in Bangladesh.

2 MR. DEMPSEY: Right, but I'm going beyond that,
3 beyond the Chief Justice's question, in saying I think
4 it's also proper to say that the charity must perform
5 charitable services in the State.

6 Now, we don't -- that question isn't here. This
7 camp is open to everybody in the State of Maine --

8 QUESTION: But that's a different question than,
9 you can be domiciled in the State, have all of your
10 operations in the State, but everybody you serve is from
11 out of State.

12 MR. DEMPSEY: That could well be, and all that
13 I'm suggesting is that a requirement that a charity
14 expend -- if this is the question --

15 QUESTION: But the Chief's question -- I --

16 MR. DEMPSEY: -- not only be domiciled there but
17 spend money in the State.

18 QUESTION: Mr. Dempsey --

19 MR. DEMPSEY: Yes.

20 QUESTION: -- I thought the Chief's question
21 was, suppose the Maine law was, charities who are
22 domiciled in this State are exempt from real property
23 taxes in this State. I thought you answered that that
24 would -- you gave an unequivocal, that would be okay.

25 MR. DEMPSEY: Absolutely, in my judgment.

1 QUESTION: So what -- so let's take a charity
2 situated in Maine, operating only in Maine --

3 MR. DEMPSEY: Right.

4 QUESTION: -- but serving only children from
5 India. Your answer is that that would get --

6 MR. DEMPSEY: I -- I --

7 QUESTION: That would be constitutional. I
8 mean, there would be no --

9 MR. DEMPSEY: Would be unconstitutional?

10 QUESTION: I'm sorry.

11 MR. DEMPSEY: No.

12 QUESTION: It serves only people from out of
13 State.

14 MR. DEMPSEY: Right.

15 QUESTION: There wouldn't be any complainant.

16 MR. DEMPSEY: Let me see if I can -- this is a
17 question, of course, I considered as soon as I started on
18 this case. What happens to a State that wants to make
19 sure that a charity that gets an exemption does something
20 for the people of the State, and -- excuse me.

21 QUESTION: How does it do that?

22 MR. DEMPSEY: Well, it's been my view, and
23 there's no case law on this that I know of, but it's been
24 my view that it is appropriate and proper for a State to
25 say not only must the corporation be a Maine corporation,

1 which this statute does require, but that it's got to do
2 something in the State of Maine.

3 Now, some of my amicus curiae friends would not
4 agree with me on that issue, you know, I think.

5 QUESTION: Can we get back to the question of
6 how people situated as your client is, how they're harmed.

7 MR. DEMPSEY: Yes.

8 QUESTION: Because we've already established
9 that at least for this category of camp they're not going
10 to change the composition of the people who come to them,
11 and we don't know whether any such entities that would
12 decide to take --

13 MR. DEMPSEY: Right.

14 QUESTION: We just don't know that.

15 MR. DEMPSEY: Yes.

16 QUESTION: So what is -- what other harm are you
17 complaining about?

18 MR. DEMPSEY: Well --

19 QUESTION: You're complaining about the tax.

20 MR. DEMPSEY: Complaining about the --

21 QUESTION: You're out of pocket, I suppose is
22 your big complaint.

23 MR. DEMPSEY: Well, but I mean, that's right,
24 Justice Scalia.

25 QUESTION: Yes, but you can't --

1 MR. DEMPSEY: In other words, we are suffering a
2 financial loss, and what the record does show is that part
3 of that is passed on to the campers and part of it
4 detracts from the ability of the camp to perform certain
5 services. That's the other line of interstate commerce
6 approach to this problem that one could take.

7 QUESTION: But if you're just complaining about,
8 there's this tax and you don't like to pay it, suppose
9 Maine has a higher sales tax than other States, and it
10 could cost you more to operate in Maine because of that?

11 MR. DEMPSEY: No, but if -- if the sales tax or
12 the real estate tax or any tax is imposed upon an
13 organization because it serves too many people from out of
14 the State -- a hotel, a motel, any kind of a service -- a
15 grocery store. Because it serves too many people from out
16 of the State, that involves a competitive relationship
17 between those organizations and organizations that get the
18 exemption within the State, and that's a financial burden
19 that disadvantages them.

20 QUESTION: But you're not competing with
21 charities that serve Maine people. That's not -- I don't
22 see the competitive situation.

23 MR. DEMPSEY: Well, I'm --

24 QUESTION: Because you just started out by
25 saying, no, we wouldn't change -- our camp is for

1 Christian Scientists from all over the United States.

2 MR. DEMPSEY: No, but just -- now, that point
3 has been made by the law court that we're not really in
4 competition with anybody else because we serve just
5 Christian Scientists.

6 Now, that argument has, it seems to me, a rather
7 unfortunate ring to it, but taking that -- and ignoring
8 that, the fact is that other camps are in the State of
9 Maine and they're open to Christian Scientists, Science
10 families, so that we're competing for that group.

11 QUESTION: You're competing to give away money,
12 not to make a profit. It's unreal to talk about competing
13 to give away money. I can give away more money than you
14 can. Are you hurt if someone else gives away more money
15 than you're giving away? I don't understand that. That
16 is not competition to my mind.

17 MR. DEMPSEY: Justice Scalia, nonprofits are
18 nursing homes -- just looking at the way that nursing
19 homes operate, or any kind of a treatment facility, any
20 kind of nonprofits, they are in competition for
21 contributions, they are in competition to build up their
22 staffs, they're in -- you've got the evidence of their
23 competition every day in the mails. They are in relation
24 one to the other in competition, and they are affecting
25 interstate commerce.

1 And I don't want to leave the point that you
2 made, Justice Ginsburg, without noting again that this
3 statute is being attacked on its face, and Justice
4 O'Connor, the question you raise about kind of a graduated
5 subsidy to me is a very difficult question. I will just
6 say that.

7 I think that clearly the State could have done
8 what it wanted to do here by eliminating the tax
9 exemptions and providing vouchers to the citizens of the
10 State to use wherever they want.

11 QUESTION: Could it do it by saying every
12 organization, that every charitable organization that
13 serves the citizens of this State gets a \$1 deduction from
14 its income tax each time it serves a citizen of the State?
15 Could it do that?

16 MR. DEMPSEY: No, I don't think so.

17 QUESTION: I think it could.

18 MR. DEMPSEY: Well, I --

19 QUESTION: Well, as I understand, your argument
20 is, even if you lose on this point about the parity of
21 competition, your argument, as I understand it, is
22 essentially the same, because you say, number 1 you can't
23 draw a charitable versus for-profit distinction because in
24 fact they are both businesses in a given place, and number
25 2, even apart from competition, you are discouraging

1 interstate activity.

2 MR. DEMPSEY: Exactly.

3 QUESTION: And that's the essence --

4 MR. DEMPSEY: Exactly. That is the essence of
5 the argument.

6 QUESTION: Yes.

7 QUESTION: Can you tell me, what is the
8 philosophy that allows you to concede, in the voucher
9 hypothetical, there would be no Commerce Clause violation?
10 What is the basis for the distinction between that case
11 and this?

12 MR. DEMPSEY: In that case, with each citizen
13 armed with a voucher to go wherever, there would be no
14 incentive on the part of any camp to limit its service to
15 non-State people. There just wouldn't, that's all, so
16 that aspect of the case just disappears in the context of
17 a voucher system.

18 In the context of a subsidy system that's
19 graduated to out-of-State service, then you're getting to
20 the edge, it seems to me, of where the Court has been
21 moving in terms of validating subsidies. A flat subsidy
22 would be okay. That kind of a subsidy I think there's a
23 question about.

24 I would like to reserve the balance of my time.

25 QUESTION: Very well, Mr. Dempsey.

1 Mr. Plouffe, we'll hear from you.

2 ORAL ARGUMENT OF WILLIAM L. PLOUFFE

3 ON BEHALF OF THE RESPONDENTS

4 MR. PLOUFFE: Mr. Chief Justice, and may it
5 please the Court:

6 Before addressing in detail the three arguments
7 in my brief which I use to support the conclusion or the
8 results achieved by the Maine law court, I want to address
9 two fundamental points which I think should be addressed
10 at the outset.

11 The first one is that there is no Federal
12 constitutional right for a nonprofit organization to
13 receive a tax exemption from local property taxes.

14 The second fundamental point is that State
15 legislatures have great latitude in deciding who should be
16 tax exempt and who should not be tax exempt. This is
17 especially true, I believe, when we are talking about
18 taxation from real estate tax, or exemption from real
19 estate taxes which really are a quintessentially local
20 matter.

21 I would suggest to you that that discretion of
22 State legislatures extends to being able to determine what
23 benefit Maine residents in this case are to achieve -- are
24 to receive in return for this tax exemption.

25 In response to the amici in this case, who, from

1 reading their briefs --

2 QUESTION: You're asserting that, unlike other
3 tax exemptions, this is a quid pro quo type of tax
4 exemption. They're giving this one because the State is
5 getting something gratis from these organizations, and
6 that distinguishes it from other tax exemptions.

7 MR. PLOUFFE: Fundamentally, Justice Scalia,
8 that is one of my arguments, that this is like the market
9 participant exemption in Hughes v. Alexandria Scrap and
10 the Massachusetts Council case involving the City of
11 Boston.

12 QUESTION: So it's like, for example, we give a
13 special exemption to our farmers, only to our local
14 farmers because they keep the land green and they in
15 addition provide employment, and they maintain the State
16 as primarily agricultural. I mean, is that a
17 justification --

18 MR. PLOUFFE: Justice Breyer, this is --

19 QUESTION: -- for discriminating against out-
20 of-State farmers?

21 MR. PLOUFFE: This actually is quite unlike that
22 kind of a subsidy or --

23 QUESTION: Oh, I understand that. I understand
24 that. My question really is, if we're going to start
25 looking to local benefits as a basis for discriminating

1 against out-of-State travel or commerce, what road are we
2 going down? Doesn't that erode most of the Court's
3 jurisprudence?

4 MR. PLOUFFE: I don't think so when we're
5 talking about exemptions for charities, and the reasons
6 are these. First, what is being returned by the charity
7 to the people are in the nature of governmental services,
8 services that the Government otherwise would provide.
9 Feeding the hungry, sheltering the homeless.

10 QUESTION: And that means, then, that in fact
11 the hungry in other States, the children who want to
12 travel to the local hospital across State lines, the
13 people who want to travel across State lines to get an
14 education, all of the different people out of State that
15 want to use commerce to take advantage in-State -- you
16 see, I'm saying, so?

17 MR. PLOUFFE: The --

18 QUESTION: Or weekend canoeing at Camp
19 Okefenokee. I don't know that a State would provide that
20 if a charity wouldn't provide it.

21 QUESTION: Don't those people use commerce?
22 Aren't they discriminated against just like the out-of-
23 State farmer? What actually is the distinction that
24 arises out of the fact that it's a charity?

25 MR. PLOUFFE: Well, the second distinction is

1 that the other exemptions that are addressed by this
2 Court -- for example, in West Lynn Creamery, there were
3 two problems with that. One, it was intended to give a
4 competitive advantage. There really is no competitive
5 advantage here, and secondly, the tax that was
6 collected --

7 QUESTION: Well, why is there no competitive
8 advantage? Suppose they get an identical camp that just
9 has 95 percent of its residents are children from Maine.
10 Why isn't there a competitive advantage?

11 MR. PLOUFFE: Well, of course, the fundamental
12 discrimination that we draw is between for-profit camps
13 and nonprofit camps that receive an exemption.

14 QUESTION: But they're competing.

15 MR. PLOUFFE: There's also competition there,
16 Justice Stevens, and --

17 QUESTION: But let me -- I just want to
18 challenge you on your no competitive advantage. You have
19 two nonprofit camps. One has 55 percent Maine children
20 there, and one has 35 percent Maine. Doesn't one have a
21 competitive advantage if it gets an exemption and the
22 other does not?

23 MR. PLOUFFE: Well, part of the answer I think
24 is, what is the competition? Is it to dispense more
25 charity, to feed more homeless -- more homeless people, or

1 to shelter more homeless people? I really don't look at
2 that in terms of competition.

3 In a case like, situation like this, one camp --

4 QUESTION: Actually, you dispense more charity
5 by losing more money, I assume.

6 QUESTION: Well, of course there are
7 universities which are presumably charitable in some
8 respects, anyway, and they say that each education they
9 give out costs more than the student pays. Nonetheless,
10 they compete for students.

11 MR. PLOUFFE: Of course, universities in Maine
12 are under a separate section of the statute and this
13 provision we're talking about which, primarily, benefits
14 doesn't apply to them.

15 QUESTION: Yes, but they can be under this
16 section of the statute if you win the case.

17 MR. PLOUFFE: If the State legislature were to
18 so determine.

19 QUESTION: Right. If you win this case, the
20 State legislature, or whoever makes these decisions in
21 Maine, can say, Bates, Colby, et cetera, are all going to
22 be fully taxed if they have this high proportion of out-
23 of-Staters, isn't that so?

24 MR. PLOUFFE: Well, we haven't done that.

25 QUESTION: No, but you can, can't you, if you

1 win this case?

2 MR. PLOUFFE: It's legislative discretion.
3 Could a legislature do it, and to the amici I would say,
4 legislators could choose to tax colleges and universities.

5 QUESTION: That's not so scary. I mean, the
6 legislatures right now, no matter how we come out on this
7 case, could simply eliminate the tax deduction for
8 public -- for private universities and choose to
9 subsidize, give some of the in-State tax money to those
10 in-State universities that have a majority of in-State
11 students. They can do that, right?

12 MR. PLOUFFE: They could do that, Justice
13 Scalia.

14 QUESTION: So this horrible can come about no
15 matter how we come out in this case.

16 MR. PLOUFFE: There is no constitutional right
17 to a tax exemption.

18 QUESTION: No, but they couldn't give the
19 subsidy to a church camp, could they?

20 MR. PLOUFFE: Ah. That's the Walz question,
21 Justice Stevens.

22 QUESTION: Yes.

23 MR. PLOUFFE: And I would like to address the
24 Walz question because that has been brought up in the
25 reply brief.

1 The -- Justice Burger's opinion in Walz, Chief
2 Justice Burger's opinion in Walz specifically avoided
3 focusing on the secular good works that churches do as the
4 rationale for granting them an exemption.

5 He focused rather upon the history of how we
6 have treated churches and religious organizations in this
7 country since its founding, and before that, how England
8 treated them, and he also focused upon wanting to avoid
9 the entanglement between Government and the churches that
10 could come about. If we did tax them and they didn't pay
11 their taxes, we might have to foreclose on their property.

12 Justice Douglas, dissenting, took another view.
13 He said, this is over some secular good works.

14 To get to the issue made in the -- by the camps,
15 or the petitioner in their brief, this Court actually, I
16 think, dealt with the problem that is raised by the
17 subsidy to the churches in Regan v. Taxation With
18 Representation, when then Justice Rehnquist, now Chief
19 Justice Rehnquist, wrote that in fact exemptions -- this
20 was under a case involving a 501(c)(3) exemption, and the
21 petitioner felt that they were being discriminated against
22 because they engaged in lobbying activities, and under
23 501(c)(3) could not be granted that status so
24 contributions to the petitioner were not tax deductible.

25 And Chief Justice Rehnquist wrote first that the

1 exemption is really the equivalent of a subsidy or even a
2 cash grant -- those are the words that were used, cash
3 grant -- and that really the Government has no obligation
4 to subsidize the First Amendment activities in that case
5 of the petitioner.

6 And in a footnote, the Chief Justice
7 acknowledged Walz, and did not find it to be at variance
8 with this case with Regan, where they were dealing with
9 clearly secular matters, so I think the Court has
10 addressed the problem that has been brought up by the
11 petitioner.

12 QUESTION: Mr. Plouffe, what is the cut off for
13 being -- serving -- for qualifying for this exemption?
14 You have to serve dominantly Maine residents, but what is
15 it, 50 percent? What is it?

16 MR. PLOUFFE: Justice Ginsburg, the statute says
17 principally benefits, and throughout the course of this
18 litigation we have treated this as being 51 percent.

19 With respect to the other sections of the
20 statute that have been raised, if I could take this
21 opportunity to do that, hospitals are -- hospitals
22 licensed by the Maine Department of Human Services are in
23 a separate section of the statute that doesn't apply.

24 QUESTION: Let me stay where the division is,
25 because do I understand the statute to work this way: we

1 have two camps, say, for the blind. One serves 50
2 residents of Maine and it's exempt from this tax. The
3 other serves 50 residents of Maine and 50 residents from
4 elsewhere in the United States. It doesn't get the
5 exemption, yet it's providing the same services.

6 MR. PLOUFFE: That would be up to the local
7 assessor, who acts as an agent of the State, to determine
8 whether or not the 50-50 meets the test of principally --

9 QUESTION: Well, let's make it 60-40 so we won't
10 run into that problem, 40 percent from Maine, 60 percent
11 from outside.

12 MR. PLOUFFE: That --

13 QUESTION: No exemption at all.

14 MR. PLOUFFE: That would be true if -- if the
15 nonexempt entity chose to be insular, not to provide any
16 other services to the surrounding people, and that's one
17 of the problems in this case. If the statute --

18 QUESTION: I'm not sure I -- it's a camp for the
19 blind, and it serves the same number of Maine people as
20 the camp that serves only Maine people, but it's a larger
21 camp so it also takes in a lot of people from out of
22 State, so it's rendering exactly the same benefits to the
23 State of Maine, but it's also including these other
24 people.

25 MR. PLOUFFE: Let me answer your question

1 directly. Under -- if that is all that camp did in terms
2 of dispensing charity, then the answer is yes, it would
3 not get the tax exemption and the other camp would, even
4 though they both serve the blind.

5 But the point I wanted to make is, when read
6 carefully, this statute doesn't focus on the residency of
7 the campers, or in your hypothetical the residency of the
8 blind people. The statute focuses on how the charity
9 spends its money, and certainly in the case of the summer
10 camp they're usually going to spend their money just on
11 the kids who pay the money, the tuition money, but they
12 could choose to do things like open their beautiful beach
13 to the people of Harrison, and that would be a benefit to
14 Maine people that could be included in the computation of,
15 do they principally benefit Maine people, but they don't
16 do that.

17 QUESTION: But a camp that served just Maine
18 residents would not have to do that.

19 MR. PLOUFFE: A camp, because they would already
20 be serving Maine people --

21 QUESTION: So you're right back to where you
22 started. There's a discrimination between in-State and
23 out-of-State campers.

24 MR. PLOUFFE: There's discrimination drawn,
25 Justice Kennedy, based on the benefit to Maine people or

1 no benefit to Maine people --

2 QUESTION: How long has this law been in effect?
3 It seems to me it's more trouble than it's worth. My
4 goodness.

5 (Laughter.)

6 QUESTION: Computing -- how do you value the use
7 of a beach, for example? Has this thing been around a
8 long time? I mean, I see endless litigation over this.

9 MR. PLOUFFE: The provision that we are arguing
10 about --

11 QUESTION: Maybe we should strike it down for
12 foolishness or something.

13 (Laughter.)

14 MR. PLOUFFE: The provision that we're arguing
15 about was enacted in 1957. It was upheld by the Maine
16 supreme court in 1963, in a case that was decided on
17 Fourteenth Amendment ground, in which the law court said,
18 we don't think that it's irrational or unreasonable for
19 the State of Maine -- and this is peculiar to charities --
20 for the State of Maine to require that its people get
21 something in return -- in return for this forgiveness of
22 taxes, and that was a Fourteenth Amendment case.

23 This Court, when it visited this issue before in
24 WHYY, Inc., a similar issue, only that one was the State
25 of incorporation of the charity, used a Fourteenth

1 Amendment analysis, and there was dicta in WHY, Inc. to
2 suggest -- and I admit that it is only dicta -- to suggest
3 that, had the facts been as they are here today, that may
4 have been okay under the Fourteenth Amendment.

5 Now, the petitioner raised the Fourteenth
6 Amendment claims in this case below, and the law court
7 ruled against the petitioner, so did the superior court,
8 and they chose not to appeal that Fourteenth Amendment
9 decision to this Court, apparently agreeing that the
10 statute does pass the Fourteenth Amendment test.

11 QUESTION: Well, I think you -- we accept the
12 fact that the Fourteenth Amendment is a much more lenient
13 standard of review on these matters of economic regulation
14 than the Commerce Clause. I mean, that's a given under
15 our jurisprudence today. That's why the other Darnell
16 case got over -- in effect overruled or rewritten in the
17 Carolina Tax case last year.

18 I mean, the standards are distinctly different,
19 so the fact that you may pass muster under the Fourteenth
20 Amendment doesn't get you over the line on the Commerce
21 Clause.

22 MR. PLOUFFE: I understand, Your Honor, that the
23 Court can and in this case is looking at this under the
24 Commerce Clause.

25 QUESTION: And in looking at it, what test do we

1 apply? It appears to be facially discriminatory against
2 interstate commerce, so it may be a tougher standard.

3 MR. PLOUFFE: If we choose not to use something
4 like the market participant exception, and therefore apply
5 the dormant Commerce Clause to it, then the question is,
6 is it, per se, a flexible approach, and the law court
7 chose the flexible approach.

8 Looking at the per se question, I think there
9 are three things we need to look at: the statute, the
10 statutory language, and then if it survives that, the
11 effects of the statute, actual effects, and incurred
12 effects. And the statute itself, as I said before, I
13 think focuses on the benefits that are provided by the
14 corporation and not by the --

15 QUESTION: Well, but if you concede that even
16 nonprofit organizations can engage in interstate commerce
17 you can certainly look at this, let's say, in the nursing
18 home context as being facially discriminatory.

19 MR. PLOUFFE: I respectfully disagree, Justice
20 O'Connor. On its face it's a tax, or an exemption from a
21 tax on real estate, number one. We've never considered
22 real estate under the Commerce Clause here before.

23 Number 2, it looks at the identity of the people
24 who are benefited, not the identity of the people who
25 cross the State lines. And so I don't think that there is

1 facial discrimination. And number 3, as the law court
2 said, it treats all Maine camps the same.

3 QUESTION: May I ask --

4 MR. PLOUFFE: There's the target. You can go
5 out and meet the target if you want the exemption.

6 QUESTION: Do you think the people benefited do
7 not include the church that runs the camp?

8 MR. PLOUFFE: I'm not sure that I understand the
9 question, Justice Stevens.

10 QUESTION: Well, you say -- you look at the
11 people benefited, and I just suggest one of the people
12 benefited would be whatever the charity it is that gets
13 the benefit of an exemption.

14 MR. PLOUFFE: The Christian Science Church in
15 Boston, for example, the church is actually owned by a
16 separate Maine corporation.

17 QUESTION: And supposing it -- just focus on the
18 church for a minute. Supposing the church is near the
19 State line and over half the people came from out of
20 State, would the church -- would you say that the church
21 should not get its exemption because the people benefiting
22 from the exemption are the people that cross State lines?
23 It seems to me the principal beneficiary of the exemption
24 is the church itself.

25 MR. PLOUFFE: Well, again, I think that under

1 Walz churches are treated differently by the Court.

2 QUESTION: And we have a church here.

3 MR. PLOUFFE: Excuse me, Your Honor?

4 QUESTION: We have a religious organization
5 here.

6 MR. PLOUFFE: We have a nonprofit Maine
7 corporation that is not itself a church. Churches are
8 treated differently under the Maine statute --

9 QUESTION: I see.

10 MR. PLOUFFE: -- and the 50 percent just doesn't
11 apply. It's a nonprofit Maine corporation. They have an
12 affiliation somehow, and I'm not exactly sure how, with
13 the Christian Science Church that do allow only Christian
14 Science children in, and I believe that at some point
15 during the day they review the tenets of the Christian
16 Science faith, but it is not a church.

17 QUESTION: I see, but let me ask one other --
18 you place so much emphasis on the fact that it's a real
19 estate tax. If it were not a charity, you would not
20 contend, I do not suppose, that in a commercial context
21 that the State could discriminate -- have a tax exemption
22 for businesses that sold only to Maine customers and no
23 tax exemption for those that sold out-of-State customers?

24 MR. PLOUFFE: I think I have a couple of
25 response to that, Justice Stevens. One, I think it would

1 fail Fourteenth Amendment analysis.

2 QUESTION: Well, under -- just confine our
3 analysis to the Commerce Clause --

4 MR. PLOUFFE: -- and would have under Green
5 Acre B'hai, which is the main case.

6 Under the Commerce Clause, I suggest that
7 because it is a -- the implications of it being exempted
8 from a tax of real estate is that it would fall under the
9 flexible approach, but would fail under the flexible
10 approach because there would be no legitimate State
11 interest.

12 QUESTION: Well, the interest would be to
13 encourage local commerce, encourage transactions within
14 the State, encourage the local economy.

15 MR. PLOUFFE: I do not think that that would
16 survive. Just --

17 QUESTION: Well, supposing there were two camps,
18 not charitable camps but just for-profit camps. One
19 served out-of-State, and the other served local, and they
20 say, we won't -- we'll give a tax exemption to those
21 serving the local people. Would that have the same
22 justification as this?

23 MR. PLOUFFE: I don't think it would. Maybe the
24 charity is becoming involved in my thinking, but --

25 QUESTION: Sure it would.

1 QUESTION: I'm just suggesting that the charity
2 is critical to your argument, and you seem to -- and I
3 don't think your real estate argument can stand without
4 coupling it with your charitable argument, but I'm not
5 sure what your position is.

6 MR. PLOUFFE: I -- again, if it's real estate,
7 then I don't think it's facial, that it's an indirect
8 effect on interstate commerce, and because it's indirect,
9 you look at it under the flexible approach, but I think it
10 would fail under the flexible approach because it would
11 not -- I can't conceive of a legitimate state interest,
12 for example, in the motel situation that's raised in the
13 reply brief. I can't think of a legitimate State interest
14 for taxing a motel --

15 QUESTION: Providing cheaper housing for local
16 residents. Give them a cheaper rate at the hotels, if
17 people have marginal income. There's certainly a State
18 interest in having people sleep indoors at night.

19 Of course, you could make all of those same arguments
20 against the market participation exception we've created.
21 You can say it's the same thing. The State is simply
22 trying to give its own citizens an advantage over out-of-
23 State. We've made an exception there, and we've made an
24 exception in the subsidy area, and the issue is whether we
25 should make an exception for charities, whether that also

1 is a distinctive situation.

2 MR. PLOUFFE: And again, under Regan -- Regan,
3 I'm sorry -- this Court has clearly characterized
4 charitable exemptions as cash grant subsidies.

5 The amici here say they're subsidies, and they
6 are from the general fund of the Town of Harrison. This
7 tax goes into the general fund to pay for municipal
8 services, police protection, fire protection, roads, and
9 the very services that ironically benefit the petitioner,
10 yet they don't want to pay the tax.

11 But the point of the general fund is the
12 language in West Lynn Creamery seemed to be very
13 interested in the fact that any subsidy had to come out of
14 a general fund. This is a broad-based tax. All of the
15 people in the Town of Harrison have to pay this tax.

16 QUESTION: Mr. Plouffe, could you -- going back
17 to Justice Stevens' hypothetical, could you explain to me
18 why it is in the case of the two profit-making
19 corporations as to which a distinction is made the
20 discrimination would not have been facial? You said it
21 would not have been. You said it would get the, as you
22 put it, the flexible approach, and I don't see why.

23 MR. PLOUFFE: I think because we're talking
24 about real estate, and we have never applied the Commerce
25 Clause to the taxation of real estate which doesn't move

1 across State lines, that effects that a tax on real
2 estate, or an exemption from a tax on real estate have on
3 interstate commerce are indirect.

4 QUESTION: Why the fact that real estate doesn't
5 move across State lines? Why is that significant?

6 MR. PLOUFFE: Well, the language of the positive
7 Commerce Clause --

8 QUESTION: I mean, interstate commerce is going
9 to be affected whether you're doing it through a real
10 estate tax or any other form of taxation. Why should it
11 matter that the specific race that is taxed happens to be
12 itself nonambulatory?

13 MR. PLOUFFE: Perhaps I have a narrow view of
14 the dormant Commerce Clause, but --

15 QUESTION: Isn't it the effect on interstate
16 commerce that we're concerned with?

17 MR. PLOUFFE: We are, but the question becomes,
18 is it per se a flexible one. I'm saying there isn't a --
19 there could be in the hypothetical an effect on interstate
20 commerce, but that it would be indirect and not subject to
21 the per se rule, and I would also add that --

22 QUESTION: Directness and indirectness hasn't
23 got anything to do with the fact that it's real estate
24 that's being taxed, number 1, and number 2, I don't know
25 where the direct-indirect distinction comes from.

1 MR. PLOUFFE: Well, I think that the tax on real
2 estate may or may not be incorporated into the charge made
3 by the for-profit organization. There are other ways that
4 they could handle that.

5 If the competitive marketplace said, gee, we
6 just can't pass on this tax and stay in business, we'll
7 find other ways to deal with this in the marketplace, for
8 example, reducing staff, or reducing overhead, those types
9 of things, it's very indirect before it gets to the
10 consumer.

11 And the other issue about the hypothetical is
12 whether or not we are going to treat consumers as articles
13 of commerce.

14 QUESTION: Well, nobody is arguing that you're
15 going to treat consumers as articles of commerce. The
16 argument is that interstate commerce -- that is to say,
17 the movement of people back and forth, the provision of
18 services to people from out of the taxing State -- is
19 going to be affected. Their argument isn't -- they don't
20 make the argument that the campers are articles of
21 interstate commerce.

22 MR. PLOUFFE: Well, they -- I think they did in
23 their first brief. Let's put that aside. They certainly
24 do make it in --

25 QUESTION: It escaped me, but it's clear in any

1 event that they have abandoned any such attempt if they
2 ever made it, isn't it?

3 MR. PLOUFFE: They certainly have not abandoned
4 the attempt to say that the travel of these campers across
5 State lines is protected by the Commerce Clause.

6 QUESTION: Well, I -- are you challenging that
7 assumption?

8 MR. PLOUFFE: I certainly am attesting that --
9 challenging that.

10 QUESTION: interstate travel is not protected
11 under the Commerce Clause?

12 MR. PLOUFFE: I don't read Heart of Atlanta or
13 Edwards for the proposition put forth by the petitioners.

14 QUESTION: Do you think that interstate travel
15 has an effect on interstate commerce?

16 MR. PLOUFFE: I think the provision of
17 interstate travel by bus companies, for example, does. I
18 think that salesmen who travel across --

19 QUESTION: Wouldn't these campers perhaps arrive
20 in Maine by bus, or by plane, or by train, or some such
21 means?

22 MR. PLOUFFE: But we're not taxing the plane or
23 the bus or the train.

24 QUESTION: No, but we're asking whether
25 interstate commerce is affected, and if it's affected by

1 bus travel, then I suppose this is a case in which it's
2 affected.

3 MR. PLOUFFE: And I'm suggesting that it would
4 be an indirect effect and subject to the flexible
5 approach, but I still do not read those two cases for the
6 proposition for which they want them to stand.

7 QUESTION: How broadly do you take charities
8 outside the dormant Commerce Clause? I know your position
9 here is that charitable exemptions, real property tax
10 exemptions shouldn't be analyzed in interstate commerce,
11 and you've given several reasons for that, but are you
12 saying that nonprofits and whatever exemptions the
13 legislature, State legislature chooses to give to them is
14 ever and always, because they're nonprofits it falls
15 outside the range of the Commerce Clause?

16 MR. PLOUFFE: My argument goes so far as to
17 cover an exemption from income taxes, which was the case
18 in Regan, Federal income taxes, excise taxes, if they
19 would pay -- having occasion to pay them, and sales taxes.
20 We exempt them from sales taxes and income taxes and
21 property taxes in the State of Maine, and if they are
22 going to challenge the impact, how the lines are drawn by
23 the legislature in granting those exemptions, then my
24 argument would say --

25 QUESTION: Do we --

1 MR. PLOUFFE: -- that it's under market
2 participation, because in each one of those cases the
3 State is asking something in return.

4 We may think that it's provincialism on the part
5 of the State of Maine to write its statute this way, but I
6 don't think that's the question. The question is whether
7 or not the State legislature in Maine can do this.

8 QUESTION: We would never think of accusing the
9 State of Maine of provincialism.

10 (Laughter.)

11 QUESTION: The -- do you know of any case of
12 ours that involves a Commerce Clause challenge to real
13 estate taxes? What cases of ours -- or exemptions to real
14 estate taxes.

15 MR. PLOUFFE: I have found none, Your Honor.
16 I -- The WHY case is as close as I could come.

17 QUESTION: That's very interesting. Does it
18 produce a sort of discrimination against out-of-State --
19 an out-of-State church, for example, to give a tax
20 exemption to any church that owns real estate, they're
21 exempt from the real estate tax, but if you're an out-of-
22 State church, of course, and happen to be located in a
23 State that taxes church real estate, you're at a
24 commercial disadvantage, I suppose, if you consider the
25 attracting of parishioners as commerce.

1 MR. PLOUFFE: I have great difficulty
2 considering the attraction of parishioners as commerce.

3 QUESTION: Garnering a collection plate.

4 (Laughter.)

5 MR. PLOUFFE: I would say that WHY in this
6 Court did strike down the distinction based on the
7 domicile of the corporation, and that was a real estate
8 tax, and that was a charity, but it was determined under
9 the Fourteenth Amendment. The Commerce Clause was not
10 mentioned at all.

11 If there are no other questions, I thank the
12 Court.

13 QUESTION: Thank you, Mr. Plouffe.

14 Mr. Dempsey, you have 2 minutes remaining.

15 REBUTTAL ARGUMENT OF WILLIAM H. DEMPSEY

16 ON BEHALF OF THE PETITIONER

17 MR. DEMPSEY: Thank you, Mr. Chief Justice. I
18 just have two comments.

19 The -- one of the questions that Justice Scalia
20 raised in terms of how old this statute is raises another
21 question, and also your last question about property
22 taxes, and that is, why hasn't this Court ever seen a case
23 like this before, and the short answer is that
24 legislatures have not passed statutes like this before.

25 Now, there have been scores, thousands of

1 statutes that we don't know anything about, but we have
2 examined, and the respondent has, the statutes on the
3 books. We have discovered one in the State of Michigan
4 that can be considered comparable. The respondent has
5 turned up three more. We deny that they're comparable.

6 But in any case, if this statute is not
7 absolutely unique, it is almost unique, and that says
8 something, because the policy of the Commerce Clause
9 doesn't have to do just with economics, it has to do with
10 interstate comity, and we suggest that this unbroken,
11 almost unbroken pattern of behavior by the legislatures
12 says something about how the States feel to meet the
13 demands of interstate comity.

14 Now, the last point is Justice Connor's comment
15 and Justice Scalia's comment, I hope it goes without
16 saying, because I didn't say it, that our case is rooted
17 in the basic premise that this statute is facially
18 discriminatory against interstate commerce.

19 Justice Scalia, I think you're absolutely -- I
20 started with this notion in the petition of certiorari.
21 If you apply all the ordinary canons that this Court has
22 established over the years dealing with these cases, the
23 other side has got to lose, in my judgment. The only way
24 out is to create an exception for -- I wouldn't say
25 charities, nonprofit organizations comparable to the

1 market participation or the subsidy charity.

2 Now, we've advanced all the reasons that we
3 think that that would be an unwise move on the part of the
4 Court, but that really I think is the issue.

5 Mr. Chief Justice.

6 QUESTION: Thank you, Mr. Dempsey. The case is
7 submitted.

8 (Whereupon, at 12:01 p.m., the case in the
9 above-entitled matter was submitted.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25