IN THE SUPREME COURT FOR THE STATE OF ALASKA

CITY OF VALDEZ Appellant/Cross-Appellee, v. POLAR TANKERS, INC., Appellee/Cross-Appellant.	Supreme Court Case No. S-12218/12223 Superior Court Case No. 3AN-00-09665 CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA,
THIRD JUDICIAL DISTRICT,
THE HONORABLE PETER A. MICHALSKI, PRESIDING

BRIEF OF APPELLEE/CROSS-APPELLANT POLAR TANKERS, INC.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES PRINCIPALLY RELIED UPON

United States Constitution, Article I, Section 8

> The Congress shall have power …
>
> ….
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes ….

United States Constitution, Article I, Section 10

> No state shall, without the consent of Congress, lay any duty of tonnage ….

United States Constitution, Amendment IV

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

46 United States Code §12102(a) (Prior Version)

> (a) A vessel of at least 5 net tons that is not registered under the laws of a foreign country is eligible for documentation if the vessel is owned by—
>
> (1) an individual who is a citizen of the United States;
>
> (2) an association, trust, joint venture, or other entity—
>
> (A) all of whose members are citizens of the United States; and
>
> (B) that is capable of holding title to a vessel under the laws of the United States or of a State;
>
> (3) a partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States;
>
> (4) a corporation established under the laws of the United States or of a State, whose chief executive officer, by whatever title, and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum;
>
> (5) the United States Government; or
>
> (6) the government of a State.

46 United States Code Appendix §883 (Prior Version)

> No merchandise, including merchandise owned by the United States Government, a State (as defined in section 2101 of the Title 46), or a subdivision of a State, shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sectin 808 of this Appendix or section 22 of this Act ….

Alaska Statute 29.45.030(a)

> The following property is exempt from general taxation:
>
> (1) municipal property, including property held by a public corporation of a municipality, state property ….
>
> ….
>
> (8) property of a political subdivision, agency, corporation, or other entity of the United States to the extent required by federal law ….

Alaska Statute 29.45.070(a)

> Mobile homes, trailers, house trailers, trailer coaches, and similar property used or intended to be used for residential, office, or commercial purposes and attached to the land or connected to water, gas, electric, or sewage facilities are classified as real property for tax purposes unless expressly classified as personal property by ordinance. This section does not apply to house trailers and mobile homes that are unoccupied and held for sale by persons engaged in the business of selling mobile homes.

Alaska Statute 29.45.500(a)

> (a) If a taxpayer pays taxes under protest, the taxpayer may bring suit in the superior court against the municipality for recovery of the taxes. If judgment for recovery is given against the municipality, or, if in the absence of suit, it becomes

obvious to the governing body that judgment for recovery of the taxes would be obtained if legal proceedings were brought, the municipality shall refund the amount of the taxes to the taxpayer with interest at eight percent from the date of payment plus costs.

Valdez Municipal Code Section 3.12.010

All property not expressly exempt by the city, or exempted from taxation by the city under federal or state constitutional provisions, shall be subject to annual taxation at its full and true value based upon the actual value of the property assessed.

Valdez Municipal Code Section 3.12.020

A. Property Subject to Taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least ninety-five feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Proration of Personal Property Taxes. Personal property shall be assessed once a year as of January 1st of the assessment year. Assessments on personal property shall not be prorated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the city the portion of the total market value of the property that fairly reflects its use in the city. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the city. The assessment formula shall be approved by the city council.

C. Tax Situs of Personal Property.

1. All personal property which has a tax situs within the city on January 1st of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1st of the assessment year, either:

a. Has been or is usually kept or used within the city, whether regularly or irregularly; or
b. Travels to or within the city along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety days or more, whether consecutive or otherwise, in the twelve months preceding the January 1st assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1st of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the city if such transactions or cargo have a cumulative value in excess of one million dollars during the tax year.

Valdez Municipal Code Section 3.12.020 (Repealed by Ordinance 99-17)

A. Effective January 1, 1968, all personal property located within or owned by residents of the city shall be exempt from the Valdez personal property tax**.** This exemption includes, but is not limited to, household furniture and effects, intangibles, inventories and goods in process, and boats and vessels of all types.

Valdez Municipal Code Section 3.12.022(A)

A. Property Subject to Taxation. For the purposes of this chapter, real property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.

Valdez Municipal Code Section 3.12.030(A)

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in AS 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1) ….

Valdez Ordinance 99-17

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

a. Has been or is usually, kept or used within the city, whether regularly or irregularly; or

b. Travels to or within the City along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year.

Section 2: Section 3.12.022 of the Valdez City Code is hereby enacted to read as follows:

3.12.022 Taxation of Real Property.

A. Property subject to taxation. For the purposes of this chapter, real property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.

….

Section 3: Section 3.12.030 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.030 Property Exempt from Taxation.

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1);

….

Valdez Resolution No. 00-15

WHEREAS, each year since 1985, the oil property (as defined in A.S. 43.56 et seq.) in Valdez, as assessed by the State of Alaska, has declined in value based upon a methodology agreed to between the State and the Trans Alaska Pipeline System (TAPS) owners; and

WHEREAS, the impact of this annual devaluation has caused the City of Valdez continued fiscal uncertainty and required the City to reduce its budget by approximately 25% over the past 5 years; and

WHEREAS, other similar terminal facilities are not devalued each year, as is the case with the Alyeska marine terminal in Valdez; and
WHEREAS, efforts by the City over the past 10-plus years to establish a floor in the value of the TAPS property in Valdez has been unsuccessful; and

WHEREAS, the City has taken substantial steps to bring stability to its tax base. Such efforts include financial support and participation in the creation of the Alaska Gasline Port Authority to build or cause to be built a gasline from Alaska's North Slope to an LNG plant located in Valdez; and

WHEREAS, with the closing of the State of Alaska Harborview Developmental facility in Valdez, the City is faced with having to build its own stand-alone hospital; and

WHEREAS, the City is faced with having to replace the existing Junior High School; and

WHEREAS, on this November's statewide election is a proposition to create a statewide tax cap of 10 mills which would decrease the property tax generated revenues received by the City by 50%; and

WHEREAS, funds received from an ad valorem tax on vessels over 95 feet in length is intended to offset the fiscal instability resulting from the continued decline in the Valdez tax base and to be able to obtain fiscal stability to allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities; and

WHEREAS, on November 15,1999, the City Council adopted Ordinance No. 99-17, which provided that a documented vessel over 95 feet in length shall be taxed at its full and true value unless it is used primarily in commercial fishing or docked exclusively at the Valdez Container Terminal; and

WHEREAS, the ordinance provides that the value of a vessel that has acquired a tax situs elsewhere in addition to its tax situs in Valdez, shall be assessed on an apportioned basis; and

WHEREAS, the Ordinance directs the Assessor to establish formulas for calculating the proportion of the total value of a vessel that fairly reflects its use in the City, and further requires that the formula be approved by the City Council; and

WHEREAS, the Assessor has developed an apportionment formula that determines value on the basis of a ratio that compares the time a vessel spends in port in Valdez with the total time spent by the vessel in all ports; and

WHEREAS, the City Council desires to approve the formula.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that

Section 1: Personal property tax on a vessel over 95 feet that has established a tax situs in places outside of Valdez shall be apportioned as follows:

A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times 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;

B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day.

Section 2: If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

Alaska Rule of Civil Procedure 82(a)

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

JURISDICTIONAL STATEMENT

The City of Valdez filed a Notice of Appeal from the Judgment the Superior Court entered on January 10, 2006, and Polar Tankers, Inc., filed its own Notice of Appeal on February 8, 2006. The appeals were consolidated and Polar Tankers, Inc.'s appeal was designated the cross-appeal. This Court has jurisdiction under AS 22.05.010(a) and Alaska Rule of Appellate Procedure 202(a).

ISSUES PRESENTED FOR REVIEW

Polar Tankers, Inc.'s Cross-Appeal

1. Does a personal property tax that taxes only vessels that enter Valdez to gain access to private facilities violate the Tonnage Clause of the United States Constitution?

2. Should the Superior Court have declared Polar Tankers, Inc., the prevailing party after it successfully established that it was entitled to a refund of unconstitutionally collected taxes because the City of Valdez had violated the Due Process and Commerce Clauses of the United States Constitution?

City of Valdez's Appeal

1. Does an apportionment formula that taxes values not connected with the City of Valdez and produces duplicative taxation violate the "fair apportionment" requirement of the Due Process and Commerce Clauses?

2. When a court declares the City of Valdez's property tax to be in violation of the Constitution, can it require the City of Valdez to correct the violation if it wishes to continue to impose the tax or to retain a portion of taxes previously collected in violation of the Constitution?

STATEMENT OF THE CASE

I. FACTS

A. The Tax at Issue

The City of Valdez (the "City") imposes a property tax on property not exempted from taxation by city, state or federal law.[1] Prior to 2000, the City exempted all personal property from the property tax. [Exc. 813]. In November 1999, effective in 2000, the City adopted Ordinance 99-17, which in Section 1 repealed the personal property tax exemption for a limited class of property:

> A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:
>
> 1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.[2] [Exc. 107-13].

All other personal property remained exempt from taxation:

> A. The following property is exempt from general taxation:
>
> 1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;
> 2. All other personal property not subject to taxation under Section 3. 12.020(A)(1) [in Section 1 of Ordinance 99-17].[3] [Exc. 110].

Ordinance 99-17 therefore targeted a specific class of personal property for taxation: documented vessels of at least 95 feet in length. [Exc. 107]. From that limited class, the Ordinance then exempted from taxation vessels engaged primarily in some

[1] Valdez Municipal Code ("VMC") §3.12.010.
[2] This portion of Ordinance 99-17 was codified at VMC §3.12.020.
[3] This portion of Ordinance 99-17 was codified at VMC §3.12.030.

aspect of commercial fishing and those that dock exclusively at the Valdez Container Terminal, where they pay municipal docking charges to the City. [Exc. 107]. The City subsequently interpreted the second exemption to apply to vessels that dock exclusively at other City-owned docks, too. [Exc. 268]. There are eight docking facilities within the territorial boundaries of Valdez. [Exc. 319-20]. Three are owned by the City, and two, the State of Alaska Ferry Terminal and the U.S. Coast Guard facility, are owned by other governmental entities. [Exc. 319-20]. There are three privately owned docking facilities: the Petro Star Refinery dock, the Ship Escort Response Vessel System ("SERVS") dock and the Valdez Marine Terminal of the Trans-Alaska Pipeline System (the "TAPS Terminal"). [Exc. 319-21].

Ordinance 99-17 applies the property tax to vessels with "a tax situs within the city on January 1 of the tax year" and conclusively presumes a tax situs within the City under a variety of circumstances. [Exc.108-09]. When a vessel has a tax situs elsewhere as well, the Ordinance calls for apportionment of the value of the vessel to Valdez, but does not define the apportionment method:

> B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:
>
> 1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council. [Exc. 107-08].

In May 2000, in Resolution No. 00-15, the City adopted an apportionment method. [Exc.114-16]. That Resolution confirmed that the tax was a general revenue measure and adopted this method of apportionment:

> Section 1: Personal property tax on a vessel over 95 feet that has established a tax situs in places outside of Valdez shall be apportioned as follows:
>
> A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times 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;
>
> B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;
>
> C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs;
>
> D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day. [Exc. 115].

The denominator includes only days spent within the boundaries of jurisdictions where a vessel has an actual tax situs; it does not account for days a vessel spends in international waters outside of the borders of a taxing jurisdiction. [Exc. 115]. The method also excludes from the denominator of the ratio the time a vessel spends in drydock (or otherwise is withheld from service for repairs). [Exc. 115]. There are no drydock facilities in Valdez suitable for vessels over 95 feet in length. [Exc. 74].

Ordinance 99-17 and Resolution 00-15 will be referred to collectively as "the Tax".

B. Application of the Tax

Polar Tankers, Inc. ("Polar") owns or operates tankers that take on cargos of crude oil at the TAPS Terminal. [Exc.189-90]. The TAPS Terminal is located within the territorial boundaries of Valdez on the opposite side of the body of water known as Port Valdez from the town center. [Exc.119].

Polar is a corporation organized under the laws of Delaware with its principal place of business in Long Beach, California; it is a wholly owned subsidiary of ConocoPhillips Company. [Exc. 188-89]. Polar's primary business is the operation of tankers that transport cargos of crude oil from the TAPS Terminal to refineries in California, Hawaii and Washington. [Exc. 189-90]. Polar's primary customer is ConocoPhillips Company (or, in earlier years, its predecessors). [Exc.189]. Polar's tankers have docked at the City's Container Terminal on occasion, paying the City's docking fees, but they cannot dock there exclusively. [Exc. 190]. Thus, starting in 2000 Polar was required to pay the Tax on its tankers that call at the TAPS Terminal. [Exc. 190-91].

Polar operates its tankers on schedules that vary according to a variety of factors, but, typically, a tanker leaves a discharge port in California, Washington or Hawaii and travels across international waters for approximately three to six days on its way to Valdez. [Exc. 189-90]. It then spends approximately fourteen to twenty-four hours in Valdez to load cargo at the TAPS Terminal, followed by three to six days in international waters in transit to a discharge port, and thirty-six to seventy-two hours in the discharge port. [Exc. 190]. After discharging its cargo, the tanker begins the cycle again. [Exc.190]. During the course of a year a tanker may deviate from that schedule for a

number of reasons, and approximately every other year it will be removed from service for a substantial period of time in order to enter drydock for maintenance and repairs. [Exc. 190]. Polar's tankers cannot enter drydock in Valdez. [Exc. 74, 190].

Polar has reported to the City the information used to apportion the assessed values of the tankers. [Exc. 121-32, 147-50, 166-70, 172-76, 819-22]. Polar requested the application of an alternative apportionment formula under Section 2 of Resolution 00-15, but the City denied that request. [Exc. 271-73]. The City therefore has applied its "port days" apportionment formula to determine the tax due on each vessel, and Polar has paid all such taxes under protest: $440,221.24 in 2000, $398,157.62 in 2001, $1,037,530.12 in 2002, $1,433,072.20 in 2003 and $1,657,249.02 in 2004.[4] [Exc. 54, 74, 190-91, 837].

In the years 2000 through 2002, the City imposed the Tax almost exclusively on oil tankers. [Exc. 273-74, 814-17]. In 2003 the City began to apply the Tax to vessels in the SERVS fleet, and also retroactively applied the Tax to SERVS vessels for tax years 2000-02. [Exc. 561, 565]. The SERVS vessels are "engaged in the business of escorting oil tankers" through Prince William Sound. [Exc. 274, 320, 827].

II. COURSE OF PROCEEDINGS

Along with four other taxpayers, Polar filed suit in 2000, seeking declaratory and injunctive relief and refund of taxes collected unconstitutionally. [Exc. 1, 52]. Three of the plaintiffs dismissed their claims. [Exc. 23, 42]. In March 2004, Polar and SeaRiver Maritime, Inc., moved for summary judgment on the grounds that the Tax violated the

[4] After the record was prepared, Polar also paid under protest taxes levied for 2005 and 2006 as set forth in the Stay Order entered on March 10, 2006. [Exc. 809].

Tonnage, Due Process and Commerce Clauses of the United States Constitution. [Exc. 81]. The City opposed and filed a cross-motion for summary judgment. [Exc. 194]. In July 2004, the Superior Court granted summary judgment in favor of Polar and SeaRiver on the ground that the Tax violates the Tonnage Clause, without reaching the Due Process or Commerce Clause claims. [Exc. 550]. The City moved for reconsideration, relying on exhibits it had not previously submitted. [Exc. 560, 580, 823, 825]. The Superior Court granted reconsideration, vacated the summary judgment order, and requested supplemental briefing, which the parties provided. [Exc. 609, 612, 631, 656].

In January 2005, the Superior Court again granted summary judgment in favor of Polar and SeaRiver, this time on the grounds that the Tax violates the Due Process and Commerce Clauses due to improper apportionment; the Court stated that it therefore was unnecessary to reach the Tonnage Clause claim. [Exc. 833-35]. Polar and SeaRiver submitted a proposed judgment consistent with that order, but the City objected and filed its own proposed judgment, which focused on allowing the City to continue to impose the Tax. [Exc. 673, 839]. Working from the City's proposed judgment, the Superior Court entered a revised "Summary Judgment Ruling" which declared the unconstitutionality of the apportionment formula, prohibited the City from collecting taxes based on the unconstitutional formula, and permitted the City to collect the Tax upon the adoption of a constitutional apportionment formula. [Exc. 694]. After the parties provided explanations on the need for a ruling on the Tonnage Clause, the Superior Court entered another order granting summary judgment in favor of the City on the Tonnage Clause claims. [Exc. 696, 841, 859, 864, 869].

The Superior Court entered final judgment on January 10, 2006.[5] [Exc. 744]. The judgment declares that with respect to Polar and SeaRiver the City violated the Due Process and Commerce Clauses of the Constitution, but not the Tonnage Clause. [Exc. 744]. It then permits the City to continue to impose the Tax, but enjoins the City from collecting the Tax from Polar and Sea River until it adopts a constitutional apportionment formula. [Exc. 744]. The judgment then establishes a mechanism for calculating the refunds of the taxes collected unconstitutionally. [Exc. 744-45]. As the judgment does not require the use of any particular apportionment formula, the amount of the refunds due is not established, but the City acknowledged that the combined refunds due Polar and SeaRiver would total approximately $5,000,000. [Exc. 900, 902-03]. The Superior Court entered a stay of the judgment on March 10, 2006. [Exc. 809]. All parties moved for attorneys' fees, with Polar's motion being based on both Civil Rule 82 and AS 29.45.500(a). [Exc. 871, 890, 908]. The Superior Court entered an order declaring that neither side was the prevailing party for purposes of awarding attorneys' fees. [Exc. 811].

In February 2006, the parties simultaneously filed appeals, the City's focusing on the Due Process and Commerce Clause issues, and Polar's and SeaRiver's focusing on the Tonnage Clause issue. In April 2006, SeaRiver dismissed its appeal and in May 2006, the City's and Polar's appeals were consolidated in this proceeding.

[5] The final judgment contains a typographical error for which Polar's counsel is responsible, referring to Resolution 00-15 as "Resolution 00-19".

STANDARDS OF REVIEW

This Court reviews *de novo* the Superior Court's summary judgment rulings on whether the Tax violates the Tonnage Clause, Due Process Clause or Commerce Clause, and uses its independent judgment to assess whether the Tax violates any of these clauses.[6] This Court reviews the decision on the prevailing party for purposes of Civil Rule 82 for an abuse of discretion, but reviews *de novo* the legal question concerning the application of AS 29.45.500(a).[7]

ARGUMENT: SECTION ONE – POLAR TANKERS' CROSS-APPEAL

I. THE TAX VIOLATES THE TONNAGE CLAUSE

The Tax is a general revenue tax the City imposes only on vessels that enter the City's waters in order to gain access to a private docking facility. The Tax therefore is a charge for the "privilege of entering, trading in or lying in a port;" it is a tonnage duty imposed in violation of the Tonnage Clause of the United States Constitution.[8]

A. The Tonnage Clause Protects Vessels' Access to Ports.

The Tonnage Clause provides: "No state shall, without the consent of Congress, lay any duty of tonnage …."[9] The purpose of that prohibition is to supplement the prohibitions against duties on imports and exports, also contained in Article I, §10:

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[6] *Lewis v. Alaska*, 139 P.3d 1266, 1268-69 (Alaska 2006).
[7] *City of Kenai v. Friends of the Recreation Center*, 129 P.3d 452, 455 (Alaska 2006); *Kenai Peninsula Borough v. Port Graham Corp.*, 871 P.2d 1135, 1141 (Alaska 1994).
[8] *See Clyde Mallory Lines v. Alabama ex rel. State Docks Commission,* 296 U.S. 261, 265-66 (1935).
[9] United States Constitution, Article I, §10.

> 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.[10]

The term "tonnage" refers to the internal cubic capacity of the vessel, but the prohibition is not limited to exactions imposed on the basis of capacity.[11] The United States Supreme Court has ruled the Tonnage Clause prohibits

> all taxes and duties, regardless 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.[12]

The Tonnage Clause does not prohibit a governmental authority from imposing charges for specific services it actually renders to a vessel in a proprietary capacity, such as pilotage or wharfage.[13] Thus, the docking fees that the City charges to Polar when a tanker docks at the City's Container Terminal – a specific charge for a specific service requested by the vessel – is not a forbidden tonnage duty. Likewise, the Tonnage Clause does not prohibit a charge imposed on vessels for general port services provided in a proprietary capacity on behalf of all vessels in the port, such as the harbor fee upheld in *Clyde Mallory Lines*.[14]

B. The Tax Is a General Revenue Measure Imposed Only on Certain Vessels.

The Tax, however, is not a fee imposed for proprietary services provided to a specific vessel or all vessels. The Tax instead is a general revenue measure in the form of a property tax imposed by the City in its sovereign capacity for the purpose of generating

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[10] *Clyde Mallory Lines*, 296 U.S. at 265.
[11] *Id.*
[12] *Id.* at 265-66.
[13] *Id.* at 266; *Packet Co. v. Keokuk*, 95 U.S. 80, 85 (1877).
[14] *Clyde Mallory Lines*, 296 U.S. at 266-67.

revenue to finance general municipal services.[15] The Tonnage Clause does not prohibit the taxation of vessels along with other personal property, but neither does it exempt personal property taxes from its scope.[16] As with any charge, the critical question is whether the property tax is imposed in such a way that it "operate[s] to impose a charge for the privilege of entering, trading in or lying in a port."[17] That is exactly what the Tax does.

The Tax applies only to vessels; no other personal property is taxed. In Ordinance 99-17, the City repealed the general exemption of personal property from taxation for a limited class of property – certain boats and vessels of at least 95 feet in length – while retaining the general exemption for all other personal property.[18] Consequently, the Tax cannot be characterized as a property tax of general application that taxes vessels along with other personal property.

The United States Supreme Court has determined that property taxes are permissible under the Tonnage Clause if the tax is applied to vessels in the same manner as it is applied to other personal property. In *Transportation Company v. Wheeling*, for example, the Supreme Court upheld a tax on vessels because "the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal

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[15] Appellant/Cross-Appellee's Brief ("City's Brief") at 42. *See also* Exc. 114, 242, 251, 539, 547, 600, 634, 642.

[16] *See, e.g., Moran v. City of New Orleans*, 112 U.S. 69, 74 (1884) ("vessels … may be taxed by state authority as property; provided the tax be not a tonnage duty …."); *Transportation Company v. Wheeling*, 99 U.S. 273, 283 (1878); *Scandinavian Airlines System, Inc. v. Los Angeles County*, 363 P.2d 25, 39-40 (Cal.), *cert. denied* 368 U.S. 899 (1961) (*ad valorem* property tax is subject to Tonnage Clause prohibitions).

[17] *Clyde Mallory Lines*, 296 U.S. at 265-66.

[18] Exc. 107, 110; VMC §§3.12.020(A), .030(A)(2).

property …."[19] Likewise, in distinguishing a valid property tax from an improper charge, the Court in *State Tonnage Tax Cases* stated that vessels "may be taxed as other property."[20] Polar is aware of no case where the Supreme Court considered, much less approved, a property tax that applies only to a limited class of vessels and excludes all other personal property.

The City previously has argued that VMC §3.12.030(A)(2) does not exempt all personal property other than vessels because the City also taxes mobile homes.[21] This argument ignores the explicit language of the ordinance and the fact that both State and municipal law classify mobile homes as real property for the purposes of property taxation, as was explicitly restated in Ordinance 99-17.[22] The City in fact exempts from taxation all personal property other than certain vessels.

C. The Tax Is a Charge for Entering Port to Use Private Facilities.

The City not only taxes only vessels, it crafted exemptions to ensure that the Tax falls exclusively on vessels such as Polar's tankers that call on Valdez in order to gain access to a private facility. The exemptions exclude from the Tax undocumented vessels, those under 95 feet in length, those engaged in any aspect of commercial fishing and any that dock exclusively at one of the City's docks.

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[19] 99 U.S. 273, 284 (1878). *See also Smith v. Turner*, 48 U.S. 283, 402 (1849) ("*Passenger Cases*") (the Court noted that though a state can not regulate interstate commerce it "may tax a ship or other vessel used in commerce the same as other property ...").
[20] 79 U.S. 204, 213 (1870).
[21] Exc. 561.
[22] Exc. 109; AS 29.45.070; VMC §3.12.022(A).

The City has claimed that that final exemption was intended to exempt foreign-owned cruise ships from the Tax.[23] But the Tax applies only to vessels for which "certificates of documentation have been issued under the laws of the United States," and foreign-owned vessels are not eligible for documentation under the laws of the United States.[24] The exemption for vessels that dock exclusively at City docks therefore does not address foreign-owned vessels. Instead, that exemption ensures that the Tax applies only to vessels that call at the three private docking facilities in Valdez.[25] Only vessels that enter Valdez's waters to gain access to those three facilities are subject to the Tax.[26] The Tax therefore is a charge for being in port and *not* using the City's docking facilities; it is a charge for the privilege of entering, trading in or being in Valdez's waters.

Polar's tankers call on Valdez for one reason: to load crude oil at the TAPS Marine Terminal in order to transport it to refineries in other states. They cannot use the City's docks exclusively.[27] Similarly, vessels calling on Valdez to take on refined products at the Petro Star Refinery are not able to use the City's docks exclusively. In 2000 through 2002, therefore, the Tanker Tax applied almost exclusively to crude oil tankers and refined product vessels.[28] In 2003, and retroactively for 2000 through 2002,

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[23] Exc. 637.
[24] 46 U.S.C. §12102(a) (Citation is to the prior version of the law; new version is located at 46 U.S.C. §12103). By law, Polar's tankers must be documented vessels. 46 U.S.C. Appendix §883 (prior law; new version is located at 46 U.S.C. §12102).
[25] Exc. 319-20.
[26] The State of Alaska's ferries calling at the State Ferry Terminal and the United States Coast Guard's vessels calling at the Coast Guard Facility are exempt from taxation under AS 29.45.030(a)(1), (8). *See also* VMC §3.12.030(A)(1).
[27] Exc. 190.
[28] Exc. 274, 814-17.

the City also imposed the Tax on the SERVS vessels.[29] Those vessels all are engaged in interstate commerce, either directly or indirectly, but, in any event, the Tonnage Clause prohibits tonnage duties on vessels engaged in either interstate or intrastate commerce.[30] The Tax in short has been applied only to a limited group of vessels that call on Valdez and use private docks.

The California Supreme Court ruled that a comparable charge violated the Tonnage Clause in a case where the City of Oakland required all vessels landing in its harbor either to dock at a City-owned dock, where they would pay the City's charges, or to pay to the City the equivalent charge to dock at a private dock.[31] The court concluded:

> We can see no escape from the conclusion that the present ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city. As to such vessels the exaction must be deemed to be a charge for the privilege merely of stopping in the plaintiff's harbor and, as such, constitutes a restriction on free commerce and navigation in violation of the constitutional prohibition [the Tonnage Clause].[32]

There, Oakland took a docking fee, generally valid under the Tonnage Clause, and created an impermissible tonnage duty by applying the fee only to vessels that did not use the city's proprietary docking service. The present situation is similar, as the City took a general revenue personal property tax, generally valid under the Tonnage Clause, and created an impermissible tonnage duty by excluding from it all forms of personal property except the limited class of vessels that do not use the City's proprietary services

[29] Exc. 565, 818.
[30] *State Tonnage Tax Cases*, 79 U.S. at 219.
[31] *City of Oakland v. E.K. Wood Lumber Co.*, 292 P. 1076, 1080 (Cal. 1930).
[32] *City of Oakland*, 292 P. at 1080.

exclusively. In both instances, the exaction violated the Tonnage Clause by imposing a charge on some vessels for entering the port to gain access to a private docking facility.

The City's taxation of the SERVS vessels underscores that violation of the Tonnage Clause. After the City began taxing those vessels, two of them were able to dock exclusively at the City's docks and therefore qualified for exemption from the Tax, while the other vessels in the same service remained subject to the tax because they could not dock exclusively at the City's docks.[33] Vessels with the same access to the services the City provides as a sovereign were taxed or not taxed based on whether they used the City's proprietary docking services exclusively. The Tax unquestionably is a charge for entering or being in port and not using the City's proprietary docking services exclusively.

D. Conclusion

That the Tax takes the form of a property tax does not excuse the City's violation of the Tonnage Clause. The Tax is not a broad-based property tax that taxes vessels along with other personal property; the Tax only taxes vessels, and all other personal property is exempt. The Tax is not a property tax that applies generally to vessels; it exempts smaller vessels, vessels engaged in any aspect of commercial fishing, and vessels that dock exclusively at the City's docks. Polar does not contend that there can be no exemptions to the Tax, but the exemptions the City devised operate to ensure that the Tax reaches only vessels such as Polar's tankers that enter Valdez's waters in order to gain access to private docking facilities. The object of the Tax is to tax only a targeted

[33] Exc. 268.

class of vessels, and no other personal property, and the essence of the Tax is to impose a charge for the "privilege of entering, trading or lying in" Valdez's waters.[34] The Tax is a tonnage duty prohibited by the Tonnage Clause.

II. POLAR IS THE PREVAILING PARTY FOR PURPOSES OF ATTORNEYS' FEES

The Superior Court ruled that neither party prevailed for purposes of attorneys' fees because Polar prevailed on the Due Process and Commerce Clause claims and the City prevailed on the Tonnage Clause claims.

If this Court reverses the Superior Court on the Tonnage Clause claim, as addressed in Argument I, then Polar clearly will be the prevailing party. Even if this Court were to reject Polar's argument on the Tonnage Clause and affirm the Superior Court on all its substantive rulings, Polar still should be considered the prevailing party.

The Superior Court ruled in Polar's favor on two key issues: the City had violated the Due Process Clause and the Commerce Clause.[35] The Court prohibited the City from collecting the Tax from Polar until it cured those violations and ordered the City to refund the sums that it had collected unconstitutionally, an amount of approximately $5,000,000, "roughly half the taxes [Polar and SeaRiver] paid under protest."[36]

A party can be the prevailing party even if it does not prevail on every issue or recover the full relief requested.[37] For example, in *Hillman v. Nationwide Mutual Fire Insurance Co.*, this Court held that the trial court abused its discretion in not declaring the

[34] *See Clyde Mallory Lines*, 296 U.S. at 265-66; *Packet Co.*, 95 U.S. at 84.
[35] Exc. 744.
[36] Exc. 744, 900, 902-03.
[37] *Alaska Placer Co. v. Lee*, 553 P.2d 54, 65 (Alaska 1976).

plaintiffs to be the prevailing parties, even though they did not prevail on every issue.[38] There the plaintiffs sued an insurer for bad faith denial of coverage. The plaintiffs prevailed on the issue of coverage but the trial court denied their claims for bad faith and declared the insurer the prevailing party. This Court upheld the substantive decisions, but reversed the prevailing party determination and ordered that the plaintiffs be declared the prevailing party:

> In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received $50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case.[39]

Here, Polar prevailed on core issues and established the right to a substantial refund. It is the prevailing party.

The refund establishes an additional ground for the award of fees to Polar. Under AS 29.45.500(a), Polar is entitled to recover the attorneys' fees it incurred in establishing the right to the refund.[40] That statutory right to recover fees does not require a prevailing party determination, though it does require a calibration of the fees consistent with the degree of success.[41]

Under either Rule 82 or AS 29.45.500(a) standing alone, Polar is entitled to recover attorneys' fees in some amount. Together, they establish that the Superior Court

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[38] 855 P. 2d 1321, 1328 (Alaska 1993).
[39] *Id. See also Ryman v. City of Yakutat*, 654 P.2d 785, 793 (Alaska 1982) (taxpayer who received one-third of the amount he requested could be the prevailing party).
[40] *Port Graham Corp.*, 871 P.2d at 1141 (statutory right to recover costs incurred in obtaining refund includes attorneys' fees).
[41] *Fairbanks North Star Borough v. Dena Nena Henash*, 88 P.3d 124, 142 (Alaska 2004).

abused its discretion in ruling that neither party was the prevailing party and therefore no fees would be awarded. Even if this Court affirms the judgment of the Superior Court as to the Tonnage Clause, it should order the Superior Court to award attorneys' fees to Polar.

ARGUMENT: SECTION TWO – THE CITY'S APPEAL

As the Tax violates the Tonnage Clause, it is void and all sums collected from Polar must be refunded. The Tax also violates the Due Process and Commerce Clauses through its use of an unfair apportionment method. If the City overhauls the Tax in order to comply with the Tonnage Clause in the future, it also will need to apply a constitutional apportionment formula. It therefore remains necessary for this Court to affirm the Superior Court's ruling that the City's apportionment method does not use a constitutional formula.

The City argued below and continues to argue here that, in essence, so long as it makes an attempt at apportionment, it has met its constitutional obligations. The Superior Court recognized and correctly ruled, however, that the Due Process Clause and the Commerce Clause require the City to apportion in a manner that is consistent with the rights of other jurisdictions to tax the same property, so that there is no possibility of duplicative taxation.[42] The City's apportionment method apportions to the City periods of time in which Polar's tankers unquestionably are outside of Valdez and subject to taxation by other jurisdictions, creating the possibility of duplicative taxation caused solely by the City's exceeding its jurisdiction to tax. The Superior Court correctly ruled

[42] Exc. 671-72.

that the City's apportionment method violates the Due Process and Commerce Clauses of the United States Constitution.[43]

I. THE TAX VIOLATES THE DUE PROCESS AND COMMERCE CLAUSES

A. Taxation of Mobile Property Must Comply with the Due Process and Commerce Clauses.

The Tax is a personal property tax. The property itself is subject to the tax simply by having a "tax situs within the City", which consists of being physically present within the City on a regular basis.[44] The limited class of property subject to the Tax is vessels, a type of mobile personal property that can move in and out of multiple tax jurisdictions during the course of a tax period and that thus may be subject to taxation in more than one jurisdiction.

A fundamental concern under the Due Process Clause is that a taxing entity may not project its taxing authority beyond its territorial boundaries:

> It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has been defended by any court. It is said by this court … that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a

[43] Exc. 671-72. *See* United States Constitution, Article I, §8 and Article XIV, §1.
[44] Exc. 108-09.

> state is not a subject upon which her taxing power can be legitimately exercised.[45]

With respect to the taxation of tangible, mobile personal property by a jurisdiction the mobile property visits, the Due Process Clause analysis has two key components:

> (1) The mobile property must have a physical presence – an "actual situs" – within the taxing jurisdiction sufficient to confer jurisdiction to tax the property.
>
> (2) If an actual situs exists, the taxing jurisdiction must exercise its jurisdiction in a manner consistent with the exercise of jurisdiction by other authorized taxing entities; that is, the tax must be fairly apportioned to the presence of the property in the taxing jurisdiction.[46]

The Commerce Clause analysis is similar, but focuses on whether the tax on the property interferes with interstate commerce. Taxes on instrumentalities of interstate commerce are not forbidden, but the tax must satisfy all components of this test:

> (1) The property taxed must have a "substantial nexus" with the taxing jurisdiction.
>
> (2) The tax must be fairly apportioned.
>
> (3) The tax must not discriminate against interstate commerce.
>
> (4) The tax must be fairly related to the services provided by the taxing jurisdiction.[47]

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[45] *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905) (citation omitted). *See also Norfolk and Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317, 325 (1968); *Farmer's Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 210 (1930) ("no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment").

[46] *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 162 (1933).

[47] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *See also Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 444-45 (1979).

In the context of a property tax, the first two elements of that test are comparable to the analysis under the Due Process Clause, so Sections B through D of this argument will address the Due Process Clause and the Commerce Clause concurrently.

B. The City Must Exercise Its Jurisdiction to Tax Consistent with the Right of Other Jurisdictions to Tax.

In simplest terms, the actual situs/substantial nexus element looks to whether the taxing entity has jurisdiction to tax. Polar always has acknowledged that its vessels have an actual situs in and a substantial nexus with the City of Valdez.[48] The City has jurisdiction to tax Polar's tankers, but it has exceeded that jurisdiction by failing to apportion fairly, so that it taxes extraterritorial values and subjects the tankers to the threat of duplicative taxation.

1. The United States Supreme Court Has Established Complementary Rules for Taxation by Domiciliary and Non-Domicilary Jurisdictions.

Polar's tankers are kept in nearly continuous service, consistent with safe practices. They therefore spend only limited periods of time in Valdez, where they take on their cargo, and limited time in other ports in California, Washington and Hawaii, where they discharge their cargo. They spend most of their time in transit, with the bulk of the transit time occurring in international waters, outside the boundaries of any taxing jurisdiction. Polar's principal place of business is in California.[49]

Thus, in a representative tax year, an individual Polar tanker has an actual situs in the City of Valdez, based on its physical presence there, and an actual situs in California

[48] Exc. 7-9, 56-58, 95, 621, 848, 850.
[49] Exc. 188-90.

and Washington, and perhaps Hawaii, based on its physical presence in those jurisdictions. In the years in which a tanker enters drydock, it will spend a substantial period of time in another jurisdiction outside of the City of Valdez. The City has jurisdiction to tax based on the existence of the actual situs, as do Washington and Hawaii, and perhaps the drydock jurisdiction, depending upon whether the contact is considered sufficient to create an actual situs. California is considered to be Polar's commercial domicile because Polar is a corporation with its principal place of business there.[50] California therefore possesses jurisdiction to tax the tankers on that basis.

The distinction between the jurisdiction of the domiciliary and non-domiciliary taxing entities is critical, and one that the City's apportionment method completely ignores. Historically, only the owner's domicile state had jurisdiction to tax a vessel.[51] That "home port doctrine" survived even as the rules governing other instrumentalities of interstate commerce evolved to permit taxation on an apportionment basis by the jurisdictions in which the instrumentality operated.[52] Eventually, however, the concept of apportionment was extended to vessels operating in inland waters, and this Court has confirmed that the home port doctrine has been replaced by fair apportionment even with

[50] *See Gulf Caribe Maritime, Inc. v. Mobile County Revenue Commissioner*, 802 So.2d 248, 250, 252 (Alabama App. 2001); *Ice Capades, Inc. v. Los Angeles County*, 128 Cal. Rptr. 717, 721 (App. 1976).
[51] *Southern Pacific Co. v. Kentucky*, 222 U.S. 63, 69-76 (1911); *Hays v. Pacific Mail Steam-Ship Co.*, 58 U.S. 596, 598-99 (1854).
[52] *See Japan Line*, 441 U.S. at 441-42; *Ott*, 336 U.S. at 173; *Pullmans Palace-Car Co. v. Pennsylvania*, 141 U.S. 18, 26-29 (1891).

respect to ocean-going vessels.[53] Thus, the constitutional rules and standards the United States Supreme Court developed for other instrumentalities of commerce now guide the analysis for ocean-going vessels, too. It is those standards that the City has violated.

The United States Supreme Court has established clear distinctions between the broad, presumptive taxing authority of the jurisdiction where the owner of tangible, mobile property is domiciled, and the contingent, circumscribed authority of the non-domiciliary jurisdictions the property visits. When an instrumentality of interstate commerce does not have sufficiently regular contact with any other jurisdiction (or jurisdictions) so as to establish an actual tax situs there, the domicile of the owner retains jurisdiction to tax the instrumentality in full; there always is a tax situs at the domicile jurisdiction even if there is no actual situs anywhere.[54] Contrary to the City's assertions, the domicile state retains jurisdiction to tax the property even if the property is used continuously outside of the domicile. [55]

The domicile's power to tax is curtailed only when the property acquires an actual tax situs in another taxing jurisdiction.[56] If that actual tax situs is permanent (for the tax

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[53] *North Slope Borough v. Puget Sound Tug & Barge*, 598 P.2d 924, 926-27 (Alaska 1979) (citing *Japan Line*, 441 U.S. at 441-43). *See also Ott*, 336 U.S. at 173-74.
[54] *Central Railroad Company of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 611-12 (1962); *Johnson Oil*, 290 U.S. at 161. *See also* J. Hellerstein and W. Hellerstein, STATE TAXATION ¶4.12[2][d], 4-61 (3rd ed. 2006).
[55] *Central Railroad*, 370 U.S. at 616-17. *See also Cream of Wheat Co. v. Grand Forks County*, 253 U.S. 325, 329-30 (1920) (state cannot tax property with a permanent situs elsewhere, but that "limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere").
[56] *Central Railroad*, 370 U.S. at 611-12; *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-85 (1952).

period), the domicile loses the power to tax that property.[57] When the property acquires an actual tax situs in one or more non-domiciliary jurisdictions that is not permanent, however, the domicile's power to tax is limited only by the extent of the actual situs in the non-domiciliary jurisdictions. That is, the domicile cannot impose an unapportioned tax, but the apportionment required need only account for the actual situs in the non-domiciliary jurisdictions.[58] Thus, the domicile's broad power to tax exists independent of the physical presence of the property, and is limited only by the existence of an actual situs in one or more other jurisdictions.[59]

The power of a non-domiciliary jurisdiction, in contrast, is limited. The non-domiciliary jurisdiction may not tax the property based on the mere presence of the property; the non-domiciliary may tax the property only if the contact is substantial enough to establish an actual tax situs in the non-domiciliary jurisdiction.[60] That actual situs then defines the portion of the property that no longer is available for the domicile to tax. Concomitantly, the non-domiciliary jurisdiction may tax only to the extent the actual situs exists in that jurisdiction.[61] Depending upon the type of property and the manner of its use, different apportionment methods may be used to determine that portion, but, in

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[57] *Central Railroad*, 370 U.S. at 616-17; *Union Refrigerator Transit*, 199 U.S. at 201, 210-11. *See also Southern Pacific*, 222 U.S. at 75 (emphasizing that *Union Refrigerator Transit* was based on permanent absence of property from domicile).
[58] *Central Railroad*, 370 U.S. at 612-14 ("the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State …"); *Standard Oil*, 342 U.S. at 384-85. *See also Kenai Peninsula Borough v. Arndt*, 958 P.2d 1101, 1103 (Alaska 1998); *Ice Capades*, 128 Cal. Rptr. at 721, 723.
[59] *Central Railroad*, 370 U.S. at 611-12, 616-17.
[60] *Id.* at 612; *Standard Oil*, 342 U.S. at 384.
[61] *Central Railroad*, 370 U.S. at 612-14; *Johnson Oil*, 290 U.S. at 162-63.

the context of a property tax, the apportionment method must be consistent with the physical presence of the property within the non-domiciliary jurisdiction and "consistent with the like jurisdiction of other states."[62]

2. An Apportionment Method Must Be Consistent with the Type of Jurisdiction Possessed.

The fair apportionment requirement serves to ensure that a taxing entity exercises its taxing jurisdiction consistent with the requirements of both the Due Process Clause (by limiting the tax to values connected with the taxing entity) and the Commerce Clause (by ensuring that the tax does not result in duplicative taxation).[63] The domicile entity must apportion so that it excludes from taxation the portion of the property representing the existence of an actual situs in another taxing jurisdiction, but otherwise there is no limitation on its exercise of its jurisdiction; the domicile has the power to tax all periods when no actual situs exists elsewhere, such as periods when a vessel is in international waters.[64] By contrast, a non-domiciliary taxing entity possesses jurisdiction to tax solely because the physical presence of the property is sustained and regular enough so as to create an actual situs, and therefore it must apportion its tax in a manner that is consistent with the property's physical presence.[65] The Unites States Supreme Court has made clear that every taxing entity, whether domiciliary or non-domiciliary, must apportion consistent with the right of other jurisdictions to tax, irrespective of whether any other

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[62] *Johnson Oil*, 290 U.S. at 162.
[63] *Standard Oil*, 342 U.S. at 384-85; *Ott*, 336 U.S. at 174.
[64] *Central Railroad*, 370 U.S. at 612-16; *Ice Capades*, 128 Cal. Rptr. at 721, 723.
[65] *Johnson Oil*, 290 U.S. at 163.

taxing entity actually taxes the property.[66] The Supreme Court therefore has ensured that mobile property always is subject to taxation on 100% of its value, but is not subject to duplicative taxation by different jurisdictions.

The Supreme Court permits both domiciliary and non-domiciliary taxing entities flexibility in selecting the units they use to apportion, but the ratio produced must be consistent with the existence of any actual situs.[67] A domiciliary jurisdiction must account for the existence of an actual situs in other jurisdictions, apportioning to itself on this basis:

$$\frac{\text{(Total Taxable Units in Tax Period) – (Taxable Units in Actual Situs Jurisdictions)}}{\text{Total Taxable Units in Tax Period}}$$[68]

A non-domiciliary jurisdiction where an actual situs exists must account for the rights of other taxing jurisdictions, apportioning to itself on this basis:

$$\frac{\text{Total Taxable Units in Non-Domicilary Jurisdiction}}{\text{Total Taxable Units in Tax Period}}$$

C. The City's Apportionment Method Unconstitutionally Excludes Time Taxable by Other Jurisdictions.

The City's apportionment method ignores the Supreme Court's standards. The City elected to base its apportionment method on time, with days being the relevant taxable unit. The measure of the fairness of a non-domiciliary entity's time-based apportionment method is whether it is consistent with the proportion of time spent within the actual situs versus all time in the tax period. The City's method fails that objective test

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[66] *Central Railroad*, 370 U.S. at 614; *Standard Oil*, 342 U.S. at 384-85; *Johnson Oil*, 290 U.S. at 162-63.

[67] *See*, *e.g.*, *Johnson Oil*, 290 U.S. at 162-63.

[68] The term "Actual Situs Jurisdictions" refers to jurisdictions other than the domicile where the property establishes an actual situs.

and thus violates the fair apportionment requirement under both the Due Process Clause and the Commerce Clause.

1. By Excluding Time Taxable by Other Jurisdictions, the City Taxes Extraterritorial Values and Creates the Risk of Duplicative Taxation.

To account fairly for the physical presence of a vessel that creates an actual situs in Valdez, and to ensure that the tax is consistent with the right of other entities to exercise their jurisdiction to tax, a time-based method must compare the time spent in Valdez with the all the time in the tax period, here, one year. Thus, a fair formula using days as the taxable unit would be:[69]

$$\frac{\text{Days in Valdez}}{365}$$

Instead of using that straightforward approach, the City's apportionment method accounts only for time spent in active service within taxing jurisdictions, eliminating from consideration the time a vessel spends in international waters or in drydock outside of Valdez. In the context of Polar's tankers, the City's method can be expressed this way:

$$\frac{\text{Days in Valdez}}{365 - (\text{Days in International Waters}) - (\text{Days in Drydock})}$$

The formula improperly eliminates from the denominator time that is taxable by other jurisdictions. The domicile unquestionably has the right to tax the time a vessel spends in international waters, outside of the boundaries of any tax jurisdiction and therefore

[69] *Johnson Oil*, 290 U.S. at 162-63; *Ice Capades*, 128 Cal. Rptr. at 721, 723.

without any actual situs.[70] The time spent in drydock (which inevitably is spent outside of Valdez) is taxable either by the drydock jurisdiction, if the drydock contact establishes an actual situs, or by the domicile, if the drydock contact does not establish an actual situs.[71] By eliminating the time taxable by other jurisdictions, the formula increases the resulting apportionment factor for the City, resulting in the taxation of values unconnected with the City and creating the potential for duplicative taxation.

An example illustrates how the City's formula violates the Constitution. Assume that one of Polar's tankers spent 42 days in Valdez in the apportionment period (the year prior to the tax year).[72] Assume further that the tanker spent 120 active days in west coast jurisdictions, including 60 days in Washington and 60 days in California.[73] That means the vessel spent 162 days (42 + 120) in an actual tax situs. Finally, assume that, of the remaining 203 days (365 – 42 – 120) in the apportionment year, 170 days were spent in international waters and 33 days were spent in drydock outside of Valdez.

The City's apportionment formula ignores the time spent outside of any tax situs (international waters and drydock) and therefore generates this ratio:

$$\frac{\text{42 Days in Valdez}}{\text{162 Days with an Actual Situs}}$$

[70] *Central Railroad*, 370 U.S. at 611-12, 614, 616.
[71] *Id.*; *Ice Capades*, 128 Cal. Rptr. at 721, 723. For the sake of simplification, this brief will assume that the drydock contact does not create an actual situs, unless specifically noted otherwise.
[72] City's Brief at 18 (tankers on average spent 42 days in Valdez in 1999).
[73] City's Brief at 33 (average apportionment factor in 2000 was 26%, implying a "Days in Valdez/Days in All Ports" ratio of roughly 42/162).

Accordingly, 26% (42/162) of the tanker's value is apportioned to Valdez. That would imply that the tanker spent roughly 95 days out of the year in Valdez (95/365 = 26%). In reality, the tanker spent only 42 days in Valdez, roughly 12% (42/365) of the year. The City's formula therefore taxes the tanker on a portion of its value that is more than double the portion of its value that represents the physical presence that created the actual situs in Valdez.

Moreover, because the City's method eliminates from consideration time that is taxable by other jurisdictions, the City's disproportionate method leads to duplicative taxation. The time the City eliminates from the denominator, 203 days, is taxable by another jurisdiction. Polar's domicile, California, is entitled to tax all time not spent within the boundaries of another actual situs.[74] In this example, therefore, in addition to the time the tanker spends in California, California can tax the time spent in international waters and the time spent in drydock. On a time basis, California's right to tax can be expressed this way:

$$\frac{\text{(Time in Tax Period)} - \text{(Time in Other Actual Situs Jurisdictions)}}{\text{Time in Tax Period}}$$

In this example, that would mean: 365 – 42 (Time in Valdez) – 60 (Time in Washington)/365 = 263/365 = 72%. Consistent with the existence of an actual situs, Washington would be entitled to tax on this basis: 60/365 = 16%. If the City were allowed to tax on the basis of its formula, apportioning 26% of the tanker's value to Valdez, the tanker would be taxed on 114% of its value.

[74] *Central Railroad*, 370 U.S. at 611-12, 614; *Ice Capades* 128 Cal. Rptr. at 721, 723. *See also Arndt*, 958 P.2d at 1103 (*quoting Central Railroad*).

2. The Risk of Duplicative Taxation Is Caused by the City.

The risk of duplicative taxation is not attributable to California, which would be taxing consistent with its right as the domicile, or Washington, which would be taxing consistent with the existence of an actual situs there. The duplicative taxation is attributable solely to the City due to its use of a formula that is not consistent with either the existence of an actual situs or the right of other jurisdictions to tax.

The City's formula takes a time-based method and distorts it by eliminating from consideration time that is taxable by other jurisdictions, thereby in effect appropriating for itself a portion of that time. Through that distortion it taxes a tanker that is present in Valdez for 42 days or 12% of the year as if it were present for 95 days or 26% of the year. No theoretical exercise is required to confirm that the City is exceeding its jurisdiction to tax; it is a verifiable fact that the tanker was in Valdez for 42 days, not 95 days. Likewise, because the City achieves that distorted result by attributing to itself a portion of the time that the tanker was in international waters and in drydock, where it was taxable by the domicile, it is verifiable that the City itself is producing the possibility of duplicative taxation. The City takes a slice of the pie that is taxable solely by the domicile and taxes a portion of that slice itself. It is a mathematical certainty that an apportionment method that eliminates from the denominator units taxable by other jurisdictions will produce distortion and duplicative taxation, and that is what the City's formula does.

3. There Is No Justification for Excluding Time Taxable by Other Jurisdictions.

The exclusion of taxable time from the denominator does not serve any legitimate purpose:

- It does not make administration of the Tax easier. The City's method requires collection of information concerning the time a tanker spends in Valdez, the time it spends in other taxing jurisdictions, and the time it spends in drydock. By contrast, a constitutional time-based formula requires only a determination of the time in Valdez.
- The exclusion of time taxable by other jurisdictions does not make the Tax fairer. Taxing a tanker that actually is in Valdez for 42 days as if it were in Valdez for 95 days is not fair.
- The exclusion of time taxable by other jurisdictions is not necessary to prevent some portion of a tanker's value from escaping taxation. The domicile of the tanker's owner is entitled to tax all time a tanker spends in international waters outside of any tax jurisdiction, and either the drydock jurisdiction or the domicile is entitled to tax the drydock time.

The only purpose served by the exclusion from the denominator of time taxable by other jurisdictions is to increase the City's apportionment factor. That purpose violates the Due Process Clause, because the City has projected its taxing authority beyond the jurisdiction conferred by the presence of the tankers. It violates the Commerce Clause by subjecting the tankers to the risk of duplicative taxation when other jurisdictions tax on the basis to which they are constitutionally entitled.

D. The City's Arguments Fail to Excuse Its Violation of the Constitution.

The City attempts to justify its unconstitutional formula through a variety of invalid arguments. In considering the City's arguments it is important to remember that the Tax is a property tax, not an income tax, and that the United States Supreme Court has articulated the rules discussed above to govern the taxation of mobile property engaged in interstate commerce. The City's invocation of income tax cases does not excuse its violation of the constitutional standards established in the United States Supreme Court's property tax cases.

1. The Existence of Jurisdiction to Tax Is Not at Issue.

First, the City argues extensively about an issue not in dispute: the existence of an actual tax situs in Valdez.[75] Polar consistently and unequivocally has acknowledged that its tankers have an actual situs in Valdez.[76] Polar does not contend that the City does not have jurisdiction to tax, but it has demonstrated objectively that the City exceeds that jurisdiction by failing to apportion fairly.

2. Polar Has Met Its Heavy Burden to Show the Formula Is Unfair.

The City argues that it is entitled to broad latitude in fashioning an apportionment formula and that Polar has a heavy burden to establish the unfairness of the formula.[77] As the United States Supreme Court has stated, though, merely invoking those deferential standards will not absolve a violation of the Constitution:

> A State will not be permitted, under the guise of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise to "project the

[75] City's Brief at 15-22 and Appendix A.
[76] Exc. 7-9, 56-58, 95, 621, 848, 850.
[77] City's Brief at 22-23.

> taxing power of the state plainly beyond its borders." Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State.[78]

As Polar demonstrated above, the City's formula is not rationally related to property values connected with Valdez: in 2000 the average tanker spent 12% of the year (42 days) in Valdez and was taxed on 26% of its value (as if it spent 95 days in Valdez). That is a grossly distorted result, and one that will produce duplicative taxation, as demonstrated above.

Polar also has demonstrated clearly that the City, and no other entity, is responsible for the distorted and duplicative taxation. By eliminating from consideration the time tankers spend outside any tax situs the City's formula effectively taxes time the tankers are not in Valdez, time in which they are taxable by another jurisdiction. Because the City's method is not consistent with the right of other jurisdictions to tax and taxes values unconnected with Valdez, it creates the possibility of duplicative taxation. The Superior Court correctly concluded that Polar met its burden of establishing unfair apportionment.[79]

3. The City's Unfair Apportionment Formula Is Not "Externally Consistent".

The City attempts to justify the potential for duplicative taxation it creates by claiming that the Tax is internally and externally consistent.[80] Polar acknowledges that the tax is "internally consistent": if every taxing entity were to use the City's method a

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[78] *Norfolk and Western Railway* 390 U.S. at 325 (*quoting Nashville, C. & St. L.R. Co. v. Browning,* 310 U.S. 362, 365 (1940)).
[79] Exc. 834-35.
[80] City's Brief at 25.

tanker would be taxed only on 100% of its value.[81] In the illustration above, for example, if every jurisdiction applied the City's method, the City would tax 26% of the tanker's value (42/162), and California and Washington each would tax 37% of the tanker's value (60/162). But that method would require California to choose not to tax the 170 days the tanker spent in international waters and the 33 days it spent in drydock, which legally are taxable by the domicile.

In other words, if every jurisdiction were to apply the City's formula, the domicile jurisdiction would have to forgo taxation of the share of the property it is constitutionally entitled to tax. Under the Constitution, California is entitled to tax all days where an actual situs does not exist elsewhere: 365 – 42 (Valdez) – 60 (Washington) = 263. The resulting apportionment ratio of 72% (263/365) is substantially greater than the 37% allotted to California under the City's formula. If the City persists with its formula and if California taxes as it is entitled to do under the Constitution, duplicative taxation will result. The duplicative taxation is caused by the City and its unconstitutional formula, not by the domicile's taxing consistent with the Constitution. The City's apportionment method thus is not fair and is not "externally consistent".[82]

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[81] *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

[82] *Id.* The City incorrectly states that the "external consistency" test "looks at whether other states have passed statutes that in conjunction with the challenged approach, create a risk of multiple taxation." City's Brief at 25-26. The City misreads the cited portion of *Goldberg v. Sweet*, 488 U.S. 252, 261-62 (1989) (the City's cite refers to a treatise, which is an error). Neither *Goldberg* nor any other case requires the existence of other tax statutes before requiring a tax to be fairly apportioned. *Central Railroad*, 370 U.S. at 614. The external consistency requirement is just "another label for the fair apportionment requirement." STATE TAXATION, *supra* n.54 at ¶4.15[2], 4-142.

The City's apportionment method taxes value not properly attributable to the City, and which is available for taxation only by other jurisdictions. The inevitable duplicative taxation that results establishes that the City's method yields unfair apportionment. [83]

4. Income Tax Apportionment Does Not Excuse Duplicative Taxation of Tangible Property.

The City tries to excuse its unfair apportionment by relying on decisions addressing the complex problem of apportioning income for purposes of an income tax.[84] In that context some state courts have permitted the use of a "port-day" formula as part of one factor of a three-factor income tax apportionment formula.[85]

In general, a three-factor apportionment formula combines the ratio of a taxpayer's sales within a state to its total sales, the ratio of a taxpayer's payroll within a state to its total payroll, and the ratio of the value of a taxpayer's property within a state to the value of all its property. A "port day" method modifies that formula by applying a ratio of "days in taxing jurisdiction/days in all tax jurisdictions" to the property factor.[86] In theory, absent such a modification, some income from a vessel might escape taxation under an income tax.

For example, as discussed in *Luckenbach Steamship Co., Inc. v. Franchise Tax Board*, assume a vessel spends 10% of its time in California, 30% of its time in other jurisdictions and 60% of its time in international waters. In simplified terms, with the

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[83] *See Oklahoma Tax Commission*, 514 U.S. at 185.
[84] City's Brief at 28-30.
[85] *See Luckenbach Steamship Co., Inc. v. Franchise Tax Board*, 33 Cal. Rptr. 544 (App. 1963), *appeal dismissed*, 377 U.S. 215 (1964); *Sjong v. Alaska Department of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982).
[86] *Luckenbach*, 33 Cal. Rptr. at 547.

"port days" formula, California would tax 25% (10%/40%) of the income and the other states would tax 75% (30%/40%), for a total of 100% of the income being taxed. Without the port day modification, the argument goes, California would tax 10% of the income and the other states 30%; then 60% of the income would go untaxed.[87]

Whatever may be the merits of that argument in the context of an income tax, that argument has no merit in the context of a property tax. Using the same example from *Luckenbach*, but looking at a property tax, California as an actual situs could tax 10% of the value of the vessel, the other states as actual situses could tax 30%, and the domicile of the owner of the vessel could tax the remaining 60% of the value.[88] No more than 100% of the value would be subject to taxation and no portion of the value would escape taxation. If the port day approach is used instead, California would tax 25% of the value of the vessel, the other states would tax 75%, and the domicile still would be entitled to tax the 60% of the value attributable to the time in international waters when the vessel had no actual situs. The property would be subject to taxation on 160% of its value, and the duplicative taxation would be attributable to the non-domiciliary states' taxing in excess of the existence of an actual situs in those states.

In the context of a property tax on ocean-going vessels, a port day formula inevitably results in duplicative taxation. That duplicative taxation violates the Due Process and Commerce Clauses, even if the same formula might be permitted in the

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[87] *Id.*

[88] *Central Railroad*, 370 U.S at 612, 614, 616; *Ice Capades*, 128 Cal. Rptr. at 721, 723.

distinctly different context of an income tax. There are numerous differences between an income tax and a property tax:

> The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.[89]

The Valdez Tax is a property tax, not an income tax, and its constitutionality must be evaluated with reference to the manner in which a property tax operates and the rules the Supreme Court has developed for property tax apportionment.[90] The Tax violates those constitutional rules.

Courts do allow greater latitude in establishing an apportionment formula for an income tax as compared to a property tax. It is difficult, if not impossible, to ascertain exactly where income is earned, and therefore equally difficult to determine whether a taxing entity is taxing more than its fair share.[91] But it is not difficult at all to determine where tangible personal property is located. There is no reason to accept a formula that

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[89] *Cohn v. Graves*, 300 U.S. 308, 314 (1937).

[90] *See Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 188, 192 (1983); *Atlantic Richfield Co. v. Alaska*, 705 P.2d 418, 433 (Alaska 1985), *appeal dismissed*, 474 U.S. 1043 (1986).

[91] *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920) ("allocating specifically the profits earned" within a particular state is an "impossibility"). In *Atlantic Richfield*, 705 P.2d at 423-28, for example, the taxpayers produced and transported crude oil in Alaska, transported it by tankers to other states, and then refined it into various products that were sold in multiple states. It was not possible to pinpoint precisely where intangible income was earned. *Id*. at 436. The same problem does not arise when determining where visible, tangible tankers spend their time.

apportions to a jurisdiction time when the tangible property objectively and demonstrably was located outside of the jurisdiction and was subject to taxation by another jurisdiction.

If apportioning income among various jurisdictions can be compared with "slicing a shadow", apportioning mobile property values can be compared with looking for a shadow.[92] For property taxation (assuming that there are no issues about whether or not an item of property has established an actual situs in a non-domiciliary jurisdiction), when the property is casting a shadow in a particular non-domiciliary jurisdiction, that jurisdiction and no other can tax it. When the property is not casting a shadow in that non-domiciliary jurisdiction, that non-domiciliary jurisdiction cannot tax the property, though another jurisdiction into which the property and its shadow have moved can tax it. When the property is casting a shadow outside of any taxing jurisdiction, the domicile of the owner of the property can tax it. Because the task of apportioning tangible property values is far more straightforward than that of apportioning intangible income, it is not difficult to formulate an apportionment method that is consistent with the rights of other jurisdictions to tax so that duplicative taxation is avoided.

The City may not rely on an apportionment formula designed for the complexities of income taxation when that formula produces duplicative taxation and taxation of extraterritorial values. The City may not rely on the latitude granted to taxing authorities for the purpose of performing the difficult and inherently imprecise task of apportioning income when in taxing the property at issue the City plainly has projected its taxing authority beyond its borders and subjected the property to the risk of duplicative taxation.

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[92] *Container Corporation of America*, 463 U.S. at 192.

5. Time Taxable by Other Jurisdictions Is Taxable Whether or Not It Is "Productive Time".

The City attempts to justify its improper formula by claiming that it is based upon "productive time".[93] This argument fails because the Tax is a property tax that applies to an item of property without regard to whether the property produces any income.[94] Because production of income is irrelevant, so is the concept of "productive" time.[95] The City nevertheless attempts to blur the distinction between income tax apportionment and property tax apportionment by claiming various airplane property tax decisions have authorized "productive time" methods.[96]

The City relies on *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, but in that case the Supreme Court did not "uphold" or "let … stand" the apportionment formula.[97] The issue there was the existence of a tax situs (and federal preemption of state taxation); the taxpayer did not challenge and the Court did not rule on the validity of the apportionment formula.[98] Moreover, the apportionment formula in *Braniff Airways* and a different one in *Alaska Airlines, Inc. v. Department of Revenue*[99], addressed the specific problems raised by the taxation of a fleet of aircraft. Unlike an

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[93] City's Brief at 30.
[94] VMC §§3.12.010, .020(A). *See also Puget Sound Tug & Barge*, 598 P.2d at 926 (property tax imposed on vessels trapped in pack ice).
[95] Furthermore, it is unclear how the City can argue that time spent in international waters is not "productive". The tankers are not employed to store crude oil, but to transport it across international waters to refineries far from Valdez. [Exc. 189-90]. Time spent doing what the tankers are employed to do plainly is productive.
[96] City's Brief at 30-32.
[97] *Id.* at 27, 31.
[98] *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 591, 602-03 (Douglas, J., concurring) (1954).
[99] 769 P.2d 193, 195-96 (Oregon 1989), *cert. denied*, 493 U.S. 1019 (1990).

ocean-going tanker, an aircraft may visit multiple jurisdictions in a single day, but it spends part of every day in some jurisdiction, so that, presumably, an actual situs always exists in some jurisdiction; it does not spend days on end outside any jurisdiction and thus without any actual situs.[100]

The *Braniff Airways* formula thus compared all takeoffs and landings (and revenue factors) in the taxing jurisdiction with takeoffs and landings (and revenue factors) in all jurisdictions.[101] Similarly, the *Alaska Airlines* formula compared time within the taxing jurisdiction versus time in all jurisdictions.[102] Neither formula eliminated from the calculation units taxable by another jurisdiction, which is what the City's formula does with respect to time when a tanker has no actual situs and is taxable by the domicile. If an aircraft formula were to exclude units taxable by another jurisdiction, whether takeoffs and landings or time, that, too, would lead to unfair, duplicative taxation.

For example, assume each location served by an aircraft qualifies as an actual situs. On a single day an airplane took off from State A, landed in and took off from State B, landed in and took off from State C, and landed again in State A. For purposes of apportioning to State B, the apportionment formula based on take-offs and landings would be: 2/(1 + 2 + 2 + 1), or 1/3. No state other than A, B, or C would have a claim to that day, and B would be taxing in rough proportion to the presence of the aircraft on that day consistent with the right of other jurisdictions to tax the aircraft. If instead the

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[100] *Braniff Airways* 347 U.S. at 600 (in context of situs issue, distinguishes aircraft traveling interstate from vessels traversing international waters, but draws analogy between such aircraft and vessels plying inland waters).
[101] *Braniff Airways*, 347 U.S at 593 n.4.
[102] *Alaska Airlines*, 769 P.2d at 195-96.

formula excluded the takeoffs and landings in State C, the resulting apportionment to State B would be: 2/(1 + 2 + 1), or 1/2. By ignoring activity taxable by another jurisdiction, State B without any justification would increase its apportionment factor, and create the risk of duplicative taxation (were State C to tax on the basis to which it is entitled).[103]

Ignoring units taxable by another jurisdiction would not be justified in the context of fast-moving aircraft, nor is it justified in the context of slower, ocean-going vessels. No matter what units are used, excluding taxable units from the denominator of the ratio produces an unfair result and ineluctably results in the potential for duplicative taxation.

6. The City Is Taxing Time Constitutionally Allocated to the Domicile, Creating the Possibility of Duplicative Taxation.

Finally, the City claims that there is no impermissible risk of duplicative taxation, again relying on an income tax case and ignoring the rules enunciated by the United States Supreme Court for property tax cases.[104] As Polar has shown, the City's formula does create the risk of duplicative taxation. The domicile is constitutionally entitled to tax all time where no actual situs exists: here, the days in transit in international waters and the days in drydock.[105] The City is constitutionally entitled to tax consistent with the existence of the actual situs and the rights of other jurisdictions to tax: here, the days in Valdez compared with all days in the year.[106] By excluding from its formula time where

[103] A similar result would occur if hours are substituted for takeoffs and landings and the hours spent in one state are excluded from the denominator.
[104] City's Brief at 35-36.
[105] *Central Railroad*, 370 U.S. at 611-12, 614; *Ice Capades* 128 Cal. Rptr. at 721, 723. *See supra* n.71.
[106] *Central Railroad*, 370 U.S. at 611-12, 614; *Johnson Oil*, 290 U.S. at 162.

no actual situs exists, the City effectively captures a portion of that time for the Tax. The resulting risk of duplicative taxation would not reflect an incidental overlap caused by two jurisdictions applying different but equally constitutionally permissible formulae. Duplicative taxation instead would be the inevitable result of two jurisdictions taxing the same days: one, the domicile, consistent with the constitutional rules, and the other, the City, in violation of the constitutional rules.

The City suggests that there can be no duplicative taxation of time spent in drydock because Polar's vessels usually enter drydock in Asia where they would not be taxed.[107] That argument is flawed. The United States Supreme Court has ruled that the Commerce Clause protects against the *potential* for duplicative taxation. Actual duplicative taxation is not required:

> [T]he domiciliary State is precluded 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 ….[108]

Polar's tankers could enter drydock anywhere adequate facilities exist; the only certainty is that they cannot enter drydock in Valdez.[109] If the drydock contact establishes an actual situs, then the drydock jurisdiction would be entitled to tax the tanker consistent with its physical presence. If the drydock contact does not establish an actual situs, then California, as the domicile, has the right to tax the time in drydock.[110] Either way, the

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[107] City's Brief at 36.
[108] *Central Railroad*, 370 U.S. at 614 (emphasis in original).
[109] Exc. 190.
[110] Because the Supreme Court has supported the domicile's broad tax jurisdiction in part to ensure that mobile property does not escape taxation when it does not have an actual situs, it is likely a court would consider any limitation on taxation by a foreign
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City's formula eliminates from the denominator of the ratio time when the tanker is outside of Valdez and is taxable by another jurisdiction, whether or not that jurisdiction actually imposes a tax. By thus effectively appropriating a portion of that time for its own taxation, the City creates the potential for duplicative taxation when another jurisdiction does tax consistent with its constitutional right to do so.

With respect to the duplicative taxation created by the City's effective taxation of time the tankers spend in international waters, the City fails to address the clear rulings of the United States Supreme Court. The City continues to misread *Union Refrigerator Transit*, and refuses even to acknowledge the existence of the clarification in *Central Railroad*, in order to claim that a domicile jurisdiction loses its ability to tax mobile property that does not return to the domicile during the tax period.[111] To the extent that the property establishes a permanent actual situs outside the domicile, the domicile does lose the ability to tax the property.[112] However, the Supreme Court has made clear that to the extent that the actual situs is not permanent, as occurs when the property spends time in international waters or in locations where it does not establish an actual situs, the domicile retains the right to tax the periods when there is no actual situs elsewhere, even if the property never returns to the domicile during the taxing period:

> this record shows only that a determinable number of appellant's cars were employed outside the Commonwealth of Pennsylvania during the relevant tax year. But as this leaves at large the possibility of their having a

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jurisdiction a reason to conclude that there was not an actual situs in the drydock jurisdiction. *See Central Railroad*, 370 U.S. at 616-17.

[111] City's Brief at 37-38.

[112] *Central Railroad*, 370 U.S. at 616-17; *Union Refrigerator Transit*, 199 U.S. at 201, 210-11.

> nondomiciliary tax situs elsewhere, that showing does not suffice under our cases to exclude Pennsylvania [the domicile] from taxing such cars to their full value. Neither *Union Refrigerator Transit Co. v. Kentucky*, *supra*, nor *Standard Oil Co. v. Peck*, *supra*, is properly read to the contrary…. To accept the proposition that a mere general showing of continuous use of movable property outside the domiciliary State is sufficient to exclude the taxing power of that State with respect to it, would surely result in an unsound rule; in instances where it was ultimately found that a tax situs existed in no other State such property would escape this kind of taxation entirely.[113]

Instead of acknowledging the United States Supreme Court's ruling in *Central Railroad*, the City relies on a ruling from the Missouri Supreme Court to argue that the domicile loses its ability to tax.[114] The Hellerstein treatise on state taxation has criticized the Missouri decision because it cannot be reconciled with United States Supreme Court precedent:

> In a questionable decision, the Missouri Supreme Court sustained an unapportioned ad valorem property tax on the aircraft, despite the fact that it was owned by a nondomiciliary corporation and operated in other states…. The majority appears to have erroneously equated the power of the domiciliary and nondomiciliary states to tax. New Hampshire, as the domiciliary state, plainly had the power to tax the aircraft, except to the extent that it was taxable on an apportioned basis elsewhere.[115]

The City has made a similar error in refusing to acknowledge the right of the domicile to tax time the tankers spend in international waters and drydock.

The City compounds that error by focusing on tankers that do not return to the owner's domicile during the tax period. The City argues about SeaRiver's tankers and the ability of Texas, SeaRiver's domicile, to tax them, without acknowledging that the

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[113] *Central Railroad*, 370 U.S. at 611-12, 616-17.
[114] City's Brief at 37-38 (citing *Bi Go Markets, Inc. v. Morton*, 843 S.W.2d 916 (Mo. 1992)).
[115] STATE TAXATION, *supra*, n. 54 at ¶4.12[2][d], 4-62 (citing *Central Railroad*).

issue of the tankers' absence during the tax period does not even exist for Polar.[116] Polar's domicile is California, and its tankers regularly return to California to discharge loads of crude oil at refineries there.[117] California has the constitutional right to tax Polar's tankers to the extent that an actual situs does not exist elsewhere.[118] The City's method ignores that right and duplicative taxation inevitably will follow if California exercises its constitutional right to tax.

Finally, the City misstates Polar's arguments about the flaws in the City's formula.[119] Polar never has contended that the City must use only a time or mileage based method of apportionment.[120] In the context of a property tax on a mobile instrumentality of commerce, those two methods are the most readily apparent, and therefore most of the cases have dealt with those methods.[121] In addition, because the City elected to use a time-based method, Polar has pointed out the constitutional limits on such a method.[122] Polar has not argued that any one method must be used; it simply has demonstrated how the method the City selected violates the Due Process and Commerce Clauses of the Constitution.

E. The Unfair Apportionment Formula Is the Basis of the City's Commerce Clause Violations.

The City's apportionment formula violates the fair apportionment requirement of both the Due Process Clause and the Commerce Clause. It therefore is not necessary to

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[116] City's Brief at 38.
[117] Exc. 188-90.
[118] *Central Railroad*, 370 U.S. at 611-12; *Johnson Oil Refining*, 290 U.S. at 161-62.
[119] City's Brief at 38.
[120] Exc. 512, 661, 664.
[121] *See, e.g.*, *Ott*, 336 U.S. at 172; *Puget Sound Tug & Barge*, 598 P.2d at 926.
[122] *See, e.g., Johnson Oil,* 290 U.S. at 162-63; *Ice Capades*, 128 Cal. Rptr. at 721, 723.

reach the final two elements of the Commerce Clause analysis. In brief, though, the unfair apportionment causes the Tax to violate those elements as well.

With respect to the discrimination element, unfair apportionment itself is a form of discrimination against interstate commerce.[123] With respect to the "fair relation" element, that element requires that the "measure of the tax must be reasonably related to the extent of the contact" with the taxing jurisdiction.[124] The measure of the Tax here is the apportioned value of a tanker. As Polar has demonstrated, the method the City uses to determine that apportioned value improperly attributes to the City time, and correspondingly value, when the tankers are not present in Valdez. When the tankers are in international waters or in drydock in another taxing jurisdiction, they are not present in Valdez. By excluding that time from the denominator of its apportionment ratio, the City effectively treats a portion of that time as if the tankers were present in Valdez, and therefore improperly apportions value to Valdez. That distorted measure of the Tax is not reasonably related to the extent of a tanker's contact with Valdez, violating the Commerce Clause.

II. THE JUDGMENT IS VALID

The City's arguments about the judgment are without merit.[125] The judgment first declares that the apportionment method is unconstitutional as applied to Polar. Addressing the future implications of that determination, it states that the Tax does not violate the Tonnage Clause and therefore may remain in effect, but that the City may not

[123] *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984).
[124] *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 626 (1981).
[125] City's Brief at 45-50.

collect the Tax from Polar until it corrects the unconstitutional apportionment method. The judgment then confirms that the City may levy the Tax against Polar once it does correct the unconstitutional apportionment formula.[126] Nowhere does the Superior Court dictate what apportionment formula the City should adopt. Finally, the judgment addresses the impact of the ruling of unconstitutionality on prior tax years. Because the City unconstitutionally collected taxes from Polar, the Court ordered the City to refund the taxes collected unconstitutionally (while retaining the amounts it could collect lawfully). Because the Court did not dictate what apportionment formula the City should use, the amount of the refund could not be determined in the judgment, and the Court simply defined the mechanism for calculating the refund: Tax Collected Under Unconstitutional Formula – Tax Calculated By Constitutional Formula Selected By City = Refund Due.[127]

There is nothing inappropriate about the judgment.[128] The declaration of unconstitutionality is confined to Polar, which Polar has acknowledged.[129] The judgment does not order the City to adopt any particular apportionment formula. It simply provides that, if the City wants to continue to collect the Tax from Polar, it has to use an apportionment formula different from the one the Court just declared unconstitutional,

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[126] Exc. 744.
[127] Exc. 744-45.
[128] As demonstrated in Section One of the Argument, though, the Court should have declared that the Tax violates the Tonnage Clause and ordered the full refund of the taxes collected unconstitutionally.
[129] Exc. 726 (Polar argued: "Plaintiffs are entitled to relief from the City and the Plaintiffs proposed judgment grants it. The judgment does not determine whether other entities are or are not entitled to relief as well.").

and, if the City wants to keep a portion of the taxes it previously collected from Polar, it needs to calculate refunds using a constitutional apportionment formula to determine the amount it is entitled to keep.

If it prefers to do so, the City may comply with the judgment without adopting a constitutional apportionment formula: it may cease collecting the Tax from Polar and refund to Polar the entire amount of tax it previously collected. If it instead prefers to keep a portion of the taxes previously paid and to continue to impose the Tax, it may comply with the judgment by using a constitutional apportionment formula to calculate refunds and collect future taxes. The element of the judgment to which the City objects exists to provide the City with a means for continuing to tax and to keep a portion of the funds previously collected, without dictating how it should do so.

Finally, the judgment in no way addresses whether the apportionment formula the City applies to future taxes or to calculating refunds should be applied through Section 2 of Resolution 00-15 or some other mechanism. Because Section 2 of Resolution 00-15 does not actually contain a specific apportionment formula, it still would be necessary for the City to develop a proper apportionment formula before collecting future taxes or calculating refunds by using that Section. The only requirement the Court imposed was that, however the City goes about collecting future taxes and calculating refunds, it must use a constitutional apportionment formula to do so.

The judgment does not legislate; it simply declares a constitutional violation and requires the correction of that violation if the City wants to continue to impose the tax on

Polar or retain a portion of taxes previously collected from Polar. There is no separation of powers issue:

> It is legally indisputable that a trial court order requiring state compliance with constitutional standards does not violate the separation of powers doctrine.[130]

The judgment is valid.

CONCLUSION

This Court should reverse the decision of the Superior Court on the Tonnage Clause and remand the matter with directions to enter judgment in favor of Polar on the Tonnage Clause issue, declaring the Tax unconstitutional, prohibiting the City from imposing or collecting further taxes under the Tax, ordering the City to refund to Polar all taxes collected from it under the Tax, and awarding attorneys' fees to Polar. No matter how it rules on the Tonnage Clause issue, this Court should affirm the Superior Court's ruling that the City's apportionment method violates the Due Process and Commerce Clauses. Further, the Court should declare Polar to be prevailing party for purposes of an award of attorneys' fees.

[130] *Alaska Department of Health and Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001).