No. 08-310

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a municipal personal property tax that falls exclusively on large vessels using the municipality's harbor violates the Tonnage Clause of the Constitution, Art. I, § 10, Cl. 3.

2. Whether a municipal personal property tax that is apportioned to reach the value of property with an out-of-State domicile for periods when the property is on the high seas or otherwise outside the taxing jurisdiction of any State violates the Commerce and Due Process Clauses of the Constitution.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of ConocoPhillips Company, which in turn is wholly owned by ConocoPhillips.

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The opinion of the Supreme Court of Alaska (Pet. App. 1a-22a) is reported at 182 P.3d 614. The opinions of the Superior Court for the State of Alaska (Pet. App. 23a-44a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on April 25, 2008. On July 22, 2008, Justice Kennedy extended the time for filing a petition for a writ of certiorari until September 8, 2008. The petition was timely filed on that date and granted on December 12, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Tonnage Clause of the United States Constitution, Art. I, § 10, Cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage * * *.

The Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, Cl. 3, provides, in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States * * *.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

The City of Valdez, Alaska ("the City"), contains the northernmost ice-free port in North America. JA 74. This location makes the City a crucial hub of interstate commerce. In Valdez, the Trans Alaska Pipeline System reaches its southern terminus. Crude oil that originates on the North Slope of Alaska passes through the pipeline to Valdez, where it is loaded into tankers en route to other States.

In 1999, Valdez faced a budget shortfall. Funds were needed to build a hospital and a school, and to repair the city's infrastructure and facilities. Pet. App. 54a. To meet this need, the City passed Ordinance No. 99-17, which enacted a personal property tax on certain vessels over 95 feet in length. Pet. App. 45a. Because almost all of those vessels are tankers that transport oil between Alaska and the Pacific coast of the United States (including Hawaii), and that accordingly also are subject to property tax in other States, the City subsequently adopted Resolution No. 00-15, which establishes a methodology for apportioning the tax. Pet. App. 53a.

This case concerns the constitutionality of the vessel tax and its apportionment methodology under three provisions of the Constitution that limit the taxing authority of state and local governments. One is the Tonnage Clause, Art. I, § 10, Cl. 3, which bars state and local governments from taxing the privilege of using ports and harbors. The others are the Commerce Clause, Art. I, § 8, Cl. 3, and the Fourteenth Amendment's Due Process Clause, both of which preclude non-domiciliary state and local governments from taxing extraterritorial values.

The City's tax runs afoul of all three of these constitutional proscriptions. It is a discriminatory per-

sonal property tax that falls *only* on certain large vessels and that has the avowed purpose of raising revenue from vessels that dock in the City; this is precisely the sort of levy that the Court has described as violating of the Tonnage Clause. Moreover, Valdez compounded its constitutional error by apportioning the levy so as to claim a right to tax vessels domiciled elsewhere for a portion of the time that those vessels spend on the high seas (or otherwise away from any tax situs); this both projects the City's taxing authority beyond its constitutional bounds and exposes the vessels to the possibility of duplicative taxation.

Because the ruling of the Alaska Supreme Court upholding the Valdez tax rests on a plain misunderstanding of this Court's decisions, improperly expands local taxing authority at the expense of out-of-state interests and interstate commerce, and denies petitioners protections safeguarded by the U.S. Constitution, the judgment below should be reversed.

A. The Valdez Tonnage Tax

Prior to 2000, Valdez exempted all personal property from property tax. Effective that year, the City repealed the personal property tax exemption for one, and only one, type of personal property: "[b]oats and vessels of at least 95 feet in length" that are not used "primarily in some aspect of commercial fishing" and that dock at privately owned docks in the City. Valdez Ordinance No. 99-17 (codified at Valdez City Code § 3.12.020(A)(1)) (Pet. App. 45a). As a practical matter, the Valdez personal property tax falls almost exclusively on oil tankers and vessels that escort or assist oil tankers in Prince William Sound. When the tax was first assessed in early 2000, it applied to 28 vessels, of which 24 were oil

tankers, three were tugboats, and one was a passenger cruise ship. JA 53. This was not an accident: imposition of the personal property tax on such vessels "climaxed a long-term effort by the City to address a serious financial dilemma" caused by depreciation of "oil and gas property" that formed a "significant portion of the available tax base located in the City." Pet. App. 38a. In adopting the ordinance, members of the city council and the mayor focused exclusively on the relationship between the oil companies and the City, and explained that they were hoping through the ordinance to reopen long-running negotiations intended to induce the companies to make "annual payments in lieu of tax." JA 47, 58-61.

Valdez applies the personal property tax to vessels that have acquired a tax situs in the City. Valdez City Code § 3.12.020(C)(1) (Pet. App. 46a). When a vessel also has a tax situs elsewhere for a portion of the year (as do all tankers subject to the tax, including those of petitioner), Valdez applies an apportionment formula that calculates the value subject to tax in the City by multiplying the total assessed value of the vessel by "a ratio determined by the number of days spent in Valdez divided by the total number of days *spent in all ports*, including Valdez, where the vessel has acquired a situs for taxation." Valdez Resolution No. 00-15, § 1(A) (Pet. App. 55a) (emphasis added). This approach *excludes* from the denominator of the apportionment formula all time spent by a vessel on the high seas or otherwise outside the jurisdiction of a tax situs.[1]

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[1] The resolution further provides that "[d]ays in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs." Valdez Resolution No. 00-15, § 1(C) (Pet. App. 55a).

Thus, as the Alaska Supreme Court described the tax, "if we assume that a tanker is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150." Pet. App. 13a. Because oil tankers invariably spend a significant portion of the year on the high seas, the Valdez formula increases the portion of the vessel's value that is subject to taxation by the City, effectively taxing the vessels while they are on the high seas.

B. Proceedings Below

1. Petitioner is a corporation that is organized under the laws of Delaware and that, during the tax years at issue here, had its principal place of business in Long Beach, California. (Its principal office is now in Houston, Texas.) Petitioner's primary business is operating tankers that transport crude oil from the terminal in Valdez to refineries in California, Hawaii, and Washington. Typically, a tanker leaves a port in one of those States and travels across international waters for approximately three to six days on its way to Valdez. It then spends approximately fourteen to twenty-four hours in Valdez to load cargo, followed by three to six days in international waters in transit to a discharge port, and thirty-six to seventy-two hours in that port. After discharging its cargo, the tanker begins the cycle again. Approximately every other year the tanker will be removed from service for a substantial period of time to enter drydock for maintenance and repairs. Such maintenance is not conducted in Valdez. JA 17; R. Exc. 189-190.

2. In March 2000, the City issued its first property tax assessments under Ordinance 99-17. Tax

statements followed in July. Polar Tankers paid the vessel tax under protest. It also protested the apportionment methodology employed by the City and, availing itself of the appeal procedure provided by § 2 of the resolution, filed a Petition for Use of Alternative Apportionment Formula. JA 21-31. That petition was denied by the city manager, and then by the city council. JA 52. For subsequent tax years, Polar Tankers and Valdez stipulated that further appeals were unnecessary to preserve petitioner's right to challenge the tax. JA 7, 17.

3. On August 18, 2000, petitioner filed suit in Alaska state court challenging the constitutionality of the levy on two grounds: (1) that the tax violates the Tonnage Clause because it effectively taxes vessels for the privilege of using the City's harbor; and (2) that the City's apportionment methodology violates the Commerce and Due Process Clauses, both by subjecting vessels to the risk of duplicative taxation and by taxing extraterritorial values.[2] The parties filed cross-motions for summary judgment, and the trial court initially concluded in July 2004 that the tax was unconstitutional under the Tonnage Clause. Pet. App. 36a-44a. The court found that "[l]arge vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling on oil tankers along with other types of property. This is a tonnage duty." Pet. App. 43a.

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[2] Initially, five companies with vessels subject to the tax joined as plaintiffs. At various stages of the litigation the other four companies settled their disputes, leaving Polar Tankers the only claimant.

On reconsideration in January 2005, the trial court changed course and reserved judgment on the Tonnage Clause issue, instead concluding that the City's apportionment method violated the Commerce and Due Process Clauses because "the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states." Pet. App. 34a. In the court's view, the State of a vessel's domicile retains the right to tax the value of the vessel for all the time that the vessel is on the high seas and has no specific tax situs, rendering the "denominator [of the Valdez apportionment formula] problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters." Pet. App. 34a-35a. Using the example of one of petitioner's coplaintiffs, the court concluded: "SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation." Pet. App. 35a. The court accordingly ruled that Valdez could impose its tax only if it made use of an acceptable apportionment formula. Pet. App. 31a-32a.

Because the tax ordinance is severable from the apportionment resolution, the trial court proceeded to reconsider its Tonnage Clause ruling. On July 28, 2005, the court reversed its earlier opinion and rejected petitioner's Tonnage Clause challenge. Pet. App. 26a-30a. Although the court continued to recognize that "the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (Pet. App. 29a), and is not "generally applicable" (Pet. App. 30a), it concluded that "[t]he failure of the City to tax more property does not make its taxation of all

property of this class an unconstitutional tonnage tax." *Ibid.*

4. On cross-appeals, the Alaska Supreme Court upheld the Valdez tax in its entirety, rejecting both the Tonnage Clause and the apportionment challenges. Pet. App. 1a-22a. Addressing apportionment first, the court recognized that "[a] tax may be invalid even if it creates only a risk of duplicative taxation." Pet. App. 11a. But the court found the Valdez apportionment formula proper because it "apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. * * * There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction." Pet. App. 12a-13a.

The court specifically rejected the possibility of duplicative taxation in this context, on the ground that the domicile State may *not* "extraterritorially tax its vessels for all time spent on the open seas." Pet. App. 13a n.26. In the Alaska Supreme Court's view, this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), had "repudiat[ed]" the nineteenth century "home port" doctrine, which had posited that *only* the home port of a vessel could subject it to property tax, even if the vessel were habitually used in another jurisdiction. Pet. App. 13a n.26. That repudiation of the home port doctrine, the Alaska court believed, precluded the taxation of personal property by the owner's domicile for the period when the property had no specific tax situs. *Ibid.*

The Alaska Supreme Court went on to hold the Valdez tax consistent with the Tonnage Clause, rea-

soning that "a fairly apportioned ad valorem tax on personal property * * * necessarily * * * does not violate the Tonnage Clause." Pet. App. 18a. Relying on the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), rev'd on other grounds, 441 U.S. 434 (1979), the Alaska court found it immaterial that the Valdez tax is "imposed only on specific vessels." Pet. App. 19a-20a. In the court's view, it is sufficient to satisfy the Tonnage Clause that the challenged levy is "based on the value of property." Pet. App. 20a, 21a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alaska Supreme Court's decision is manifestly inconsistent with this Court's precedents. Those precedents establish that a state property tax that discriminates against vessels making use of local ports is barred by the Tonnage Clause, yet that is precisely what the Valdez tax does, and indeed was *designed* to do. At the same time, the City's assertion of taxing authority over personal property domiciled in another State for a portion of the time when the property has *no* specific tax situs – as well as the Alaska court's insistence that the State where the property *is* domiciled *lacks* the authority to fully tax personal property for periods when that property is not located in any taxing jurisdiction – rests on propositions that have been rejected by this Court. The decision below therefore departs in two respects from constitutional rules intended to prevent States and municipalities from fomenting interstate economic tension and taking more than their fair share of taxable values.

I. The Tonnage Clause, along with the Import-Export Clause, was placed in the Constitution in response to the problem created by States that took advantage of their seaboard location to impose financial burdens on other States that have less favorable access to maritime commerce. To effectuate this intent, the Court consistently has interpreted the Tonnage Clause to preclude the imposition by the States of all levies, in whatever form, that have the effect of taxing the privilege of entering, trading in, or lying in a port. Although this prohibition does not extend to charges for specific services offered to ships or to taxes of general application that happen to fall on ships, a levy that singles out vessels is forbidden by the Clause. This anti-discrimination principle, which also applies under the Import-Export Clause, is an essential element of Tonnage Clause doctrine.

The Valdez tax cannot survive application of this principle. It is a personal property tax that falls *only* on certain large vessels and was written specifically to exact revenues from that category of commerce. It is not a charge for particular services made available only to vessels; it avowedly was imposed to raise general revenues. A tax that effectively singles out ocean-going tankers used to export goods through the Port of Valdez is precisely the sort of levy that is prohibited by the Tonnage Clause.

B. The apportionment formula employed by Valdez violates the Due Process and Commerce Clauses. In determining the proportion of a vessel's value that it will tax, Valdez uses a fraction that places in the numerator the number of days of the year that the vessel spends in Valdez, and in the denominator the number of days the vessel spends in *all ports* (omitting port days for which the vessel is under repair or tied up because of strikes). By excluding from the

denominator of the apportionment fraction the many days that tankers spend outside of Valdez (either on the high seas in revenue-producing service or in another port for repairs or because of a strike), Valdez taxes a share of each ship's value that far exceeds the portion of the year that the vessel actually is present within the City's territorial jurisdiction.

This approach violates the Constitution for two closely related reasons. It is fundamental that a State or municipality that is not the taxpayer's domicile lacks the constitutional authority to tax the portion of the taxpayer's personal property that lies outside the taxing jurisdiction; but that is just what Valdez does. And it is equally basic that the State of the taxpayer's domicile *does* have the authority to tax the value of the taxpayer's personal property for periods when that property has no tax situs – a rule that will lead to duplicative taxation if both petitioner's domicile and Valdez tax petitioner's tankers for the time when those vessels are on the high seas. Overlapping taxation also will result if both Valdez and the ports where tankers are under repair or held up on strike tax the vessels for periods when the ships are out of service. This prospect of material and substantial duplicative taxation also renders the City's tax unconstitutional.

ARGUMENT

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE.

When a State or a municipal corporation singles out vessels for special tax burdens to obtain revenue for its general account, that tax violates the Tonnage Clause, which provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, Cl. 3. The Valdez

vessel tax – which was levied for the express purpose of extracting revenue from ships to subsidize local needs, and which falls only on specified large vessels – lies squarely within that prohibition.

A. The Tonnage Clause Precludes State Taxes That Discriminate Against Vessels Making Use Of The Taxing Jurisdiction's Ports.

The Tonnage Clause has fallen into relative obscurity in modern times, in part because it has been generally successful in effectuating the Framers' goal of discouraging levies that have the effect of taxing vessels for the privilege of using a harbor. But the meaning of the Clause is settled. A duty of tonnage is "a charge for the privilege of entering, or trading, or lying in, a port or harbor." *Transp. Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1883). By enacting the Tonnage Clause, the Framers sought "to guard against local hindrances to trade and carriage by vessels," *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877), which "never ceased to be a source of dissatisfaction & discord" under the Articles of Confederation. J. Madison, Preface to Debates in the Convention of 1787, in 3 M. Farrand, *The Records of the Federal Convention of 1787*, at 542 (1911).

1. Under the Articles of Confederation, the States retained the independent power to regulate commerce except to the extent that a treaty was implicated. Art. VI, § 3. This decentralized power "engendered rival, conflicting and angry regulations," such that "some of the States, * * * having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on." Madison, *supra*, in 3 Farrand, *supra*, at 542. As James Madison described

it, "New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms." *Ibid.* "[I]t was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 214 (1871).[3]

To address this serious national problem, the first draft of the Constitution provided that "no state * * * shall lay imposts or duties on imports." 2 Farrand, *supra*, at 135, 187. The Constitution's language subsequently was broadened to include exports. *Id.* at 577.[4] But the Import-Export Clause, as

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[3] Some States' exploitation of their geographic advantage "'never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976) (quoting Madison, *supra*, in 3 Farrand, *supra*, at 542). See *id.* at 285 ("'the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them'") (quoting Madison, *supra*, in 3 Farrand, *supra*, at 548).

[4] "The Framers of the Constitution thus sought to alleviate concerns" about interstate discord and to preserve "harmony among the States" by prohibiting "seaboard States, with their crucial ports of entry, * * * from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Michelin Tire*, 423 U.S. at 285-286. The Import-Export Clause accordingly was "fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State" (*id.* at 290), so as "to prevent coastal States from abusing their geographical positions" and thus "to prevent interstate rivalry and friction." *Dep't of Revenue* v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 753-754 (1978). Although the Court in *Michelin Tire* was addressing imports,

it stood, was insufficient to resolve the problem of States exploiting their port facilities to the disadvantage of other jurisdictions. The Framers recognized that "[t]he general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance." *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867); accord *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 264-265 (1935) ("If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise."). After John Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it" (2 Farrand, *supra*, at 625-626), the Framers incorporated the Tonnage Clause into the Constitution "to supplement Art. I, § 10, Clause 2 [the Import-Export Clause], denying to the states the power to lay duties on imports or exports * * * by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state." *Clyde Mallory Lines*, 296 U.S. at 264.

As Justice Story wrote, through the operation of the Import-Export and Tonnage Clauses, "[a] petty warfare of regulation is thus prevented, which would rouse resentments and create dissensions, to the ruin of the harmony and amity of the states." 3 J. Story, *Commentaries on the Constitution of the United States* § 1016, at 704 (2d ed. 1851).

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the same policies apply to exports. See *Wash. Stevedoring*, 435 U.S. at 758 ("any tax relating to exports can be tested for its conformance" with the policies identified in *Michelin Tire*).

2. The Tonnage Clause must be interpreted to effectuate the intent of the Framers. As a literal matter, "tonnage" refers to the "entire internal cubical capacity, or contents of [a] ship or vessel expressed in tons of one hundred cubical feet each." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 212. As Justice Miller explained, "[t]he word 'tonnage' was used by the framers of the Constitution, because at that day and time it was the customary mode of measuring the value of a ship." S.F. Miller, *Lectures on the Constitution of the United States* 253 (1891). But it has long been understood that the Tonnage Clause is not limited to this literal scope. See *Portwardens*, 73 U.S. (6 Wall.) at 34 ("In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent."); see also *Keokuk*, 95 U.S. at 87 ("A mere adherence to the letter, without reference to the spirit and purpose, may in this case mislead as it has misled in other cases.").

Consistent with the purpose of the Tonnage Clause, the Court instead has understood it to prohibit "levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state." *Clyde Mallory Lines*, 296 U.S. at 265. This restriction proscribes not only state and local[5] taxes that literally fall upon the tonnage of a vessel (see, *e.g.*, *Inman S.S. Co.* v. *Tinker*, 94 U.S. 238, 243-245 (1877)) or that expressly purport to be on the "privilege" of port access, but also "all taxes and duties re-

[5] The Tonnage Clause has frequently been applied to municipal corporations that act "under the authority of the State." *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581 (1874).

gardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266; accord *Portwardens*, 73 U.S. (6 Wall.) at 35.

3. Although the prohibition against tonnage duties absent approval by Congress is absolute, not all exactions upon vessels are proscribed. The Valdez tax, however, falls far outside the range of permissible levies.

First, "a charge for services rendered or for conveniences provided is in no sense a tax or a duty" and does not constitute a "local hindrance[] to trade and carriage by vessels." *Keokuk*, 95 U.S. at 84-85. Under this principle, there is no constitutional obstacle when a State collects fees for services such as pilotage (see *Cooley* v. *Bd. of Port Wardens*, 53 U.S. (12 How.) 299, 314 (1852)) or wharfage (*Parkersburg*, 107 U.S. at 698). But where a tax, supposedly for a service, applies whether or not that service is provided, it constitutes a prohibited tonnage duty. *Cannon*, 87 U.S. (20 Wall.) at 580-581; see also *Keokuk*, 95 U.S. at 86 (distinguishing between "a sovereign exaction" and "a charge for compensation"); *Alexander* v. *Wilmington & Raleigh R.R. Co.*, 34 S.C.L. (3 Strob.) 594, 599 (1868) ("The distinction between a tax or duty, and fees or charges, is, that the former is imposed by the sovereign authority, without any regard to a corresponding and equivalent benefit or advantage: the latter proceeds upon the *quid pro quo*, and unless service be rendered nothing is to be paid."). The Valdez tax, of course, "is not one for specific services to the vessels." Pet. App. 29a; see pp. 23-25, *infra*.

Second, a State need not exclude vessels from a generally applicable *ad valorem* property tax, because a *nondiscriminatory* tax is not "a tax upon the boat as an instrument of navigation." *Perry* v. *Torrence*, 8 Ohio 521, 524 (1838) (in bank); see *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 283 (1879). But "the prohibition" of the Tonnage Clause *does* "come[] into play where [the vessels] *are not taxed in the same manner as the other property of the citizens*." *Wheeling*, 99 U.S. at 284 (emphasis added). See also *The Passenger Cases*, 48 U.S. (7 How.) 283, 402 (1849) ("A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce *the same as other property owned by its citizens*.") (emphasis added). This prohibition of discriminatory property taxes on vessels is an essential element of the rule. If property taxes that fall only on vessels making use of a jurisdiction's docks are permissible, it would be an easy matter for States to disguise what really are "tax[es] [on] the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) simply by tweaking the label applied to the charge – thus frustrating the policy of the Tonnage Clause.[6]

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[6] In its opposition to certiorari, Valdez contended that the Court's invocation of a nondiscrimination requirement in *Wheeling* resulted from its misreading of an 1877 treatise by William Burroughs cited by the Court in that opinion. Opp. 12. But the Court correctly interpreted the Burroughs treatise. Burroughs explained that the Tonnage Clause "was designed to enable the government to give uniformity to the commerce of the States" and that, to accomplish this end, "it was not necessary to prohibit the States from taxing vessels as property *in the same manner as other property of the State is taxed*." JA 80 (emphasis added). A property tax that discriminates against

The Court's emphasis that property taxes in this context must be nondiscriminatory – a criterion repeated five times in *Wheeling*[7] – is consistent not just with the purpose of the Tonnage Clause but also with the practice of the States in the generation after adoption of the Constitution. See, *e.g.*, *Battle* v. *Corp. of Mobile*, 9 Ala. 234, 236, 238 (1846) ("[I]t may be conceded[] that the State has relinquished the right to levy a specific tax on vessels navigating her rivers. * * * Upon the whole, we think it clear, that this tax, *not being a specific one, applicable alone to steamboats, but a general one, extending to all personal estate*, is free from constitutional objection.") (emphasis added); *Howell* v. *State*, 3 Gill 14, 16, 24 (Md. 1845) (rejecting a Tonnage Clause challenge to

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vessels used in commerce, however, results in the vessels not being taxed "in the same manner as other property of the State"; allowing States to impose such a discriminatory tax – and giving them the concomitant power to regulate commerce through that tax – would prevent the United States from "giv[ing] uniformity" to commerce among the States. The point is proved by the *Wheeling* Court's citation (99 U.S. at 284), along with the Burroughs treatise, to *Johnson* v. *Drummond*, 61 Va. (20 Gratt.) 419 (1871). In that case, the court rejected an attempt to characterize a levy as a legitimate property tax because it discriminated against vessels that carried oysters. *Id.* at 426. As a result, the court concluded that the levy was an unconstitutional tax on a vessel "as a vehicle of conveyance." *Id.* at 425.

[7] See *Wheeling*, 99 U.S. at 282 (a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens"); *ibid.* ("the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property"); *id.* at 283 (vessels "may be taxed like other property"); *id.* at 284 ("the prohibition only comes into play where [vessels] are not taxed in the same manner as the other property of the citizens"); *ibid.* ("the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property").

a tax on "all real and personal property in the State" because vessels were "taxed rateably, with other property produced within the State"). We are not aware of any decision by any court during that period – or, indeed, *ever* – upholding a tax that discriminated as the Valdez tax does.[8]

4. The operation of the Tonnage Clause is further confirmed by reference to the Import-Export Clause, which the Tonnage Clause was designed to complement. See *Keokuk*, 95 U.S. at 87 ("What was intended by the provisions of the [Import-Export Clause] was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent."); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) ("'A duty of tonnage' is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also.").

In the context of the Import-Export Clause, the Court had an opportunity to speak directly to the nondiscrimination principle in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). In *Michelin Tire*, the Court reconsidered the precedent of *Low* v. *Aus-*

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[8] When *Wheeling* and *The Passenger Cases* were decided, the home-port doctrine allowed movable property to be taxed only by the domiciliary State. See *Hays* v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855); p. 8, *supra*. Thus, the discrimination proscribed by those cases necessarily is discrimination between vessels and other forms of property. The home-port doctrine has since yielded to a rule of fair apportionment, see, *e.g.*, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 21-26 (1891), such that it is now possible for a vessel tax also to discriminate between domestic and foreign vessels.

tin, 80 U.S. (13 Wall.) 29 (1872), which prohibited States from applying any property taxes to imports until they became "incorporated and mixed up with the mass of property in the country." *Id.* at 33. The Court overruled *Low* as to "nondiscriminatory ad valorem property taxes," which it concluded would not offend the objectives of the Import-Export Clause, including the need to ensure that seaboard States "were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." 423 U.S. at 285-286.

That *Michelin Tire* was distinguishing between "discriminatory" and "nondiscriminatory" *ad valorem* property taxes is unmistakable. The Court repeated the nondiscrimination requirement at least 13 times (see 423 U.S. at 279-302) and specifically noted, in reference both to *ad valorem* property taxes and to other types of levies imposed on imported goods after their entry into the United States:

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost.

Id. at 288 n.7. Additionally, while overruling the *Low* rule as to nondiscriminatory *ad valorem* taxation, the Court left undisturbed *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), which provides that a tax that applies a more favorable rate to domestic arti-

cles than to imported goods violates the Import-Export Clause.

In *Washington Stevedoring*, the Court extended the rule of *Michelin Tire* to the treatment of exports. 435 U.S. at 758. In so doing, the Court acknowledged that, "[t]o the extent that the Import-Export Clause was intended to preserve interstate harmony, * * * four safeguards will vindicate the policy": "Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits." *Id.* at 761.

Indeed, the Court's early emphasis on the nondiscrimination principle under the Tonnage Clause anticipated not only its Import-Export Clause rulings, but also its modern Commerce Clause doctrine. As it has under the Import-Export Clause, when addressing constitutional limits on state taxing authority under the Commerce Clause the Court has come to reject formalistic rules and has emphasized the practical impact of the challenged levies on the taxpayer, while also recognizing that interstate businesses must pay their own way – so long as they are not subjected to discriminatory treatment. Much like the Import-Export and Tonnage Clauses, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the States themselves." 3 Farrand, *supra*, at 478 (J. Madison). As a consequence, although "interstate commerce may be required to share equally with intrastate commerce the cost" of local government (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 647 (1981)), "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid" (*Or. Waste Sys.,*

Inc. v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Thus, each of the constitutional provisions designed to limit the dangers of interstate economic rivalry – the Commerce, Import-Export, and Tonnage Clauses – embodies the same anti-discrimination principle.[9]

B. The Valdez Tax Discriminates Against Vessels Making Use Of The City's Port.

1. The Valdez levy is flatly inconsistent with this nondiscrimination requirement. It does not tax vessels "in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. To the contrary, "large vessels, and only large vessels, are the only personal property taxed by the City" (Pet. App. 43a), and the tax was then further gerrymandered to exclude vessels used primarily in commercial fishing, most of which are local. In fact, the tax plainly seems to have been drafted to apply only to ocean-going tankers, a point that both courts below recognized in acknowledging that the tax was adopted in response to "a serious erosion of the city's tax base, much of which is oil- and gas-related property." Pet. App. 3a; see Pet. App. 38a; see also Valdez Resolution No. 00-15 (Pet. App. 54a) ("funds received from an ad valorem tax on vessels over 95 feet in length [are] intended to offset the fiscal instability resulting

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[9] The Alaska Supreme Court concluded that "the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property," citing *state* law that authorizes municipalities to exempt some types of personal property from ad valorem property taxes. Pet. App. 20a. But this observation is beside the point. *Wheeling* and *Michelin Tire* indicate that the *U.S. Constitution* prohibits the imposition of discriminatory property taxes on vessels. State law cannot authorize a violation of the federal constitutional requirement.

from the continued decline in the Valdez tax base and to be able to obtain fiscal stability").[10]

2. Moreover, the tax was not designed to charge for services uniquely provided to tankers; the trial court "found that the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (Pet. App. 29a), and the Valdez City Council made explicit that the tax was a general revenue measure that would "allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." Valdez Resolution No. 00-15 (Pet. App. 54a); see also Pet. App. 19a-20a. In its opposition to certiorari, Valdez contended that the availability of these services to vessels somehow satisfies the Tonnage Clause. See Opp. 8-10. But obviously, a tax that is placed in the

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[10] The authority relied upon by the Alaska Supreme Court to justify the Valdez tax does not support its holding. The court (Pet. App. 19a) principally invoked the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), which rejected a Tonnage Clause challenge to "nondiscriminatory ad valorem property taxes." *Id.* at 258. But even setting aside that the California court's decision in *Japan Line* was *reversed* on Commerce Clause grounds by this Court – which expressly declined to reach the Tonnage Clause question in light of that disposition (see 441 U.S. at 439 n.3) – the reasoning of the California Supreme Court does not support the decision below. In *Japan Line*, the tax at issue was a *nondiscriminatory* general tax, not directed at shipping containers in particular. See *id.* at 437; see also *id.* at 445 (California levy was "an ad valorem tax of general application"). The decision therefore simply did not address the consideration that is crucial in this case: that the challenged tax singles out oceangoing vessels for unfavorable treatment. The same distinction applies to the tax upheld by the Vermont Supreme Court in *Bigelow* v. *Dep't of Taxes*, 652 A.2d 985, 987-988 (Vt. 1994), which also was invoked by the Alaska court (Pet. App. 18a n.43).

City's general fund is not at all like a wharfage fee or similar levy imposed as a *quid pro quo* for particular services rendered.[11] To the contrary, Valdez sought simply to raise general revenue, which is the core concern of the Tonnage Clause. See *Gibbons*, 22 U.S. (9 Wheat.) at 202 ("the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed"); *State* v. *Turnbaugh*, 705 A.2d 530, 532 (R.I. 1997) (finding vessel tax unconstitutional because the funds were "entirely subject to being used as a general-revenue measure and not merely for the purpose of providing services to boats, boaters, and navigational improvements").

It is notable that an early Congress that contained many of the Framers of the Constitution believed that a tax for the purpose of funding a hospital *was* subject to the Tonnage Clause. In 1806, Congress approved a tonnage tax imposed in South Carolina for the purpose of "erecting and supporting an hospital in the vicinity of Charleston for the reception and relief of sick and disabled seamen." Act of Dec. 21, 1804, 2 Acts of the Gen. Ass'y of S.C. 553, 555 (seeking the consent of Congress to levy the tonnage tax); Act of Mar. 28, 1806, Ch. 17, 2 Stat. 357 (granting consent);[12] see also *Alexander*, 34 S.C.L. (3

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[11] The crews of commercial fishing vessels enjoy access to the hospital, school, and city infrastructure tax-free, and vessels that use only the City's public docks and pay for dockage services are also exempted from any obligation to "offset the fiscal instability resulting from the continued decline in the Valdez tax base." Valdez Resolution No. 00-15 (Pet. App. 54a); Valdez City Code § 3.12.020(A)(1) (Pet. App. 45a).

[12] These Acts are reproduced in the Addendum to this brief.

Strob.) at 599. That this early Congress believed its approval was necessary to allow imposition of the Charleston tax – a levy that, if anything, was more closely related to the object of the taxation than is the one imposed by Valdez – confirms that such a levy falls under the Tonnage Clause.

3. Finally, the Valdez vessel tax implicates the concerns of interstate rivalry that led to the adoption of the Import-Export and Tonnage Clauses. Like "discriminatory state taxation against imported goods as imports," the discriminatory taxation by Valdez of large vessels – virtually all of which are used to transport products for use in other States – operates as "a form of tribute by seaboard States to the disadvantage of the other States." *Michelin Tire*, 423 U.S. at 286. Similarly, by taxing large but not small vessels, and by taxing oil tankers but not fishing schooners, Valdez is regulating interstate commerce and infringing upon federal power. Cf. *id.* at 286 ("nondiscriminatory property taxation * * * cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation"); see also JA 48 (explaining that commercial fishing vessels were exempted from the vessel tax because "[t]hese industries were thought to contribute to the City economy in other ways").

In this respect, the Valdez vessel tax is a close Tonnage Clause equivalent of the hypothetical discriminatory tax on imports that the Court in *Michelin Tire* declared impermissible under the Import-Export Clause. The levy purports to be a property tax rather than a tonnage duty, but the reality is that it is uniquely imposed on vessels that dock in Valdez. The property tax label, and the availability of municipal services to vessels that dock in Valdez in the same manner as those services are

available to residents and other visitors to the City who are untaxed, should not save such a levy.[13]

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL PROPERTY VALUES AND CREATES A CLEAR RISK OF DUPLICATIVE TAXATION.

The Valdez tax also violates the Due Process and Commerce Clauses because it employs an apportionment formula that artificially inflates the fraction of a ship's total value that is taxed by the City. The numerator of the formula's apportionment ratio is the number of days per year that a ship spends in Valdez. The denominator, however, is *not* the number of days in a calendar year. Rather, Valdez subtracts from what would otherwise be a 365-day denominator (a) the number of days that petitioner's tankers spend plying the high seas and therefore are not physically present in *any* tax situs; and (b) "periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs." Pet. App. 55a. The direct and inevitable effect of these exclusions is that Valdez taxes a share of each ship's value that far exceeds its actual presence within the City's territorial jurisdiction. This approach offends the Constitution for two closely related reasons.

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[13] It does not matter that the Valdez tax does not, in terms, purport to be on the "privilege" of docking in the City. Under the Commerce Clause, the Court has refused to "'attach[] constitutional significance to [such] a semantic difference,'" instead "emphasiz[ing] the importance of looking past 'the formal language of the tax statute [to] its practical affect.'" *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 285, 279 (1977)).

First, this formula arrogates to Valdez the authority to tax property, belonging to a nondomiciliary, that does not lie within the City's territorial jurisdiction. By taxing, for example, 20% of a vessel's value when the ship was in Valdez for only 10% of the tax year, the City necessarily stakes a tax claim on periods of the year when the ship was elsewhere and therefore not subject to the City's taxing authority at all. There should be no doubt that this formula yields taxation that is not "fairly apportioned" (*Complete Auto*, 430 U.S. at 279), because there is no "rational relationship" between the value *attributed* to the taxing State and the *actual* in-state value. *Mobil Oil Corp.* v. *Comm'r of Taxes*, 445 U.S. 425, 437 (1980).

This same assertion of extraterritorial taxing authority gives rise to a second constitutional infirmity. This Court's holdings demonstrate that the State of the owner's domicile possesses authority to tax the full value of movable personalty except for the portion of the year when that property has a tax situs in another State. This means that petitioner's domicile may tax petitioner's tankers for the time when they are on the high seas. Similarly, a jurisdiction that has acquired taxing authority over property may exercise that authority while the property remains within the jurisdiction's borders due to a labor stoppage or for repairs. But Valdez, by its distortive apportionment ratio, has claimed the right to tax petitioner's vessels during these same periods and thus has created the prospect of duplicative taxation. Because the Constitution precludes a State from "imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere" (*Central R.R. Co. of Pa.* v. *Pennsylvania*, 370

U.S. 607, 614 (1962)), the Valdez apportionment formula is invalid regardless of the tax policy of petitioner's domicile. See *Mobil Oil*, 445 U.S. at 444.

A. The Valdez Formula Taxes Extraterritorial Values.

The structure of Valdez's taxing formula establishes its constitutional infirmity. By design, this formula inflates the proportion of a ship's value that is subject to taxation in Valdez by excluding from its denominator *all time* that petitioner's tankers spend traveling on the high seas between Valdez and ports in California, Washington and Hawaii, and *all time* that these ships spend out of service for periodic repair work or because of a strike. As a result of these exclusions, the denominator against which the ship's time in Valdez is measured regularly falls from 365 to 200, or 150, or even lower.

The Alaska Supreme Court casually dismissed petitioner's contention that this apportionment method was tantamount to taxing the vessels for days spent at sea or otherwise outside of Valdez. See Pet. App. 13a. But the truth of that statement is beyond dispute. In mathematical terms, excluding days spent on the high seas, repair days, and strike days from the apportionment denominator is *exactly the same* as adding a portion of those days to the numerator.

Take for example the illustration, employed by the Alaska Supreme Court, of a tanker that is in port in Valdez for 50 days during a year, and in port (for reasons other than for repairs or a strike) in any tax-

ing jurisdiction for a total of 150 days.[14] Under the Valdez formula, that tanker would be taxed by Valdez on 33.3% (50/150) of its assessed value. This would be so even though the City accepts that the tanker was *actually* present in Valdez for only about 13.7% (50/365) of the year. Or, to state the resulting distortion in another way, this ship would be taxed as if it had been present in Valdez for approximately 121 days of a full calendar year (33.2%) – 71 days more than it actually was in the City.

Other circumstances would produce tax assessments that depart even more radically from reality. Consider the example, first introduced in the petition, of a ship that spends one day per year in Valdez, one day in Long Beach, and the rest of the year on the high seas. That ship would be taxed by the City on 50% of its value under the Valdez formula – *i.e.*, as if it had spent 182.5 days in Valdez – even though the record relied upon by the city would show that the ship *actually* spent roughly 0.27% of the year in Valdez (1/365). Nor is this the most extreme example of how Valdez could use its apportionment formula to reach extraterritorial value. Imagine a ship that spent nine days in Valdez, just one day in Long Beach, and the rest of the year on the high seas, under repair, or in dock because of a strike. That ship would have spent less than 2.5% of the year in Valdez (9/365). But under the Valdez formula, its owner nonetheless would be taxed on an astonishing *90%* of the ship's full value – as if, despite all evidence to the contrary, the ship had been in Valdez for 328.5 days.

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[14] This illustration is a realistic one. In 1999, for example, petitioner's vessel "Polar Spirit" spent 51 days in Valdez and 151 total days in port in a tax situs. See JA 26-27.

These examples serve to illustrate the mathematical effect of applying Valdez's "port time" formula. When even a single day is deducted from the ratio's denominator, the fractional value of the vessel deemed subject to tax in Valdez becomes larger than the fractional portion of the year that the ship actually spent in the City. As applied to petitioner's oceangoing tankers, some of which spent as many as 249 days on the high seas during the tax years at issue and none fewer than 91 (see JA 21-45), the inflationary effect is substantial. And the degree to which Valdez appropriates these extraterritorial days for itself is also a direct function of the apportionment ratio. Thus, in the example used by the Alaska Supreme Court, because the "Valdez days" to "port time" ratio is 1:3 (50:150), Valdez assigns to itself 1/3 of the days artificially excluded from the denominator (*i.e.*, roughly 71 of the 215 days that were excluded). In the second example, because the resulting ratio is 1:2, Valdez takes for itself 1/2 of the extraterritorial days (*i.e.*, 181.5 of the 363 days removed from the denominator). And in the final illustration, Valdez would take 90% of the 355 excluded days, taxing 319.5 days that the vessel spent outside the City's territorial jurisdiction.

B. The Due Process And Commerce Clauses Preclude Valdez From Taxing Property Of Non-Domiciliaries When That Property Lies Beyond Its Borders.

1. A state or local jurisdiction may not impose property taxes on extraterritorial values.

Valdez thus imposes a per-unit *ad valorem* property levy that taxes petitioner's vessels in a manner that is grossly disproportionate to their actual pres-

ence within city limits. It does so even though the City *knows* when each of those vessels is, and is not, in Valdez, and indeed employs precisely that data to calculate the tax due under the apportionment formula now in use. And it does so even though the City *knows* that, by the very nature of petitioner's business, petitioner's vessels will *always* spend much of the year at sea. This is not a situation where an inexact formula is used to capture approximate in-state value and misses the mark by an excusable measure due the imprecise nature of apportionment. It is, instead, a formula *designed* to tax extraterritorial value. Such an apportionment formula is unconstitutional.

"Established principles are not lacking in this much discussed area of the law." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). On the one hand, "[i]t is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise." *Ibid.* On the other, "the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State," and it has held that States may not "cast their tax burden upon property located beyond their borders." *Id.* at 324, 325. It thus is fundamental that "[t]he Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008); accord *Asarco Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).

To accommodate these rules, under both the Commerce and the Due Process Clauses the values subject to a state or local tax, including a property tax, must be apportioned among all jurisdictions in which the property has acquired tax situs, which is

defined for property tax purposes as existing when there has been "habitual employment [of the property] within the jurisdiction." *Central Railroad*, 370 U.S. at 613.[15] Although this requirement was developed in cases involving railroad rolling stock, it has been applied to virtually all movable property, including vessels. See, *e.g.*, *Japan Line*, 441 U.S. at 442; *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).[16] And it is settled that property that has not acquired *any* tax situs elsewhere may be taxed at its full value by the domicile of the owner, even if the property spends a portion of the tax year outside the domicile's jurisdiction; such a levy is not

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[15] The Court applies a four-part test under the Commerce Clause that mirrors the one applicable under the Import-Export Clause (see p. 21, *supra*): a state tax must (1) be applied to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided to the taxpayer by the State. See *Complete Auto*, 430 U.S. at 279. Insofar as is relevant in this case, however, the apportionment requirements of the Commerce and Due Process Clauses substantially overlap. See generally *MeadWestvaco Corp.*, 128 S. Ct. at 1505.

[16] The one exception has been oceangoing vessels; the Court has never expressly repudiated the home port doctrine as it applies to such vessels, and therefore has not squarely held that such vessels may be taxed by any jurisdiction other than their State of domicile. See *Japan Line*, 441 U.S. at 442 ("In discarding the 'home port' theory for the theory of apportionment, * * * the Court consistently has distinguished the case of oceangoing vessels"); *id.* at 443-444 ("There is no need in this case to decide currently the broad proposition whether mere use of international routes is enough, under the 'home port doctrine,' to render an instrumentality immune from tax in a nondomiciliary State."). In this case, however, petitioner has not contended that the home port doctrine applies.

an improper extraterritorial tax because it reflects the understanding that the domicile State may impose a tax in return for providing the property's owner unique "'opportunities, benefits, or protection.'" *Central Railroad*, 370 U.S. at 612 (citation omitted). See *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 297-298 (1944); *Johnson Oil Ref. Co.* v. *Oklahoma*, 290 U.S. 158, 161 (1933). Valdez has not challenged that rule.

The question here is how these principles apply to the apportionment of taxes on property that may be taxed by more than one jurisdiction but has no identifiable tax situs for a portion of the year. Specifically, it is whether the domicile State has the right to tax *all* the value for periods when there is no established tax situs (as we maintain), or whether non-domicile jurisdictions in which the property has acquired tax situs may tax a portion of the value attributable to periods when the property had no specific situs (as Valdez asserts and the Alaska Supreme Court held). The answer to that question is apparent: the Valdez formula is impermissible because it taxes extraterritorial values without the unique justification that States of domicile have for doing so.

2. Apportionment of a personal property tax must rest on an assessment intended to measure the taxable object's actual proportionate presence within the taxing jurisdiction.

a. This Court has long made clear that where the property of non-domiciliaries is concerned, "the power to tax is predicated upon jurisdiction of the property." *United States* v. *Allegheny County*, 322 U.S. 174, 184 (1944). Indeed, the Court has held it "*essential* to the validity of a tax that the property

shall be within the territorial jurisdiction of the taxing power * * * [and] no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised." *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905) (emphasis added). See also *Norfolk & W. Ry.*, 390 U.S. at 325 (extraterritorial taxation "imposes an illegitimate restraint on interstate commerce and * * * denies to the taxpayer the process that is his due"); *R.I. Hosp. Trust Co.* v. *Doughton*, 270 U.S. 69, 80 (1926) (citing cases) ("It goes without saying that a state may not tax property which is not within its territorial jurisdiction.").

These principles yield none of their force where, as here, the property at issue is an instrumentality of interstate commerce that has acquired a tax situs in more than one jurisdiction. To the contrary, the Court has frequently applied the rule against extraterritorial taxation in examining the validity of State property taxes levied upon movable railroad equipment. See, *e.g.*, *Norfolk & W. Ry.*, 390 U.S. at 317; *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919); *Fargo* v. *Hart*, 193 U.S. 490 (1904). The inquiry in such cases is aimed at determining *how much* of the property's value is present in, and therefore subject to tax in, each State.

In *Union Tank Line*, for example, Georgia sought to tax rail cars owned by a New Jersey corporation by using an apportionment method that did not correlate to the actual presence of the corporation's property within the State – although the extent of the rail cars' presence in Georgia was both directly ascertainable and actually known. Georgia instead proposed to calculate the value of the corporation's

intra-state property (which consisted *only* of rail cars) by using a ratio that depended entirely on the mileage of *railroad track* (owned by *other* corporations) on which the taxpayer's rail cars ran in Georgia and elsewhere; under this formula, "[t]he valuation to be assigned to Georgia [would] be in the same proportion to the valuation for the entire company as the mileage [of track] in Georgia bears to the entire mileage everywhere." 249 U.S. at 278.

The Court held that this methodology could not be employed to determine the in-state value of the petitioner's rail cars, recognizing that "[r]eal values – the essential aim – of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto." *Id*. at 283. And the Court went further still. It indicated that in view of the unchallenged facts, the quantum of value subject to taxation in Georgia was clear: "Fifty-seven was the average number of cars within Georgia during 1913, and each had a 'true' value of $830. *Thus, the total there subject to taxation amounted to $47,310*." *Ibid.* (emphasis added). Accord *Johnson Oil*, 290 U.S. at 163 ("Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were to be found physically present within the state.").

Some 50 years later, the Court confronted a similar question in *Norfolk & Western Railway* and returned an identical answer. At issue there was a Virginia rail corporation's contention that a Missouri property tax assessment was unconstitutional because it, "in effect reached property not located in Missouri." 390 U.S. at 320. Here, too, a "rigid appli-

cation" of a mileage-based apportionment formula had yielded a tax apportionment that bore no relation to reality – Missouri had postulated that over 8% of the petitioner's rail stock was located within its borders, whereas the evidence (undisputed by the State) showed that only about 3% of that property was actually in Missouri on any given day. *Id.* at 326-328. This demonstrated discrepancy between actual presence and the State's tax assessment led the Court to strike down the Missouri assessment; the Constitution, the Court held, does not "tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product." *Id.* at 327.

With respect to movable and immovable property alike, the governing rule is thus clear:

> [t]he taxation of property not located in the taxing State is constitutionally invalid * * *. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders."

Norfolk & W. Ry., 390 U.S. at 325 (quoting *Nashville, Chattanooga & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)). See also *Union Tank Line*, 249 U.S. at 286 ("under *no formula* can a state tax things wholly beyond its jurisdiction") (emphasis added).

b. These settled principles give definition to what it means for a tax on personal property that moves in interstate commerce to be "fairly apportioned" within the meaning of *Complete Auto*. However structured, an apportionment formula is valid only if its aim, as well as its approximate result, is to tax property on

the basis of its actual proportionate presence within the taxing jurisdiction. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 121 (1920) (state income tax formula upheld because apportionment method "reached, and was meant to reach, only the profits earned within the state"); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978) (same) (quoting *Underwood*); *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920) (striking down facially valid apportionment formula that, in view of the factual record, plainly taxed extraterritorial property owned by the plaintiff railroads).

We do not suggest that the Constitution permits only one method of measuring actual presence. Compare *Japan Line*, 441 U.S. at 444-445 & n.8 (stating that container tax could be presumed "'fairly apportioned,' since it is levied only on the containers' 'average presence' in California, * * * *i.e.*, the time each container spends in the State per year") with *Goldberg* v. *Sweet*, 488 U.S. 252, 264 (1988) (noting Court's general approval of mileage-based apportionment formulas in cases involving "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State"). What we do contend, and what this Court's precedents amply demonstrate, is that the Constitution does not tolerate the use of an apportionment formula that ignores undisputed realities about the actual location of a taxpayer's property. "That would be taxing property outside of the state under a pretense." *Fargo*, 193 U.S. at 500.

The rationales supporting that longstanding prohibition are compelling. By definition, an apportionment formula that overstates the percentage of the taxpayer's property that is present in the taxing

State results in the taxation of extraterritorial values. And if States and localities were permitted to impose a tax on some basis other than a formula designed to measure the actual local presence of property, they could readily shift a disproportionate share of the local taxing burden onto non-local interests. They could do this by raising the effective tax rate imposed on property that is owned by non-locals and employed in interstate commerce, even while holding the facial tax rate even across the board.

By way of illustration, imagine two ships, one that spends the entire year in Valdez, the other that spends 50 days per year in the City and 150 days total in all ports (other than for repair or due to a strike). Assume as well that each ship has an assessed value of $l0 million and is subject to a 2% property tax rate. The first ship would pay $200,000 in tax – roughly $548 per day – for the benefits and protections afforded by Valdez over the course of the full year. The second ship, owned by a non-domiciliary, used in interstate commerce, and therefore frequently absent from Valdez, would pay far more per day. Under the Valdez formula, the vessel would pay tax on 1/3 of its assessed value and would thus owe $66,667. This would translate to a tax bill of over $1,333 per day spent in Valdez, in return for *precisely* the same benefits and protections as those afforded to the local ship. No valid conception of due process, or of the national free trade idea that underlies the Commerce Clause (see *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949)), permits such a disproportionate share of a local tax burden to be shunted onto instrumentalities of interstate commerce in this manner.

c. The Alaska Supreme Court nevertheless saw "no reason why the days at sea outside the jurisdic-

tion of any taxing authority should be included in the denominator of the [apportionment] fraction." Pet. App. 13a. But the reason is obvious: the inexorable logic of the mathematics establishes that excluding those days (as well as repair and strike days while the vessels are outside Alaska) means that Valdez is manipulating the operation of the apportionment formula so that it taxes for periods when the vessel is outside the City. Simply because a jurisdiction has sufficient contacts with property to support the imposition of *some* tax on it does not justify the imposition of a tax that does not fairly reflect the time *actually spent* in the jurisdiction.

This conclusion also follows from the Court's historic treatment of the authority of the property owner's domicile. The Court has held that property that has no tax situs for a portion of the year should not "escape [property] taxation entirely" for that period. *Central Railroad*, 370 U.S. at 617. This means that taxing authority over such property for the period when it is outside a tax situs must either be (1) allocated to the domicile or (2) apportioned proportionately between the domicile and those non-domicile jurisdictions that have acquired tax situs for a portion of the year. As between these two choices, Valdez has chosen the latter, but the former is compelled by this Court's decisions. Allowing the domicile to tax for the "no-tax-situs" period accords with the traditional and, so far as we are aware, unchallenged authority of the domicile to tax at *full* value property that has not acquired *any* actual situs elsewhere. See pp. 32-33, *supra*. It follows from that same understanding that the State of domicile possesses authority to tax the *portion* of the property's value that is attributable to time spent outside any tax situs, because it is only the domicile State that

provides the benefits and protections that justify taxation of the owner's absent property.

3. The record evidence shows that the Valdez formula has, in fact, produced malapportioned taxation.

The Valdez apportionment formula thus necessarily yields an unconstitutional result. And not surprisingly, just as in *Union Tank Line* and *Norfolk & Western Railway*, the undisputed factual record demonstrates that the formula has produced assessments for the years at issue, 2000 to 2003, that are clearly excessive in relation to the subject vessels' actual proportionate presence in Valdez. In the interest of brevity we focus here on a single vessel, petitioner's ship "Polar Alaska," although the City's apportionment scheme has had a similarly disproportionate effect on the tax assessment of every one of petitioner's tankers.

Polar Alaska spent 53 days in Valdez during 1999 and 195 days during that year in a status discounted by the apportionment formula (174 days on the high seas and 21 under repair). JA 21-22. Polar Alaska thus spent 14.5% of the tax year in Valdez, but was taxed by the City on 31.1% of its full assessed value. In 2000, Polar Alaska similarly spent 52 days in Valdez and 174 days outside of any tax situs. JA 32. The vessel thus spent 14.2% percent of this leap year in Valdez, but was taxed as if it had spent 27.2% of the year within city limits. A similar result accrued in 2001, when Polar Alaska spent 48 days in Valdez and a total of 179 days outside of a tax situs. JA 36. Again, the 25.8% assessment produced by the Valdez apportionment formula dwarfed the 13.2% of the year that Polar Alaska was actually present in Valdez. And in 2002, Polar Alaska spent

40 days in Valdez (just under 11% of the year) and a total of 226 days in all tax situs jurisdictions (although 28 of those non-Valdez port days were spent in repair outside Alaska and therefore were excluded from the apportionment denominator). JA 41. The vessel was thus subject to tax on 20.2% of its value.

It bears emphasis that there is no dispute as to when Polar Alaska, or any of petitioner's vessels, actually was in Valdez in any year. Nor is there any issue as to how to determine the full value of any individual ship. There is simply a gross discrepancy between the amount of time that these vessels spent in Valdez in any given year and the proportionate share of value that Valdez taxed under its formula. This will always be the case because it is the nature of an oil tanker's business to spend a portion of its time – necessarily a substantial portion – on the high seas. The Valdez tax therefore is unfairly apportioned and cannot be sustained even if it survives the Tonnage Clause challenge.

C. The Valdez Formula Subjects Petitioner's Property To An Impermissible Risk Of Duplicative Taxation.

Even if the Constitution does not otherwise prohibit Valdez from taxing a ship, owned by a Texas or California corporation, for periods the ship spends outside the City's jurisdiction, the prohibition against potentially duplicative taxation would still require invalidation of the Valdez apportionment formula. As demonstrated above, the Valdez formula effectively imposes tax on petitioner's vessels for periods when they are on the high seas or in some other port for repair (or because of labor unrest). But other jurisdictions plainly are entitled to levy property tax on the vessels during these same periods.

Accordingly, the Valdez tax gives rise to a risk that the vessels will be subjected to duplicative taxation.

1. A domicile may tax movable property for periods when the property has no tax situs.

a. As we note above, the Court in *Central Railroad* drew on decades of precedent to hold that the Constitution does not "confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders." 370 U.S. at 612 (citing, *inter alia*, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905), *Johnson Oil*, 290 U.S. at 161). Rather, so long as the taxpayer has not shown that its property has acquired a tax situs in another jurisdiction for the period subject to tax, the domicile retains the power to tax the property "to its full value," including time spent moving *outside* the domicile State. *Central Railroad*, 370 U.S. at 612. See also *id.* at 613 (emphasis added) ("the burden is on the taxpayer who contends that *some portion* of its total assets are beyond the reach of the taxing power of its domicile to prove that the same property may be similarly taxed in another jurisdiction"). Valdez's view that it also may tax petitioner's vessels for a portion of the time that they spend on the high seas and outside of any tax situs therefore means that it is asserting the authority to tax values already subject to tax by petitioner's domicile. Because, as we also note above, a tax is "invalid even if it creates only a risk of duplicative taxation" (Pet. App. 11a, citing *Central Railroad*, 370 U.S. at 614), the Valdez apportionment formula cannot stand.

The Alaska Supreme Court acknowledged that a tax must be invalidated "even if it creates only a risk of duplicative taxation" (Pet. App. 11a), but it found no such danger here because it believed that this Court's decision in *Japan Line* had effectively abrogated the special authority of domicile States recognized in *Central Railroad*. See Pet. App. 11a-12a. It reasoned that the domicile's historic authority to tax property for periods when the property is not physically present in the domicile is traceable to the home port doctrine. But it concluded that "the Supreme Court in *Japan Line* * * * recognized that the home port doctrine has yielded to a rule of fair apportionment among situs states." *Ibid.* (citing *Japan Line*, 441 U.S. at 442). The Alaska court added that "[m]odern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers" – *i.e.*, no more power than any other tax situs jurisdiction – to tax vessels for time spent on the high seas. Pet. App. 13a n.26. The court therefore found that petitioner's "view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*." *Ibid.* And if that is so, the court concluded, there is no danger of unconstitutional duplicative taxation here.

The Alaska Supreme Court's ruling, then, turns on the notions that (1) the domicile's special taxing authority derives from the home port doctrine, and (2) *Japan Line* worked what might be called a sea change in Commerce Clause analysis by not only repudiating the home port doctrine but also by retiring entirely the domicile preference. See Pet. App. 13a n.26. But that analysis is wrong on both points and reflects a plain misreading of this Court's decisions: *Japan Line* neither held nor hinted that domicile ju-

risdictions have been deprived of *all* power to tax property that lies outside their borders. Indeed, that issue (which would have required reconsideration of a long line of decisions by this Court – not just *Central Railroad*) was not presented at all in *Japan Line*.

b. What *was* at stake in *Japan Line* was the validity of a generally applicable apportioned municipal tax, as applied by a non-domiciliary jurisdiction to shipping containers that principally moved in foreign commerce. In relevant part, the taxpayer asserted that the home port doctrine *completely* shielded these containers, which were domiciled in Japan, from state taxation in the United States. See Brief for Appellants at 23-27, *Japan Line*, 441 U.S. 434 (No. 77-1378). The taxing city (Los Angeles) disagreed, but argued only that it was entitled to tax the containers for the portion of the time they were within the City's borders. See Brief for Appellees at 17, *Japan Line*, 441 U.S. 434 (No. 77-1378) (describing the levy at issue as a "property tax, based upon the value of property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction"). This Court, like the litigants, understood the apportionment formula at issue to reach only the containers' period of actual local presence in the taxing jurisdiction. See *Japan Line*, 441 U.S. at 443, 445 & n.8 (stating that the container tax could be presumed to be "'fairly apportioned,' since it is levied only on the containers' 'average presence' in California, * * * *i.e.*, the time each container spends in the State per year").

As a consequence, the Court had no occasion in *Japan Line* to consider whether the domicile lacked the authority to tax the vessels for the time they were traveling on the high seas. The case actually

was about something very different – whether the same standards that apply to apportionment for *interstate* commerce should apply to *foreign* commerce. The Court concluded in *Japan Line* that it should not "rehabilitate the 'home port doctrine'" to deal with the special issues presented by foreign commerce (see 441 U.S. at 443), but its solution was not to diminish the taxing power of the domiciliary jurisdiction over either foreign *or* domestic commerce. Instead, *Japan Line* held that Los Angeles could not assert *any* taxing authority over the property in question because the property's domicile, Japan, taxed its full value. *Id.* at 451. Los Angeles in that case occupied the position of Valdez in this one. It therefore would be perverse to read the decision as announcing a new constitutional doctrine that eliminates the residual rights of domiciliary States.[17]

c. Nor can a criticism of the *Central Railroad* rule be fairly discerned from the *Japan Line* Court's comments about the doubtful status of the "home port" doctrine in the domestic context. The "home port" doctrine and the rule describing the domicile's special, residual right to tax that was articulated in *Central Railroad* are hardly the same thing. To the contrary, the *Central Railroad* rule – that a domicile may *not* tax the full value of property that has ac-

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[17] The Alaska court also purported to find support for its holding in *Braniff Airways, Inc.* v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954), and *Ott*. See Pet. App. 13a-15a. But *Braniff* simply did not address the reasonableness of the apportionment formula used by the State in that case, which was not challenged by the taxpayer. See 347 U.S. at 598. It therefore has no direct bearing here. And *Ott* says nothing at all to support the Alaska court's speculation that the decision meant to approve a non-domicile State's right to tax property for a portion of the time spent on the high seas.

quired a tax situs elsewhere, but *may* tax that property for periods when it has no tax situs – was itself a function of this Court's rejection of the ancient rule that *only* a domicile jurisdiction may tax personal property, wherever it is located. That rejection long pre-dated *Japan Line*. See, *e.g.*, *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 383-384 (1952). Accordingly, there was simply no basis for the Alaska Supreme Court's conclusion that *Central Railroad* had been displaced by the "tenor" of *Japan Line*. See Pet. App. 13a n.26.[18] Because petitioner's domicile accordingly

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[18] In the years since *Japan Line*, leading commentators and numerous courts have concluded that the *Central Railroad* rule still governs. See, *e.g.*, Hellerstein & Hellerstein, *State Taxation* ¶ 4.12[2][d] (3d ed. 2000) ("Notwithstanding the erosion of the home port doctrine, it remains the law that the domiciliary state retains the power to tax the full value of instrumentalities of interstate commerce that have not acquired a tax situs in other states."); *ibid.* (domicile "plainly had power to tax the aircraft, except to the extent that it was taxable on an apportioned basis elsewhere"). See also *Ice Capades, Inc.* v. *County of Los Angeles*, 56 Cal. App. 3d 745, 755 (1976) (holding that for property of a California domiciliary having a taxable situs in New Jersey, but which spent much of the year in other jurisdictions without acquiring a tax situs, "a formula will be valid if it apportions to the County of Los Angeles * * * the proportion of the value of the property which the period of the tax year during which the property was not present in New Jersey bears to 365 days"); *East West Express, Inc.* v. *Collins*, 449 S.E.2d 599, 600 (Ga. 1994) ("ad valorem tax on property engaged in interstate commerce must be apportioned if the taxpayer bears its burden of demonstrating that its property has acquired a tax situs in another state"); *Appraisal Review Bd.* v. *Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998) ("If the facts show that property has a taxable situs in more than one state, the domiciliary state may not tax at full value"); *Jet Fleet Corp.* v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744, 746 (Tex. Ct. App. 1988) ("the state of domicile has jurisdiction to tax the personal property of its corporations unless some measurable portion of

retains the authority to tax petitioner's vessels for periods while they are on the high seas, the danger of duplicative taxation requires invalidation of the Valdez apportionment formula.

2. A threat of duplicative taxation also flows from Valdez's taxation of vessels for periods they spend in other ports for repairs or because of a strike.

It is equally plain that a non-domicile jurisdiction that has acquired taxing authority over movable property by virtue of the property's local presence may levy on that property for periods that it remains within the jurisdiction "because of strikes or * * * for repairs." Pet. App. 55a. Routine presence for repairs has long been viewed as highly relevant in considering whether a jurisdiction has acquired taxing authority over the property of a non-domiciliary. See, *e.g., In re Wheeling Steel Corp. Assessment Personal Prop. Brooke County 1951 Taxes*, 73 S.E.2d 644, 653-654 & Syllabus pt. 4 (W.Va. 1952) (marine equipment acquired tax situs in county where, *inter alia*, repairs to the equipment were routinely made); *Ott* v. *De Bardeleben Coal Corp.*, 166 F.2d 509, 512 (5th Cir. 1948) (noting the district court's holding that certain barges had acquired a tax situs in Louisiana, where, among other ties, the barges were regularly brought for repair), overruled on other grounds *sub nom. Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949). Indeed, the Alaska Supreme Court has itself

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the property has acquired a permanent location or 'taxable situs' elsewhere."); *Ryder Truck Rental, Inc.* v. *County of Chesterfield*, 449 S.E.2d 813, 815 (Va. 1994) ("[A]pportionment is required only when property is subject to taxation, that is, has a tax situs, in another jurisdiction. Without a tax situs in another jurisdiction, a domiciliary state retains the authority to tax the full value of the property").

held, in an analogous circumstance, that the Constitution permits a locality to assess property tax upon seagoing vessels for the portion of the year in which they are marooned within the borough's territorial jurisdiction by pack ice. See *N. Slope Borough* v. *Puget Sound Tug & Barge*, 598 P.2d 924 (Alaska 1979). The recognition of this authority makes perfect sense: a vessel present for repairs or because of a strike still receives the benefit of police, fire, and other governmental services even though it is not operable at the time.

For this reason as well, Valdez's assertion of extraterritorial taxing authority creates a clear risk of duplicative taxation. The City excludes from the denominator of its apportionment formula days when vessels are in another port but undergoing repairs or idled by a strike. By doing so, Valdez is effectively taxing vessels for a portion of the period that they are removed from the Alaska service and physically located in these *other* taxing jurisdictions. Because those jurisdictions may impose taxes for the same periods, the Valdez formula is insupportable.

* * * *

We note a final point related to the proper disposition of the case: we urge the Court to resolve the apportionment challenge even if it also holds the Valdez tax unconstitutional under the Tonnage Clause. Although such a Tonnage Clause ruling would invalidate the tax, it would leave open the possibility that Valdez could attempt to impose a new tax after eliminating the old one's discriminatory features. So long as the tax retained use of the existing apportionment formula, however, such a new levy would remain constitutionally flawed. Resolution of the apportionment challenge now accordingly would pro-

vide necessary guidance to the City and to other jurisdictions contemplating the imposition of similar taxes, while avoiding the prospect of substantial additional litigation regarding the City's tax and the possible return of an identical challenge to this Court. Because the issue is squarely before the Court and is being fully briefed by the parties, decision of the matter at this time is appropriate.

CONCLUSION

The judgment of the Alaska Supreme Court should be reversed.

Respectfully submitted.

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ADDENDUM

An ACT to authorize the City Council of Charleston, with the consent of Congress, to impose and levy a duty on the tonnage of ships and vessels, for the purpose therein mentioned.

WHEREAS the city council of Charleston, by their memorial to the legislature of this state, have, amongst other things, set forth that a proposition, authorized by the president of the United States, has been made to the said city council, to pay over to them the sum of fifteen thousand dollars for building a marine hospital in the vicinity of Charleston; and likewise to pay over to them all the hospital monies to be collected in the said port, on their taking upon themselves the direction of the said hospital, and defraying all expenses attending the same; which sums the said city council state to be altogether inadequate for the building and supporting the said hospital; but that for the reasons in their memorial mentioned, they have nevertheless agreed to assume the superintendance, direction and support of the said marine hospital, to accept the sums offered for building and supporting the same, and to rely on the legislature of this state to pass an act, and on congress to assent thereto, for authorizing the said city council to impose and levy a duty on the tonnage of ships and vessels to supply any deficiency which may arise in building and supporting the said hospital; and the said city council have therefore prayed that an act may be passed, authorizing them to impose and levy a duty, not exceeding six cents per ton, on ships and vessels, for the purpose aforesaid:

Be it therefore enacted by the honorable the Senate and House of Representatives, now met and sitting in general assembly, and by the authority of the

same, That whenever the consent of Congress shall be given to this act, the city council of Charleston shall be, and they are hereby authorized and empowered to impose and levy a duty, not exceeding six cents per ton, on all ships and vessels of the United States, which shall arrive and be entered in the port of Charleston, from any foreign port or place whatsoever; and a like duty, each time of entry, on all ships and vessels of the United States, not licensed, which shall arrive and be entered in the said port, with goods, wares and merchandize on board, from another state, other than an adjoining state, on the sea coast or on a navigable river; and also a like duty on all ships and vessels which shall be entered in the said port, having a license to trade between the different districts of the United States, or to carry on the bank or whale fisheries, whilst employed therein, to be paid on the said last mentioned ships and vessels, not more than once a year; which said duty shall be collected and paid in such way and manner as the city council of Charleston shall direct and appoint; and shall be appropriated by them in supplying any deficiency which may arise in erecting and supporting an hospital in the vicinity of Charleston for the reception and relief of sick and disabled seamen.

In the Senate House, the twenty-first Day of December, in the Year of our Lord one thousand eight hundred and four, and in the twenty-ninth Year of the Sovereignty and Independence of the United States of America.

JOHN WARD, *President of the Senate*
W.C. PINCKNEY, *Speaker of the House of Representatives.*

CHAP. XVII. – *An Act declaring the consent of Congress to an act of the state of South Carolina, passed on the twenty-first day of December, in the year one thousand eight hundred and four, so far as the same relates to authorizing the city council of Charleston to impose and collect a duty on the tonnage of vessels from foreign ports.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and it is hereby granted and declared to the operation of an act of the general assembly of the state of South Carolina, passed the twenty-first day of December, in the year of our Lord one thousand eight hundred and four, intituled "An act to authorize the city council of Charleston, with the consent of Congress, to impose and levy a duty on the tonnage of ships and vessels, for the purposes therein mentioned," so far as the same extends to authorizing the city council of Charleston to impose and levy a duty not exceeding six cents, per ton, on all ships and vessels of the United States, which shall arrive and be entered in the port of Charleston from any foreign port or place whatever.

SEC. 2. *And be it further enacted*, That the collector of Charleston is hereby authorized to collect the duty imposed by this act, and to pay the same to such persons as shall be authorized to receive the same by the city council of Charleston.

SEC. 3. *And be it further enacted*, That this act shall be in force for three years, and from thence to the end of the next session of Congress thereafter, and no longer.

APPROVED, March 28, 1806.