No. 08-310

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,
v.
CITY OF VALDEZ, ALASKA
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF *AMICI CURIAE* WORLD SHIPPING COUNCIL & CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The World Shipping Council and Cruise Lines International Association respectfully file this brief as amici curiae in support of Petitioner. Blanket consent letters are on file with the Clerk.

[1] In accordance with the Court's Rule 37.6, amici and their counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than amici and their members made any monetary contribution to the preparation or submission of this brief.

The World Shipping Council ("WSC") is a U.S.–based membership trade association with 28 members that provide international liner shipping services to and from the United States and between other nations around the world. WSC's members are domiciled in 17 different countries, with agencies and offices in virtually all of the nations that they serve.

"Liner" shipping is that sector of the ocean transportation industry that operates vessels on regularly scheduled routes, as opposed to "tramp" shipping, in which vessel itineraries are dictated by the spot demands of particular customers. WSC's members provide international containerized shipping services, in which cargoes are loaded into containers that can be lifted on and off of vessels, trains, and truck chassis without the need for opening and repacking, as well as roll-on/roll-off services, in which automobiles and other wheeled vehicles are driven onto and off of vessels.

Liner carriers employ vessels operated under a number of types of arrangements. A substantial number of vessels are owned directly by the shipping lines. In addition, a sizeable number are owned by companies that are in the business of owning vessels and chartering them to others, under both short-term and long-term arrangements. Vessels may be documented in their owners' countries of domicile, or they may be flagged in other jurisdictions. In addition to providing port-to-port cargo transportation service, ocean carriers also routinely provide "through" transportation for U.S. importers and exporters from an inland point in one country to an inland point in another country. In those cases, for example, a container bound for Chicago might be unloaded at a port in California and moved inland by rail.

Taken together, WSC's members handle over ninety percent of the United States ocean-borne containerized cargo. In 2007, WSC member lines' liner shipping vessels made 25,940 port calls in the United States (71 per day), serving 57 different U.S. ports (including Alaskan ports, but not Valdez), and transporting goods to and from 175 foreign countries. In that year, they carried approximately 17 million loaded containers of American import and export cargo.

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington, D.C., is the world's largest cruise line non-profit trade association. CLIA's 23 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members. CLIA operates pursuant to an agreement filed with the Federal Maritime Commission under the Shipping Act of 1984 and serves as a non-governmental consultative organization to the International Maritime Organization, an agency of the United Nations. CLIA actively monitors international shipping policy and develops recommendations to its membership on a wide variety of issues.

CLIA's member lines operate over 150 ships. In 2007, CLIA's members carried approximately 12.5 million passengers of which nearly 9.2 million passengers embarked in U.S. ports alone. The number of ports visited continues to grow each year. Many of CLIA's member lines' cruise ships reposition among multiple jurisdictions throughout each year, both in

the U.S. and abroad. A typical ship might spend the winter months cruising the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer cruises embarking in Vancouver and visiting ports in Alaska. Of the 30 U.S. ports and numerous other foreign ports on which CLIA's member lines' vessels call, research shows the Caribbean, Alaska, Bahamas, Hawaii, and the Mediterranean/Greek Isles are top choices of cruisers. The ability of each individual state or subdivision to impose local fees and taxes is of central concern to CLIA's members given (1) the likelihood of multiple and inconsistent taxation by individual local governments, and (2) the possibility of retaliation by foreign ports against both American and other vessels calling abroad.

WSC and CLIA file this brief in support of Petitioner in order to provide perspective to the Court about the potential impacts on international commerce of the Court's actions here.

SUMMARY OF ARGUMENT

1. The prohibition against States' establishment of tonnage duties embraces all taxes and duties regardless of their name and form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port. If this Court were to uphold the Valdez tax as valid under the Tonnage Clause, the implications for international shipping and commerce would be substantial. The Tonnage Clause on its face makes no distinction between State tonnage duties levied against U.S. documented vessels (the vessels covered by the Valdez tax) and State tonnage duties levied against vessels documented in other countries.

There is no textual basis for this Court in the Tonnage Clause context to draw a distinction between interstate commerce and foreign commerce in the way that it has drawn such a distinction in the Commerce Clause context. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445-49 (1979). Thus, although the limitation of the Valdez tax to U.S. documented vessels plainly has implications for the apportionment issue raised by the second question presented, the Court's analysis under the Tonnage Clause will not be affected by the fact that Valdez's ordinance applies only to U.S. vessels. If States and municipalities may, under the Constitution, levy taxes on vessels for unspecified purposes where other personal property in the jurisdiction is not so taxed, the Tonnage Clause becomes a nullity, and the practice of the various States and municipalities charging vessels for the privilege of entering a port and serving the needs of the nation's commerce, which the Tonnage Clause was adopted to prevent, would likely proliferate.

2. On the issue of apportionment, the practice of taxing vessels on the high seas by a non-domiciliary jurisdiction on the basis that a vessel has at some point during a tax year acquired a tax situs in a particular port is one that has the potential to create great mischief in the field of international shipping. Amici urge reversal on this question on the grounds argued by Petitioner. In addition, however, amici urge the Court to be mindful of the additional factors applicable to Commerce Clause analysis in the context of international commerce that the Court articulated in *Japan Line*. Whatever this Court's decision with respect to Valdez's approach to apportionment as it applies to Petitioner's vessels, United States courts are not in a position to police alloca-

tions among nations that would necessarily arise with respect to vessels that are documented in or are owned by persons resident in nations other than the U.S. and that call ports in this country. See *Japan Line, Ltd.*, 441 U.S. at 447, 454.

ARGUMENT

1. The Valdez Levy is a Prohibited Tonnage Duty.

The Tonnage Clause "prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress." *Wheeling, P & C Transp. Co.* v. *Wheeling*, 99 U.S. 273, 277 (1879). Thus, "the only question which can properly arise in the case presented for decision [is] whether the tax as imposed by state authority is or is not a tonnage duty * * *." *Id*. at 279.

The Alaska Supreme Court answered the question of whether the Valdez charge was a tonnage duty in a circular fashion. Beginning with the truism that "[a] fairly apportioned property tax is not a tonnage duty," it found that the tax was fairly apportioned, and so it "necessarily also [held] that it does not violate the Tonnage Clause." Pet. App. 18a. The problem with this approach is that no tonnage duty may be saved by being "fairly apportioned." Because the Constitution's prohibition on States imposing "duties of tonnage" is unequivocal, the issue of apportionment plays no part in the determination of whether a levy is a permissible tax or a prohibited tonnage duty.

In order to determine whether a charge is a tonnage duty, it is necessary to look at how that charge operates in practice, not what it is called. See

Passenger Cases, 7 How. 283, 459 (1849) (opinion of Grier, J.) ("We have to deal with things, and we cannot change them by changing their names"). The "thing" here is a levy against only one type of personal property—oceangoing vessels. It appears that all other forms of personal property within the City of Valdez are either not covered by the tax or have been exempted. See Pet. at 16; Opp. at 11-12. It appears further that the parties agree that there are no specific services provided to the taxed vessels in exchange for the monies paid. If the analysis stopped there—a levy *only* on vessels with no services rendered in return—then the charge would clearly be a levy "upon the privilege of access by vessels * * * to the ports or to the territorial limits of a state," *Clyde Mallory Lines* v. *Alabama,* 296 U.S. 261, 265 (1935), and thus a prohibited tonnage duty.

Respondent argues, of course, that there is more to the analysis than the fact that the personal property tax in question applies only to ocean-going vessels and that no specific services are provided to the vessel in return. The additional consideration, according to Respondent, is that the money collected from the tax on the vessel is used to provide services to the general public, of which the employees of the Petitioner constitute a part. See Opp. at 8-9 (listing, for example, a hospital, post office, community college, arts council, etc. as beneficiaries of the tax).

This argument, like the Alaska Supreme Court's holding that a tax is not a tonnage duty if it is fairly apportioned, misses the crucial point. *Every* government levy, unless it is pilfered or squandered, is used to pay for the "advantages of a civilized society," *Exxon Corp.* v. *Wisc. Dep't of Rev*., 447 U.S. 207, 228 (1980). The cases using such formulations to describe

the existence of a due process nexus with the tax payer have also uniformly held that the taxes involved must be non-discriminatory (i.e., they apply uniformly to broad classes of personal property) and fairly apportioned. See, e.g., *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1975). There is no Tonnage Clause case that upholds a targeted levy on vessels on the ground that the money so collected is used for governmental purposes, nor could there be. To say that a particular charge has some of the attributes of taxes that have been held to be permissible under the Commerce Clause and the Due Process Clause is not the same as saying that such a charge is not a tonnage duty. There is, in short, a fundamental flaw in the syllogism that says that: Permissible taxes are used for governmental purposes; our tax is used for governmental purposes; therefore our tax is permissible. That flaw, to repeat, is that *all* government levies are used for governmental purposes. That factor is therefore of no use in determining when an exaction is a permissible property tax and when it is an impermissible tonnage duty.

Stripped of the two logically and legally flawed bases of its Tonnage Clause holding, the Alaska Supreme Court's ruling stands on nothing. This Court should therefore reverse on that question. But this Court should reverse not merely because the State court's reasoning does not bear scrutiny, but rather because the Tonnage Clause becomes a nullity if it does not prohibit the duty collected by Valdez. As a practical matter, if the only attributes necessary for the avoidance of the absolute constitutional prohibition stated by the Tonnage Clause are that the State or local charge is apportioned among taxing jurisdictions and that moneys collected are spent by the government to provide general governmental ser-

vices, then any State or port in the country would be able to lay taxes on ships in order to support any government program, no matter how tangential (or nonexistent) the benefits of that program might be to the ships that pay the tax. That is precisely the evil that the Tonnage Clause was designed to prevent, and there is no line that can be drawn if that line is not drawn here.

2. Apportionment

In the event that the Court reaches the apportionment issue, amici urge reversal on the grounds argued by Petitioner. In addition, however, amici request that the Court remain mindful of its long-held distinction between interstate and international commerce in apportionment cases. *Japan Line* controls international commerce, and even if the charge here were held to be a permissible property tax that was fairly apportioned, that situation should be distinguished from a hypothetical tax that extends beyond the United States documented vessels reached by the Valdez tax.

In *Japan Line*, the Court added two additional considerations relevant to foreign-owned property used as an instrumentality of international commerce to the test set forth for interstate commerce in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977): (1) the enhanced risk of multiple taxation and (2) the need for the federal government to "speak with one voice." *Japan Line*, *Ltd*., 441 U.S. at 446-49. These considerations are not implicated by the facts in this case, and the Court here, as it has before, should refrain from addressing what the outcome would be with respect to vessels of many nations operating in international commerce, where much stricter scrutiny is applied. See, e.g., *Ott* v. *Mississippi Valley Barge*

Line Co., 336 U.S. 169, 173-74 (1949) ("We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters"). As the Court noted in *Japan Line*, *Ltd.*, 441 U.S. at 447, "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign." As the Court also stated there, *id*. at n.11, "[o]ceangoing vessels * * * are generally taxed only in their nation of registry," a statement that remains true today. The scope and complexity of ocean transportation services has only increased since *Japan Line* was decided (see "Interest" section, *supra)*, and the difficulty in managing apportionment has likewise increased.[2] Thus, in the event that the Court reaches the apportionment question, and in the event that it upholds the State court on that point, amici urge the Court to make clear that its holding does not extend to vessels engaged in international trade. Failure to make such a distinction under those circumstances could lead to a substantial risk of States and municipalities misunderstanding the constitutional limits on their ability to tax international shipping.

CONCLUSION

The charge that Valdez levies against ocean-going vessels is a prohibited tonnage duty. It singles out shipping, and no services beyond those provided to the populace at large are provided in return for the money collected. Other than in name, it is precisely

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[2] The international commerce situation would also present a question, not presented here, of whether vessels calling for an average of a day at each U.S. port after voyages that can last many weeks would acquire a tax situs in any of the ports that they call in the U.S.

the sort of State and local tax on shipping that the Tonnage Clause was designed to prevent. The case should be resolved on that basis, and there is no need to reach the apportionment issue. If the Court does reach the apportionment question, it should limit its analysis to the facts here, under which the tax applies only to vessels documented in the United States, and the vessels in question typically serve only United States ports. The very different case of foreign-registered vessels in international trade was settled by *Japan Line*, and need not be revisited here.

Respectfully submitted,

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