

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHRISTOPHER H. LUNDING ET UX., Petitioners v.
NEW YORK TAX APPEALS TRIBUNAL ET AL.

CASE NO: 96-1462

PLACE: Washington, D.C.

DATE: Wednesday, November 5, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHRISTOPHER H. LUNDING :

4 ET UX., :

5 Petitioners :

6 v. : No. 96-1462

7 NEW YORK TAX APPEALS TRIBUNAL :

8 ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, November 5, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

16 CHRISTOPHER H. LUNDING, ESQ., New York, New York; on
17 behalf of the Petitioners.

18 ANDREW D. BING, ESQ., Assistant Attorney General of New
19 York, New York, New York; on behalf of the
20 Respondents.

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On behalf of the Petitioners	3
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On behalf of the Respondents	30

1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-1462, Christopher H. Lunding v. the New
5 York Tax Appeals Tribunal.

6 ORAL ARGUMENT OF CHRISTOPHER H. LUNDING

7 ON BEHALF OF THE PETITIONERS

8 MR. LUNDING: Mr. Chief Justice, and may it
9 please the Court:

10 In calendar year 1990 I was a lawyer practicing
11 law in the City of New York and residing some 38 miles
12 from my office in the State of Connecticut, some 9,000
13 feet, plus or minus, over the State border. It is
14 something I did not think of when I moved to the State of
15 Connecticut that I would be here today on my on behalf,
16 challenging a statute of the State of New York as
17 discriminating against me as a nonresident in taxation.

18 QUESTION: What, 9,000 feet would be roughly,
19 what, 2 --

20 MR. LUNDING: A little less than 2 miles over
21 the State line, Your Honor, into Connecticut.

22 QUESTION: Well, but -- okay. Okay.

23 MR. LUNDING: Right. Close to the border. Not
24 that I think that in --

25 QUESTION: That doesn't make a difference,

1 though.

2 MR. LUNDING: No, it does not, Your Honor. I do
3 not urge that the distance from the State line is legally
4 relevant in this case.

5 What is legally relevant, though, is the
6 question of the constitutionality of New York State tax
7 law 631(b)(6), which entirely denies --

8 QUESTION: Well, you don't argue, do you, or
9 maybe you do, that in apportioning this income for people
10 who work full- or part-time in New York, that New York has
11 to allow personal deductions of various kinds to out-of-
12 State residents, do you? I mean, deductions that don't
13 relate to the production of income in New York?

14 MR. LUNDING: Well --

15 QUESTION: Let's talk about that kind of
16 deduction. It doesn't relate to the production of your
17 income in New York. Now, does New York have to worry
18 about personal deductions of that kind?

19 MR. LUNDING: Well, the money is fungible,
20 Justice O'Connor, and a substantial portion of my income
21 and a much more substantial person -- portion of other
22 taxpayers' nonresident-in-New York income is earned in the
23 State of New York. I think there could be made a
24 persuasive argument that, because of that, it is a
25 requirement of the Privileges and Immunities Clause that

1 nonresidents be allowed to take deductions in proportion
2 that their New York income bears to their total income for
3 personal expense items.

4 It is not necessary to reach that point in this
5 case, and that's particularly because the nature of
6 alimony is very different from the nature of other
7 personal expense items in several respects.

8 In the first respect, in the State of
9 Connecticut, as well as in other States, the amount of
10 alimony is based, must be based upon the payor's total
11 income from all sources. Inevitably -- one case so
12 holding is Wanatowitz v. Wanatowitz, which is found in 533
13 A.2d. Because of that, inevitably in the setting of the
14 amount of the alimony my New York income was taken into
15 account.

16 So that's point number 1. There's a direct
17 connection there between the alimony and my New York
18 income which is not present if it were a charitable
19 deduction, or a real estate tax, or any number of --

20 QUESTION: Couldn't you say, too, that you
21 couldn't afford a very nice house in Connecticut which
22 perhaps you have if you didn't make a good deal of money
23 in New York, and therefore that New York ought to allow
24 your property tax in Connecticut to be deducted?

25 MR. LUNDING: That may be true, but it

1 wouldn't -- but the property tax would not be determined
2 based upon my New York income in part. That's the
3 difference I'm articulating here. Alimony specifically is
4 determined on the basis of total income. Property taxes
5 are determined on the basis of the value of the real
6 estate in question, and therefore not so clearly connected
7 to --

8 QUESTION: Yes, but that would be true even --
9 supposing your divorce took place while you were getting
10 all your income in Connecticut, and then you later started
11 to practice in New York and had the same alimony, would
12 that make it a different case?

13 MR. LUNDING: Well, we --

14 QUESTION: You're relying on the fact that your
15 alimony is partially determined by your New York income,
16 but we'd have the same case before us if that were not the
17 fact.

18 MR. LUNDING: Right. I believe I must say that
19 that is correct, and it's because this statute has as its
20 unitary basis for discrimination nonresidents and no other
21 factor. It is, of course, true that only that factor is
22 really before this Court, and to some degree all other
23 elements are extraneous.

24 QUESTION: Well, I'm not sure that that's the
25 way the State of New York would see it. Won't -- wouldn't

1 they say we're not discriminating based solely on
2 residence, we're discriminating based on (a) nonresidents,
3 and (b) the fact that this particular deduction was not
4 related to the earning of income in New York?

5 MR. LUNDING: Well, that --

6 QUESTION: And --

7 MR. LUNDING: Right.

8 QUESTION: -- that seems to me very, very -- a
9 very different case.

10 MR. LUNDING: Well, they are discriminating --

11 QUESTION: Now, am I characterizing their
12 position correctly, to begin with?

13 MR. LUNDING: Well, let me --

14 QUESTION: Perhaps not.

15 MR. LUNDING: Let me go back and state the
16 analysis here under the Privileges and Immunities Clause.
17 The first element is, is this statute discriminatory
18 against nonresidents. There's a two-prong test. I will
19 answer your question, but in a long way, if I may.

20 The first test is to be satisfied is, is this
21 statute discriminatory? Well, this statute is
22 discriminatory. It has one sole, unique, intentional
23 purpose, which is to discriminate against nonresidents by
24 denying this particular adjustment to income. That
25 element is satisfied in this case.

1 The State of New York is unclear actually on
2 that point, but objectively we certainly assert that it's
3 satisfied.

4 QUESTION: Mr. Lunding, let me ask you about
5 that.

6 MR. LUNDING: Yes.

7 QUESTION: Because I had always thought of
8 alimony as an income-splitting between the payor and the
9 ex-spouse.

10 MR. LUNDING: Correct.

11 QUESTION: Now, I could see, if you were
12 presenting us with a situation where what -- New York lets
13 you deduct the tax to your ex-spouse so that New York gets
14 the tax on that amount of money that you earned in New
15 York, but you would like to take the deduction while on
16 the income side, if there is any income, it is to the ex-
17 spouse, who is a Connecticut residence, so it seems to me
18 you say, let me take the sweet and New York will be stuck
19 with the bitter.

20 MR. LUNDING: Well, I would not agree with that
21 conclusion, Your Honor, but I would point out this about
22 the nature of alimony. The statute calls alimony a
23 deduction, and we -- we're talking about personal
24 deductions here.

25 Alimony is not really a deduction at all. For

1 Federal purposes and for New York purposes it is an
2 adjustment to income, meaning it is -- and it is taken out
3 of the income of the payor, transferred to -- functionally
4 the responsibility to pay tax transferred to the income of
5 the payee, or the recipient for tax purposes. On your
6 Federal return that's the way it works, and if you're a
7 resident in New York that's the way it works, and that's
8 irrespective of where the recipient lives.

9 QUESTION: Yes.

10 MR. LUNDING: Right.

11 QUESTION: And in the Federal union that's fine,
12 because the IRS is going to get it either way.

13 MR. LUNDING: Right.

14 QUESTION: The husband or the wife, it could be,
15 deducts it, and the one who receives it pays income on it.

16 MR. LUNDING: Right.

17 QUESTION: But when you're in one State and
18 you're dealing with nonresidents, in the generality of
19 cases if you have a marital situation it's in the State of
20 their residence.

21 MR. LUNDING: Yes.

22 QUESTION: So one State is going to get the
23 income to tax, the other State is not going to get that
24 tax, so there seems an imbalance there, and my only
25 question is, why is it a violation of Privileges and

1 Immunities to say that when New York doesn't get the
2 chance to tax the one who's getting the money, getting the
3 alimony, it shouldn't have to give a deduction to the one
4 who's paying it?

5 MR. LUNDING: Well, my point there was, if I had
6 been a resident of New York there would have been an
7 adjustment in which I would have been absolved entirely
8 for the tax on the alimony amount, and it would have been
9 transferred to my spouse.

10 Now, the New York statute doesn't require for
11 that operation for a resident that the spouse live in New
12 York. The spouse could live anywhere in the world, and if
13 the spouse did not live in New York there would be no tax
14 captured by New York on any part of that transferred
15 income, so this is really, I believe, a factor which is
16 not a motivating factor for New York, and if you look at
17 it in terms of the incidence of the tax as to residence,
18 it apparently is completely irrelevant in the economic
19 analysis.

20 In the case of nonresidents, in any event the
21 residence of the recipient is also irrelevant. The
22 statute doesn't say, which it could, if the recipient
23 lives in New York, and therefore we tax that money in New
24 York, we let you off the hook, Connecticut taxpayer. It
25 hits everybody.

1 This is -- these are another example of
2 extraneous elements that are not really involved here,
3 where the only basis for discrimination is nonresidence
4 and everything else is --

5 QUESTION: Now, I don't think we completed
6 our --

7 MR. LUNDING: Yes. Yes.

8 QUESTION: -- brief colloquy on what you think
9 the standard is.

10 MR. LUNDING: Well --

11 QUESTION: Does New York have to treat residents
12 precisely the same as nonresidents in every category of
13 taxation?

14 MR. LUNDING: Well, Austin v. New Hampshire
15 teaches us that New York has to treat nonresidents under a
16 rule of substantial equality of treatment, and --

17 QUESTION: Can that substantial equality of
18 treatment be based on a theory that the income -- pardon
19 me, that the deduction or the adjustment must be related
20 to the income that's earned in New York, and income-
21 producing activities in New York?

22 MR. LUNDING: As regards personal expenses, the
23 answer is no, because money being fungible, as a practical
24 matter, looking at the actual, practical impact of the
25 tax, which is the method of analysis, not labels, not

1 anything else, but the actual practical impact, there is a
2 discrimination here. There is a higher tax paid by
3 nonresidents than by residents.

4 It is not insubstantial in this instance or in
5 any other, and it is much worse in the case of people with
6 proportionately greater New York-source income in
7 proportion to the whole, and therefore
8 New York may not, the petitioners urge, distinguish
9 between the two in the manner that this statute does.

10 QUESTION: Now, you don't earn all your income
11 in New York, is that correct?

12 MR. LUNDING: About half of it in my case, year-
13 in, year-out. That's right.

14 QUESTION: But a person who earns all income in
15 New York but lives in Connecticut, strictly the bedroom
16 community situation --

17 MR. LUNDING: There are many such people, yes.

18 QUESTION: As to that person, there would be a
19 very substantial difference, I suppose.

20 MR. LUNDING: Well, the State has --

21 QUESTION: If alimony is not deductible.

22 MR. LUNDING: Or -- well, it would be -- yes,
23 that is correct, and the amount of course, would vary
24 according to how much alimony, and in proportion to the
25 total income, but in that scenario the amount which would

1 be paid by the nonresident in New York tax would be
2 greater than the amount that would be paid by a resident
3 of New York. I mean, in whole dollars, not in proportion
4 to anything. And this is another problem with the way
5 this statute does operate.

6 QUESTION: May I ask you a question just for my
7 own clarification?

8 MR. LUNDING: Yes.

9 QUESTION: Is it correct that the rate that New
10 York imposes on the nonresident is based in part on the
11 nonresident's non-New York income?

12 MR. LUNDING: That's correct. The case that
13 allowed that is named Brady v. State, and they take into
14 account worldwide income in setting the rate, which is
15 progressive.

16 QUESTION: Do you -- did you -- you didn't
17 challenge that feature of the tax in this case, did you?

18 MR. LUNDING: No, I did not, and I -- therefore
19 I don't have the standing to -- I have a view on it, but I
20 don't think it's appropriate necessarily to state it at
21 this time. But you're --

22 QUESTION: What is --

23 MR. LUNDING: Yes.

24 QUESTION: What is the top rate?

25 MR. LUNDING: I don't really -- 9 percent, I

1 believe, currently. I don't -- I'm not sure what it is
2 today, but it's 8 or 9 percent is the -- and I'm thinking
3 about 1990. I frankly don't remember.

4 But that's ball park, and it is progressive, and
5 they do tax -- they do take into account in setting the
6 rate worldwide income, and that could be another basis
7 upon which it could be said as a matter of the Privileges
8 and Immunities Clause that they also must allow some
9 proportion of worldwide deductions, whatever they may be,
10 or adjustments, because strictly speaking alimony is not a
11 deduction, not subject, for example, to the Federal limit
12 on deductions, but an income transfer, as Justice Ginsburg
13 pointed out.

14 QUESTION: But an income transfer that can be
15 very beneficial.

16 MR. LUNDING: Well, the actual effect in any
17 particular case will, of course, vary according to the
18 personal circumstances, where the receiving ex-spouse
19 lives and many other factors, but the effect of this
20 statute in all cases compared to the situation if the
21 statute were not there will be to discriminate against
22 nonresident taxpayers who pay alimony, because this
23 reduction in their income, taxable income, will obviously
24 discriminate.

25 QUESTION: Well, when you say discriminate, you

1 mean treat differently, I take it.

2 MR. LUNDING: Treat differently than residents
3 who pay alimony, yes, that's what I mean, and the amount
4 in this case is \$3,724 for the year 1990 in my particular
5 case, or a 15-percent increase in the tax in my case.

6 QUESTION: But you deduct if Connecticut has an
7 income tax?

8 MR. LUNDING: It did not have a tax on earned
9 income in 1990 at all.

10 QUESTION: Which is the year in question.

11 MR. LUNDING: Issue. The year in issue.

12 QUESTION: But ordinarily, if a State has an
13 income tax, the resident State, you could then deduct the
14 New York tax from the Connecticut tax. I'm just trying to
15 see how much in practice is left when you take into
16 account, well, you have to pay New York more, but then you
17 got a bigger deduction in your home State.

18 MR. LUNDING: Well, looking at the matter
19 currently, the tax rate in Connecticut is 4-1/2 percent.
20 The tax rate in New York is -- I don't remember, 8 or 9
21 percent. The deduction in Connecticut is at the rate in
22 Connecticut, and therefore there still is something left
23 over to be discriminatory on that regime, 4-1/2 percent,
24 whatever it is, the difference between the marginal rates
25 in the two States, but --

1 QUESTION: And in figuring the level of
2 discrimination, do we take account at all of the tax
3 that's being paid on these funds by the Connecticut
4 resident who's receiving them?

5 MR. LUNDING: No, and that is because in Austin
6 v. New Hampshire this Court held that the
7 constitutionality of one State statute that discriminates
8 against nonresidents may not be -- depend upon the present
9 configuration of the statutes of another State, which is
10 what we're talking about here as to the State of
11 Connecticut. What its tax laws may or may not be at any
12 particular time cannot be the basis for holding
13 constitutional this discriminatory statute in the State of
14 New York.

15 QUESTION: Are there some deductions or credits
16 that really are closely tied to the taxpayer's domestic
17 life as opposed to his or her business life?

18 MR. LUNDING: Well, there are commentators --
19 Professor Hellerstein in a 1974 article in the Michigan
20 Law Review seems to suggest a possible test in the
21 abstract that there would be some particular deductions
22 which are particularly tied to the particular
23 circumstances of the State of residence, without
24 identifying what they are.

25 QUESTION: Isn't it true, Mr. Lunding, that the

standards by which tax law classifications are judged are about the most generous known to the law?

MR. LUNDING: No, I don't think that -- well, the petitioners would not agree with that statement. Austin --

QUESTION: Well, several of our cases say that. Perhaps not in the Privileges and Immunities Clause kind, but just in the sense of classification generally for tax laws.

MR. LUNDING: Well, the standard there -- I'm thinking of Allied Stores v. Bowers, which is one of the places where the test you're describing I believe is set forth.

Assuming first that the particular act by the State does not violate the Federal Constitution, which is what it says in that case, there is a wide latitude, but if it -- but if --

QUESTION: Well --

MR. LUNDING: -- that assumes the conclusion which is --

QUESTION: There's a total latitude if it doesn't violate the Federal Constitution.

MR. LUNDING: Well, that -- and in any event, that is not the -- yes, that's correct, but the issue in the privileges & immunities context, in light of Austin v.

1 New Hampshire, the first thing is that there is a standard
2 of review substantially more rigorous under the Privileges
3 and Immunities Clause for State taxing decisions affecting
4 individuals than affecting business organizations, trades,
5 or professions. That is part of what the case says, and
6 therefore I would not agree that there is a -- in this
7 context a greater degree of latitude than in others.

8 In fact, in the taxing area petitioners would
9 argue that this is a case where a substantially heightened
10 scrutiny is required, a rule of substantial equality is
11 required, and it is our position that it has not been met
12 in this instance.

13 QUESTION: Mr. Lunding --

14 MR. LUNDING: Yes.

15 QUESTION: -- I hate to think we're going to
16 have to go through State deductions one by one in order --
17 in case after case in order to decide which must be
18 allowed to out-of-Staters and which need not be. What is
19 your criterion for whether it must or need not be?

20 MR. LUNDING: Well, the only criterion that
21 needs to be addressed -- well, I guess I under -- I'll
22 answer the question in two parts. The only criterion that
23 needs to be addressed in this case is evidently whether
24 alimony as an adjustment, and I've stated the unique
25 aspects of that, so --

1 QUESTION: If that's all we do, then we're going
2 to have another case on the next item, and another case on
3 the next item. I want a principle.

4 MR. LUNDING: Well, the simple principle view --
5 the simple principle view is that when you're talking
6 about taxes which fall by their terms upon personal
7 service income -- and this is a personal income tax in New
8 York. That's the label that goes on it. That's what it
9 taxes, my personal individual income in New York.

10 When the State wishes to tax a nonresident's
11 personal income, the bright line rule would be that if
12 there are personal deductions, no matter what they are, or
13 adjustments, such as alimony, no matter what they are,
14 then they must be allowed in the proportion that the New
15 York State income bears to total income, period.

16 QUESTION: What are nonpersonal deductions?

17 MR. LUNDING: Business expenses, or running a
18 donut shop in Connecticut, or something along those lines
19 might be treated differently, and I'm thinking of Shaffer
20 v. Carter, which appeared to do that.

21 Whether there's a principle basis to treat any
22 deduction differently we could debate, but we're talking
23 about personal deductions here and I was trying to answer
24 your specific --

25 QUESTION: All right.

1 MR. LUNDING: -- question on that subject.
2 QUESTION: What about life insurance --
3 QUESTION: What about --
4 QUESTION: -- premiums?
5 QUESTION: What about home -- excuse me. What
6 about -- what about --
7 MR. LUNDING: Life insurance or home mortgage
8 interest?
9 QUESTION: No. What about a deduction for
10 investing in a solar panel for your home, which is in
11 Connecticut?
12 MR. LUNDING: Well, responding to Justice
13 Scalia, the bright line rule which will avoid what -- the
14 problem he foresees is to just say, if you tax personal
15 income, you must give all personal deductions that the
16 State gives to its own residents in the proportion that
17 the income in that State bears to total income.
18 QUESTION: So this --
19 MR. LUNDING: Therefore the answer would be, for
20 solar panels or for anything else, if New York gives that
21 personal deduction from personal income of its residents,
22 it must do so in proportion for nonresidents which it
23 taxes.
24 QUESTION: Of course, when I asked you that
25 question at the start, you said, oh, no, no, no, we're

1 just talking about alimony here --

2 MR. LUNDING: Right.

3 QUESTION: -- and there's a big difference, and

4 that's all we're talking about, and we're not going to

5 talk about personal deductions.

6 MR. LUNDING: Well --

7 QUESTION: Now we've got a whole different

8 approach.

9 MR. LUNDING: Well, no. He asked me a

10 hypothetical question about where the line would be in --

11 QUESTION: Right.

12 MR. LUNDING: -- if we were dealing with other

13 subjects. It is -- to be clear, it is our position that

14 the question before the Court today is one and unitary,

15 and that is the adjustment-for-alimony issue, and we do

16 believe it's different, and I pointed out why I believe

17 it's different, for many reasons, from the standard run of

18 personal deductions --

19 QUESTION: Mr. Lunding, are you --

20 MR. LUNDING: -- and not getting into solar

21 panels or other matters.

22 QUESTION: Are you attacking the New York

23 statute as it applies to your particular facts, or are you

24 saying it is invalid as to everybody who doesn't get an

25 alimony deduction?

1 MR. LUNDING: The latter is the answer.

2 QUESTION: Across the board.

3 MR. LUNDING: It is -- yes.

4 QUESTION: So you're in effect here on behalf of
5 the person who has 100-percent New York income, 100
6 percent of his income comes from New York, but if his
7 alimony is -- if he's a nonresident he gets taxed at a
8 higher rate than the New York resident does.

9 MR. LUNDING: It is certainly true that the
10 petitioners view themselves -- well, we are attacking the
11 statute on its face, not as apply to the petitioners in
12 particular, and proceeding, if you will, by principles of
13 stare decisis at least, whatever happens here, for the
14 benefit of all other nonresidents similarly situated who
15 pay alimony.

16 QUESTION: And then we get into this fascinating
17 question of what is the standard for judging a facial
18 attack, because under your view -- you might say it's
19 clearly unconstitutional in the hypothetical you have in
20 your brief about the -- all the income comes from a New
21 York -- you know, a New York resident and a nonresident
22 both earn all their income in New York.

23 MR. LUNDING: Right.

24 QUESTION: On the other hand, at the other end
25 of the spectrum you say it's perfectly all right -- you

1 might say it's perfectly all right on a fact picture such
2 as yours, because --

3 MR. LUNDING: Well --

4 QUESTION: -- your income is -- you know, is
5 different.

6 MR. LUNDING: It would -- the petitioners
7 evidently would not agree with that conclusion, Your
8 Honor, but I think I may bring in here some question of
9 the particular laws of New York and why I'm standing here
10 alone rather than in a representative capacity or some
11 other.

12 New York has a rule, which was stated in a case
13 called Martin v. Lavine, L-a-v-i-n-e, in 1976 and
14 elsewhere, including in the intermediate appellate court
15 in Brady v. State, that when a tax statute is challenged
16 in New York, generally speaking, you cannot have a
17 representative action. You have to proceed individually,
18 and therefore in the State court system, which is where
19 this started, you are prohibited from proceeding in a
20 representative capacity.

21 QUESTION: I didn't know you could sue for a
22 refund or -- in the Federal system either in a class
23 action capacity.

24 MR. LUNDING: Well --

25 QUESTION: Isn't that generally the rule with

1 respect to challenges?

2 MR. LUNDING: I can only say in Brady v. State,
3 which involved the question of considering worldwide
4 income and setting the progressive rate in New York, it
5 was brought as a class action, and it was stopped as a
6 class action because of this rule, and the rule is based
7 on the theory as to the Government that an individual who
8 would win a case on the constitutionality of a statute
9 gives the benefit to all others by way of stare decisis,
10 and therefore there is no need for --

11 QUESTION: Oh, this Court has said that in a
12 number of cases.

13 MR. LUNDING: Yes, of course, but --

14 QUESTION: Let me just be clear, because you do
15 have to, if you're invoking privileges and immunities,
16 give us some kind of principle.

17 MR. LUNDING: Yes.

18 QUESTION: That you -- you are candidly saying
19 yes, anything that's personal, including your medical
20 expenses, including what could be ambiguous in some cases
21 like life insurance, whether it's to protect the business
22 or to protect the individual, but all of those you have to
23 be treated just like a resident.

24 MR. LUNDING: I'm saying if a bright line rule
25 is desired, which is what Justice Scalia asked, that that

1 would be a rational bright line rule which would avoid the
2 necessity for future definition of what is or is not
3 appropriately required.

4 QUESTION: May I raise one --

5 MR. LUNDING: But that's -- but it's not this
6 case, and we do not argue for the adoption of such a
7 general rule in this case. This case is limited to
8 alimony, and the only purpose of the petitioners here is
9 to have a decision on the question of whether the
10 adjustment for alimony, which in many ways is different
11 from other sorts of items which are deductions, must be
12 given as a matter of constitutional right under the
13 Privileges and Immunities Clause.

14 QUESTION: Well, if Justice --

15 MR. LUNDING: It need not get into all this
16 other --

17 QUESTION: Assuming we --

18 QUESTION: If Justice Souter would permit me for
19 just one reason, to --

20 MR. LUNDING: Yes.

21 QUESTION: Justice Scalia and Justice Ginsburg
22 and I have all asked you, what is your -- we have to write
23 this opinion.

24 MR. LUNDING: Yes.

25 QUESTION: This violates the Privileges and

1 Immunities Clause because it's not equal? That -- That's
2 not the standard. We need a standard that's more specific
3 than that.

4 MR. LUNDING: It favors -- well, it -- well, I
5 think the standard under Austin v. New Hampshire is that
6 there is a rule of substantial equality of treatment of
7 nonresidents mandated by the Privileges and Immunities
8 Clause in the area of judging the constitutionality of
9 State taxes which impact nonresidents, and the
10 petitioners' view of the matter is that in this instance
11 there is a lack of equality. There are no reasons for it
12 which are cognizable, and accordingly it's a rather simple
13 matter that this particular exaction and the statute which
14 gives rise to it is unconstitutional.

15 QUESTION: Mr. Lunding, I, too would like to
16 have, if not a bright line rule, at least a bright line
17 principle, and I have this reservation about the one that
18 you suggested.

19 You suggest a line to be drawn essentially
20 between personal expenses and -- or deductions and
21 business deductions, deductions for the production of
22 income in the other State.

23 My reservation comes for this reason. You also
24 suggested, and I thought with some cogency, that because
25 New York takes into consideration worldwide income when

1 the rate is set, therefore, New York ought to take into
2 consideration worldwide deductions.

3 MR. LUNDING: Yes.

4 QUESTION: The income, the worldwide income that
5 New York takes into consideration includes business
6 income, I assume.

7 MR. LUNDING: Yes, it does.

8 QUESTION: And therefore, if we were to adopt
9 what I suggested might be a cogent rationale, I think
10 we've got to go the whole hog, and I think we've got to
11 say, whatever is related to the production of any income,
12 or whatever would be appropriate as a deduction from any
13 income, must be allowed in New York pro tanto.

14 MR. LUNDING: Certainly petitioners would not
15 object to such a rule for -- but --

16 QUESTION: Yes.

17 MR. LUNDING: -- I mean, I can understand the
18 struggle here.

19 QUESTION: But wait a minute --

20 MR. LUNDING: I don't mean to indicate -- I
21 don't mean to indicate, though, Justice Souter, that there
22 should necessarily be a different rule for business than
23 for personal deductions. I mention that only because of
24 Shaffer v. Carter and there are no business deductions
25 involved in this case.

1 QUESTION: Surely that would be an unfair rule,
2 because New York takes into account out-of-State income --

3 MR. LUNDING: Yes.

4 QUESTION: For purposes of what rate you pay.

5 MR. LUNDING: That's right.

6 QUESTION: But it does not tax you on that out-
7 of-State income.

8 MR. LUNDING: No.

9 QUESTION: So it would certainly be unfair to
10 let you get dollar-for-dollar deductions on that --

11 MR. LUNDING: We're only asking for it in
12 proportion. We're not asking for it dollar-for-dollar.
13 We're asking for it in the proportion that the New York
14 State income bears to the total income and because of that
15 it doesn't raise the question of fairness which I think
16 you're --

17 QUESTION: Well, and you're only asking for it
18 to the extent that New York allows the same deduction for
19 its own residents.

20 MR. LUNDING: Yes. It can certainly make the
21 decision not to allow it to its own residents and it need
22 not give it to nonresidents, and that's true whether it's
23 a deduction or an adjustment or they use some other label
24 because, as this Court's decisions tell us, labels are not
25 determinative. It's the practical effect.

1 QUESTION: Well, I thought our test was
2 something along the following lines, that a statute that
3 discriminates against nonresidents must be justified by a
4 substantial reason for the discrimination against the
5 nonresidents, beyond the mere fact that they're citizens
6 of another State. What do you think the reason is that's
7 offered by New York here, and is it substantial?

8 MR. LUNDING: Well, there are two reasons. One
9 is that there exists untaxed income, meaning they can't
10 reach it because of the Due Process Clause under Shaffer
11 v. Carter, and for that reason they're free to
12 discriminate as they please, which is their actual
13 position as regards personal deductions, adjustments, or
14 whatever.

15 That part of the position is foreclosed by
16 Travis v. Yale & Towne, which says because the statute
17 does not condition its discrimination on the existence of
18 untaxed income, whether that exists or not is irrelevant
19 to the constitutionality of the statute on its face, so
20 that reason number 1, Travis takes out.

21 The only other reason that -- well, my colleague
22 will speak for himself, but the only other reason that I
23 foresee here is the lack of connection argument which
24 we've been talking about for most of this oral argument,
25 and we allege that there is a sufficient connection and

1 obvious connection, and that therefore this statute is
2 unconstitutional on its face

3 If I may, I'd like to reserve the remainder --
4 well, I have no time remaining.

5 QUESTION: Thank you -- thank you, Mr. Lunding.

6 MR. LUNDING: Thank you.

7 QUESTION: Mr. Bing, we'll hear from you.

8 ORAL ARGUMENT OF ANDREW D. BING

9 ON BEHALF OF THE RESPONDENTS

10 MR. BING: Mr. Chief Justice, and may it please
11 the Court:

12 The issue in this case is really whether New
13 York is required by the Privileges and Immunities Clause
14 to afford nonresidents an alimony deduction because it
15 affords the same alimony deduction to residents. In New
16 York's view, New York is not so required because the basis
17 upon which New York taxes residents and nonresidents is
18 completely different.

19 New York's taxation of residents is based on the
20 fact that they reside within New York, residence giving
21 New York plenary jurisdiction over their income from every
22 source worldwide.

23 With respect to nonresidents, the basis of New
24 York's taxation is that nonresidents --

25 QUESTION: Would you address at the outset the

1 one little flaw in that presentation, namely the rate is
2 in part determined by non-New York income and therefore,
3 whether directly or indirectly, you are to a certain
4 extent taxing this gentleman at a higher rate than you
5 would someone who had just the same amount of New York
6 income, who lived in New York, that he has.

7 MR. BING: Justice Stevens, it is correct that
8 we tax -- that the rate is set based upon the
9 nonresident's worldwide income, but as Justice Scalia
10 pointed out a moment ago we are not taxing the --

11 QUESTION: But you really are in a way, if the
12 bottom line, you get more money than you would if that
13 weren't the fact. Whether you say it's taxing, it does
14 affect the total tax he pays.

15 MR. BING: It affects the rate, Justice Stevens.
16 The --

17 QUESTION: Well, it affects the rate, the --
18 more money on the check he has to write to you.

19 MR. BING: The --

20 QUESTION: Does it not?

21 MR. BING: It does.

22 QUESTION: Yes.

23 QUESTION: What's the percentage of -- you
24 say -- I believe Mr. Lunding said the high end of New
25 York's tax rate was 9 percent. What is the low rate?

1 What is the low end?

2 MR. BING: During the -- during 1990, the lowest
3 marginal rate for married filing jointly and surviving
4 spouse was 4 percent, and the highest rate at which I
5 believe -- the top marginal rate was 7.875 percent, which
6 was the rate at which the additional deficiency was
7 calculated in this case.

8 QUESTION: Now, let's consider the situation,
9 which must occur with some frequency, of people who earn
10 all their earned income in New York and live outside the
11 city, outside the State.

12 MR. BING: Those --

13 QUESTION: And the end result is going to be the
14 payment of a substantially higher tax than would be the
15 case for a similarly situated New York resident who
16 nevertheless lived in New York.

17 MR. BING: It is true that in the case of the
18 nonresident who derived all, or substantially all his or
19 her income in New York, that the tax that the nonresident
20 pays would be higher than the resident who derives all of
21 his income in New York.

22 QUESTION: What is the substantial reason that
23 New York offers for the validity of such an arrangement?

24 MR. BING: This is the inevitable result of the
25 fact that New York, with respect to nonresidents, is only

1 looking at, and believes it is entitled to only look at
2 their net income from the economic activity that they
3 conduct within New York State, and that deductions,
4 however large they may be in relationship to the total
5 income, which have no relat -- which are not incurred to
6 produce or to generate that in-State income, are simply
7 not something that New York is required to take into
8 account.

9 QUESTION: Why? You don't do that for New
10 Yorkers. You allow New Yorkers to do that stuff. It is
11 not incurred in the generation of the New York income.
12 You give them all sorts of personal deductions.

13 MR. BING: But again --

14 QUESTION: What justification is there for not
15 allowing the same treatment to the out-of-Staters?

16 MR. BING: In the context of the New York
17 resident, again we are looking not only at the New York
18 resident's New York income but the New York resident's
19 worldwide income, and so the New York resident as a
20 general matter is someone who will generally be subject to
21 a burden of taxation which is greater than that of an
22 individual in petitioner's situation.

23 Again, under the Privileges and Immunities
24 Clause --

25 QUESTION: You're saying if you're looking at

1 all his income for purposes of taxes, you're entitled to
2 give him all deductions of any sort, but these people,
3 since they're out-of-Staters and you're not looking at all
4 of their income, except as to the rate, and therefore you
5 don't have to give them all of the deductions. I guess
6 there's a certain parallelism there.

7 MR. BING: That is correct, Justice Scalia.
8 Residence also affords the State an opportunity to take
9 into account certain personal activities of its residents
10 that it is not in our view required to take into account
11 for purposes of nonresidents, and under the Privileges and
12 Immunities Clause absolute equality of treatment has never
13 been the hallmark.

14 QUESTION: But absolute equality of treatment, I
15 found it awfully easy to construct bizarre examples. That
16 is, I just imagined a person at \$100,000 income, all out
17 of New York, and \$50,000 alimony, and all you have to do
18 is, you multiply by 4 percent, and that person is paying,
19 what, 4 percent times 50,000 I guess is \$2,000, and then
20 apply your formula, and your formula will be \$100,000, the
21 total income, over Federal, minus the alimony, which will
22 be 50, so you get a multiple of 2, and so you have the New
23 York person paying 2,000, the Connecticut person paying
24 4,000.

25 And if, by the way, the person had a bad year,

1 and his income went down to where it was close to the
2 judicial decree for alimony, suppose he had 100,000, his
3 alimony was 90, you're going to get results that are going
4 to be phenomenal.

5 I mean, what will happen is the New York person
6 on \$1,000 will pay -- let's say, if it's 10 percent, they
7 pay 1,000. You'd have to multiply by a multiple of 10,
8 and you would discover that the Connecticut resident has a
9 \$10,000 tax in New York, or if it's 8 percent, \$8,000, and
10 his real income is 10,000.

11 Am I wrong in those? I mean, I just -- all I
12 did was apply the formula, you know. I took the formula.
13 It says, he has \$100,000, he has 90,000 alimony. For New
14 York purposes, he has \$10,000 income. He pays, let's say,
15 8 percent, or 10 percent. That's \$1,000.

16 Then it says you're supposed to take the New
17 York total, which is \$100,000, right, and then you have in
18 the -- that's the denominator, his Federal, but not
19 counting alimony, so that's 10.

20 So 100 is 10 X 10, so you multiply 10 times the
21 New York tax, and you discover you've got \$10,000 in tax.
22 Wow.

23 I mean, I could create, you know, worse ones, or
24 I suppose there are a lot of better ones, but it seemed to
25 me that it was pretty easy to create odd examples, and --

1 which seem very unfair.

2 Now, am I wrong about the ease of doing that, or
3 is there some justification for that, or is it just
4 bizarre that a person would have, say, half his income in
5 alimony and yet all of his income out of New York, or that
6 he could have a bad year, or what?

7 MR. BING: Your mathematics are entirely
8 correct, and your application of the formula are correct.
9 The justification for it that New York has offered is, I
10 guess, twofold. The first one, again, is this is exactly
11 the result that is contemplated by this Court's decision
12 in Shaffer and by this Court's decisions in the portion of
13 Travis upon which we rely, and has been accepted --

14 QUESTION: What was that portion, because that's
15 been a little fuzzy to me. I know what they held about
16 the exemptions, that you have to give the out-of-Stater
17 the same personal exemption, but what is the part that you
18 were relying on?

19 MR. BING: The taxpayer in Travis also
20 specifically challenged a provision of the New York --
21 then New York tax laws, section 360, subdivision 11, which
22 permitted nonresidents the deductions available to
23 residents only if and to the extent connected with New
24 York income, and the taxpayer specifically challenged that
25 provision in its brief in this Court arguing that it

1 would, for example, disallow the Connecticut resident who
2 worked in New York the deduction for his real property
3 taxes while at the same time allowing the New York
4 resident a deduction for the real property taxes on the
5 New York residence.

6 QUESTION: Was it hypothetical, or was there
7 something in the case, that this taxpayer said, I want a
8 deduction for my real property tax or my life insurance
9 premium and they're not giving it to me?

10 MR. BING: I believe that because of the posture
11 of that case and because of who the taxpayer was that
12 issue was hypothetical. The taxpayer in this case was a
13 Connecticut corporation that employed a number of
14 Connecticut residents in New York as well as residents of
15 other States and was challenging the entire personal
16 income tax treatment of nonresidents, including personal
17 exemptions, including the fact that it was required to
18 withhold only with respect to nonresidents in this
19 deduction provision.

20 So there were a number of provisions that were
21 being challenged by the employer rather than by any
22 particular taxpayer who was pointing to him or herself and
23 saying, this tax adversely affects me this way, but that
24 example was included within their brief, and I believe
25 that that example was what this Court responded to when it

1 said that the State is permitted to limit the deduction in
2 the case of nonresidents to those expenses that are
3 connected with the New York income, as settled by the
4 Shaffer case.

5 I think they were referring to that particular
6 contention of the taxpayer in the Travis case, and
7 subsequent to Travis, this Court has repeatedly in summary
8 dismissals in effect permitted States to recognize that
9 the difference in tax treatment which is mandated by the
10 Constitution, the fact that we can only reach the
11 nonresident's State-source income, permits, justifies a
12 State treating personal deductions differently in the case
13 of nonresidents.

14 QUESTION: You say personal deductions, so I
15 gather that you are making the distinction between
16 expenses for the production of income and personal
17 expenses, and you are not relying to any extent on the
18 peculiarity of alimony, that it is a two-way thing, one
19 gets a deduction, the other gets income.

20 MR. BING: We treat alimony -- in our view
21 alimony is properly treated as a personal expense
22 deduction because it is not incurred to produce income
23 within New York State, that New York State --

24 QUESTION: Just like the sole, or whatever,
25 so -- but you're not -- I would just like to be clear on

1 getting a factor out of my head if it shouldn't be there,
2 that is that the spouse who receives the alimony would be
3 paying the State in which he resides income on it.

4 MR. BING: The residence of the recipient is not
5 a factor in our analysis.

6 QUESTION: Well, if the former wife receiving
7 the alimony lived in New York, would that spouse be taxed
8 on the alimony income by New York?

9 MR. BING: Yes, New York would tax the
10 recipient.

11 QUESTION: Yes.

12 MR. BING: Regardless of the location of the
13 payor.

14 QUESTION: Right. But you don't, on the other
15 hand, allow the deduction as a result, as the Federal
16 Government would.

17 MR. BING: We --

18 QUESTION: I thought that under our cases, under
19 the Privileges and Immunities Clause there had to be a
20 reasonable relationship between whatever the evil is
21 presented by the nonresident and the rule adopted by the
22 State, and I just haven't heard what that reasonable
23 relationship is here to justify New York's rule. I'd
24 really like to hear that.

25 MR. BING: The -- again, the relationship is, I

1 guess, twofold. First, we don't tax the nonresident with
2 respect to anything that occurs outside New York, and in
3 our view we are not required, as a result of that, to take
4 into account with respect to the nonresident anything that
5 is unrelated to the economic activity that that
6 nonresident is doing within the State of New York.

7 Again, we're put in the posture of not being
8 able to afford equality of treatment. From the very
9 beginning, this is not a case where New York has gone out
10 of its way to single out nonresidents. They're different
11 by virtue of the Due Process Clause and by virtue of our
12 reach.

13 QUESTION: But he's not asking for the entirety
14 of the deduction. He's only asking for a percentage of
15 the deduction that is equivalent to the percentage of his
16 total income which consists of New York income. I mean,
17 your answer would be a good one if he was coming in and
18 saying, give me a full deduction, and you say, well, we
19 can't tax you on your out-of-State and therefore we don't
20 have to give you a deduction.

21 But he's saying, don't give me the whole
22 deduction. Just give me the same percentage that I -- you
23 know, that New York income constitutes of my total income.

24 MR. BING: We don't dispute that that is a
25 reasonable approach. In fact, it's one that New York did

1 follow between 1961 and 1987. We do believe, however,
2 that New York is not required to afford a proportionate
3 deduction, and we believe that our rule is, in fact, a
4 better rule because it recognizes that the alimony simply
5 has nothing to do with where petitioner earns his income.
6 There's no particular reason --

7 QUESTION: How is it a better rule in the
8 circumstances described by Justice Breyer? Why is New
9 York's present rule better? It looks to me like there are
10 some circumstances where it's an absolutely lousy rule.

11 MR. BING: There are cases where the
12 hypothetical posited by Justice Breyer will happen.

13 QUESTION: In fact, isn't it true that -- one of
14 the things that troubles me, and I -- it's a very
15 troublesome case -- is if the nonresident turns out in one
16 year to be extraordinarily generous, giving large amounts
17 of money to charity, to hospitals, one thing and another,
18 they're all deductible on his Federal return. The net
19 effect of that is to increase his New York tax, because it
20 makes the denominator so much bigger in your fraction.

21 MR. BING: That's true, but --

22 QUESTION: So that in a way his activities out
23 of State -- this is a second way in which activities out
24 of State impact on the tax he pays in New York in kind of
25 a perverse way, because if he's a very generous person,

1 he'll end up with a higher New York tax.

2 MR. BING: He ends up with a higher New York tax
3 than a comparably situated New York resident having the
4 same --

5 QUESTION: Or that he would have had to pay if
6 he didn't do all these things. If he didn't have all
7 those deductions the denominator would be smaller, and
8 therefore his New York would be smaller.

9 MR. BING: With respect to charitable
10 contribution deductions I'm not sure that they -- because
11 they don't affect either -- they're below-the-line
12 deductions, in other words. They're deductions from
13 adjusted gross income for Federal purposes --

14 QUESTION: Could I --

15 MR. BING: -- to get the taxable income.

16 They're not -- I believe that the fraction is
17 neutral with respect to them, because they are not a
18 reduction of either New York-source income or Federal
19 adjusted gross income.

20 QUESTION: I failed to understand that from the
21 briefs. I see.

22 MR. BING: Federal adjusted gross is the
23 denominator in that, so with respect to those, I don't
24 believe that there would be a difference akin to the
25 difference with respect to alimony, but --

1 QUESTION: My examples were meant to be quite
2 ordinary, most of them. I mean, the one that they have
3 100 percent in New York, then you get the odd rate.

4 But whether it's those examples or the -- you
5 know, the unusual ones you can construct with the generous
6 person, you had two justifications, because you've said
7 twofold several times, and I've heard one, and I want to
8 be sure I get the other.

9 MR. BING: The second one is simply, again, the
10 concept that New York can do for its residents things that
11 it is not obligated to do for nonresidents, and that --
12 again, the Privileges and Immunities Clause and other
13 provisions of the Constitution have been allowed -- have
14 been construed to permit certain beneficial residence
15 treatments based on policy adopted by particular States
16 with respect to the right to vote, the right to hold
17 elective office, the right to free public education or
18 welfare or medical benefits.

19 QUESTION: Well, maybe you could allow -- I
20 could see your allowing a deduction for contributions to
21 New York charities that are not allowed for deductions to
22 out-of-State charities, or maybe allowing a deduction for
23 payment of county or municipal taxes in New York only, and
24 not out of State. I can see some policy justification for
25 that.

1 But you're not giving me any policy
2 justification, just sort of a yah, yah, yah argument. We
3 do it because we can do it, that's why. I mean, that
4 doesn't seem to me a policy justification.

5 MR. BING: It's not intended to be a simply-
6 because-we-can argument, Justice Scalia. With respect to
7 the treatment of alimony, the policy, if you will, is to
8 really conform the treatment of alimony, of income-
9 splitting post marriage with the treatment of income-
10 splitting if people are married.

11 QUESTION: So now you are going back when you
12 say it does count that most often the spouse will be in
13 the other State, so that you are not allowing the
14 deduction, but on the other hand, you're not getting your
15 hands on the income to tax.

16 MR. BING: It's because with respect to married
17 people we don't allow income-splitting unless they're both
18 residents. If one of the parties is a nonresident,
19 income-splitting is not permitted in the case of people
20 who are still married, and this provision is -- conforms
21 that same rule with respect to income-splitting with
22 respect to people who are no longer married.

23 QUESTION: But even --

24 QUESTION: Why did New York change in 1987? You
25 said they had the other rule where they allowed the same

1 deductions, personal deductions, and then they changed.

2 What prompted the change?

3 MR. BING: Well, the treatment of marital income
4 generally was addressed in '87, and at that time New York
5 abolished the filing-separately-on-the-same-return status
6 that married people had previously enjoyed and went to
7 more or less full income-splitting for the first time,
8 which is premised on the assumption that spouses share
9 total marital income equally.

10 Again, that was the assumption underlying
11 treatment of people who are still married to each other,
12 and because alimony, as you pointed out, is a tax-
13 shifting device rather than a true deduction, the
14 treatment of alimony with respect to nonresidents was
15 designed to bring it into congruence with the treatment of
16 income-splitting for people who are still together, still
17 married to each other.

18 QUESTION: But there's the countervailing
19 consideration, isn't there, in the fact pointed out by
20 your brother that alimony is characteristically assessed
21 on the basis of total income, and therefore there is a
22 very strong relationship between the amount of alimony
23 ordered and income earned in New York.

24 MR. BING: There is a relationship, but in our
25 view the controlling standard is the one set forth by this

1 court in the Gilmore case, which looks to the origin of
2 the claim in characterizing an expense as personal or
3 business under section 162 of the Internal Revenue Code
4 with respect to marital dissolution.

5 In Gilmore, simply because the expenses were
6 incurred to preserve and to protect the taxpayer's income-
7 producing assets, it was not enough to give them a
8 sufficient nexus to make them related under section 162 to
9 be deductible for income tax purposes.

10 We argue the same standard ought to apply in a
11 case like this, that the alimony in this case, related
12 though it may have been to petitioner's -- the amount of
13 petitioner's worldwide income, including the New York-
14 source income, was not incurred to produce that income, or
15 incurred in carrying on the trade or business that
16 generated that income, and that that should be the test
17 with respect to alimony or any other personal expense.

18 QUESTION: Do you know how many States do it the
19 way New York is currently doing it?

20 MR. BING: I believe that in addition to New
21 York there are six other States that specifically disallow
22 alimony deductions.

23 However, there are a number of other States that
24 have relied upon the general tenor of the Shaffer and
25 Travis cases, as well as summary dismissals such as

1 Goodwin, to treat a number of different items differently
2 for nonresidents, including, in addition to the alimony
3 expenses we're talking about today, real estate taxes and
4 mortgage interest in out-of-State residence, medical
5 expenses, insurance premiums, moving expenses, income
6 averaging, rollover of gain on sale of principal
7 residence, grocery and medical tax rebates, food sales tax
8 credit, and homestead tax rebates, all of which have been
9 upheld under Privileges and Immunities Clause challenges.

10 QUESTION: Well, under your principle I suppose
11 if a taxpayer living in Connecticut had a second home on
12 Long Island in New York, you could deny him the home
13 interest deduction.

14 MR. BING: The deduction would not be allowed in
15 computing New York-source income, that is correct, because
16 it does not relate to the production of the New York-
17 source income.

18 I guess I'd like to address the policy reason.
19 What is it about these personal deductions and about the
20 nonresident status that seems to be -- that justifies what
21 we're doing, and again, we're not simply saying we're
22 doing it because Shaffer and Travis and Goodwin and the
23 others say we can.

24 We're doing it because we think it's perfectly
25 reasonable, and it's entirely justified for New York to

1 say with respect to nonresidents, all we have jurisdiction
2 over regarding you is what you do here, your economic
3 activity here, and that it's reasonable and permissible
4 for us to say to those people, we will allow you
5 deductions with respect to the production of the income,
6 the net income from your economic activity.

7 We'll look at what you do here, and we'll let
8 you deduct that. We'll tax you on your net income, but
9 we're not going to let you take into account either losses
10 or deductions arising from expenses in out-of-State
11 businesses over which we have no jurisdiction, and we're
12 also not going to take into account personal expenses that
13 you may incur in your personal life in some other
14 jurisdiction, even though with respect to people who
15 reside in New York we will allow them.

16 New York has believed and continues to believe
17 that that is a substantial justification and a legitimate
18 reason for what New York has done in this case.

19 QUESTION: Why aren't those personal expenses --
20 I mean, if 20 percent of your income is from New York, why
21 isn't 20 percent of those personal expenses fairly
22 attributable to New York income? I mean, you're sort of
23 adopting the premise that all of your personal expenses
24 come from non-New York State income. That seems to me an
25 unreasonable premise.

1 MR. BING: Again, we're not saying that the
2 contention is -- is being argued for in terms of this
3 would be a reasonable approach is not true. We're not
4 saying it's an unreasonable approach, but we are saying
5 that we don't think the Privileges and Immunities
6 Clause --

7 QUESTION: Requires --

8 MR. BING: -- requires that absolute equality,
9 or at least that percentage equality of treatment.

10 And again, these expense actions have nothing to
11 do with where Mr. Lunding earned his income, and there
12 really is no principle basis, other than just saying,
13 well, 20 percent of the income, 20 percent of the
14 deductions, for looking at what happened in Connecticut.

15 There's no reason for us to say well, it could
16 be 20, but it could be more than 20. We could say that
17 with respect to his medical expenses he's entitled to more
18 than that because it was really primarily related to his
19 getting back and forth to New York and dealing with the
20 rush-hour traffic.

21 I mean, there's no principled reason, no
22 constitutional principled requirement for New York to be
23 forced under the Privileges and Immunities Clause to adopt
24 a rateable approach, even though, as I said, that is one
25 that New York has followed in the past.

1 QUESTION: Can I just give you one hypothetical
2 that keeps running through my mind and just ask you to
3 comment on it? Supposing you've got a Connecticut
4 resident and a New York resident, both of whom make
5 exactly the same amount of money, both of whom derive all
6 of their income from New York -- they're commuters.

7 One of them is a commuter and one lives in the
8 city, and one of them, the one who lives in Connecticut,
9 donates a substantial amount of money to the law school in
10 New York and wants a charitable deduction. The one who
11 lives in New York donates a substantial amount of money to
12 Yale in Connecticut. The one who gets the deduction is
13 the one who makes a donation to the New York recipient.

14 MR. BING: Well, Justice Stevens, in
15 computing --

16 QUESTION: I mean, the one who does not get the
17 deduction is the one -- yes.

18 MR. BING: In computing the New York-source
19 income portion of the equation, that's correct, but in
20 computing the tax as if a resident, which is the number by
21 which the fraction is multiplied, you do treat the
22 nonresident as if the nonresident were a resident, so that
23 there is -- again, this doesn't affect the computation of
24 the fraction, because the charitable contribution --

25 QUESTION: Right.

1 MR. BING: -- deduction is below the line in
2 both cases, so there is a --

3 QUESTION: Would they be taxed the same in my
4 hypothetical as -- would the bottom line be the same?

5 MR. BING: I believe that the -- obviously
6 the -- when you computed the New York -- the taxes if a
7 resident, on the part of the New York resident, then
8 obviously you'd stop, because that would be the answer.

9 The percentage of that that would be paid by the
10 nonresident wouldn't be affected by the formula, by the
11 fraction, which is the other thing, because New York-
12 source income is a net number without any reduction for --
13 itemized deduction such as the charitable contribution.

14 QUESTION: I thought, to oversimplify it, that
15 the New York resident would get the deduction and the
16 Connecticut resident would not, in my hypothetical.

17 MR. BING: In looking at the New York fraction,
18 Justice Stevens, there's no difference in the New York-
19 source income number -- there would be no deduction in
20 computing New York-source income for the charitable
21 contribution.

22 QUESTION: That's not a constitutional point, so
23 any constitutional holding that permitted you to do what
24 you've done here would permit Justice Stevens'
25 hypothetical.

1 All it would take would be a Federal statute
2 that does the same thing that this statute did here. A
3 delegation imposes -- you know, convinces the other
4 Members of Congress to write a little thing which says
5 that New York-source alimony is not -- you know, the way
6 they did it here, they'd do the same thing for charities.
7 They could do the same thing for anything, so it would be
8 easy under the Constitution to replicate just that
9 problem, wouldn't it?

10 MR. BING: Our --

11 QUESTION: And that's what's worrying me.

12 Of course, if it's constitutionally permissible
13 to do this, the States that are always anxious to get more
14 money could think of, you know, dozens and dozens of ways
15 to produce the kinds of results that we were talking
16 about.

17 MR. BING: It's true that I believe our argument
18 would permit -- it doesn't work in New York's particular
19 methodology, but our argument is based on the legitimacy
20 of permitting States to focus solely on the economic
21 activity within the State and not to look at the
22 personal --

23 QUESTION: Maybe the distinction is that New
24 York treats nonresidents as just purely mechanical money-
25 making machines, whereas it treats its own people as whole

1 persons and citizens who have all sorts of interests other
2 than making money, because that's what you treat the
3 nonresident --

4 QUESTION: They're New Yorkers, after all.

5 QUESTION: Yes.

6 (Laughter.)

7 QUESTION: Or they're non-New Yorkers.

8 MR. BING: In fact, as to New York State, that
9 is a permissible -- in our view, that's all right. That's
10 a distinction that we seek to draw.

11 It's a distinction that New York and other
12 States have always, at least since 1920, thought that they
13 had the power to draw, and it's a reasonable distinction
14 based on the fact that we argue that we should not be
15 required to take into account the fact that yes, Mr.
16 Lunding does have a personal life, but it's a personal
17 life that is related to Connecticut, not related to any of
18 the other places from which Mr. Lunding derives his
19 income.

20 If there are no further questions, thank you,
21 Your Honor.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bing.

23 The case is submitted.

24 (Whereupon, at 12:05 p.m., the case in the
25 above-entitled matter was submitted.)

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:

CHRISTOPHER H. LUNDING ET UX., Petitioners v. NEW YORK TAX APPEALS TRIBUNAL ET AL.
CASE NO: 96-1462

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

BY Don Mari Fedele-----

(REPORTER)