No.

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Polar Tankers, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

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

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

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves three provisions of the Constitution that limit the taxing authority of state and local governments. One is the Tonnage Clause, art. I, § 10, cl. 3, which proscribes the imposition by state or local governments of taxes that effectively fall on the privilege of using ports and harbors. The others are the Commerce Clause, art. I, § 8, cl. 3, and the Fourteenth Amendment's Due Process Clause, both of which preclude non-domiciliary state and local governments from taxing extraterritorial values.

The City of Valdez, Alaska, has enacted a tax that runs afoul of all three of these constitutional proscriptions. It is a discriminatory personal property tax that falls *only* on certain large vessels and that has the avowed purpose of raising revenue from vessels that dock in the City; this is precisely the sort of levy that this Court that has described as running afoul of the Tonnage Clause. And Valdez compounded its constitutional error by apportioning the tax in such a way as to claim a right to tax vessels domiciled elsewhere for a portion of the time that those vessels spend on the high seas (or otherwise away from any tax situs); this both threatens to impose duplicative taxation on the vessels and projects the City's taxing authority beyond its constitutional bounds. Because the ruling of the Alaska Supreme Court upholding the Valdez tax rests on a plain misunderstanding of this Court's decisions, improperly expands local taxing authority at the expense of out-of-state interests and interstate commerce, and de-

nies petitioners protections safeguarded by the U.S. Constitution, further review is warranted.

1. Prior to 2000, Valdez exempted all personal property from property tax. Effective that year, the City repealed the personal property tax exemption for one, and only one, type of property: "boats and vessels of at least 95 feet in length" that are not used "primarily in some aspect of commercial fishing" and that dock at privately owned docks in the City. Valdez Ordinance No. 99-17 (codified at Valdez City Code § 3.12.020(A)(1)) (App., *infra*, 45a). As a practical matter, the Valdez personal property tax falls almost exclusively on oil tankers and vessels that escort or assist oil tankers in Prince William Sound. R. Exc. 273-274, 814-817, 827. This was not an accident: imposition of the personal property tax on such vessels "climaxed a long-term effort by the City to address a serious financial dilemma" caused by depreciation of "oil and gas property" that formed a "significant portion of the available tax base located in the City." App., *infra*, 38a.

Valdez applies the personal property tax to vessels that have acquired a tax situs in the City. Valdez City Code § 3.12.020(C)(1) (App., *infra*, 46a). When a vessel also has a tax situs elsewhere for a portion of the year (as do all vessels subject to the tax that dock in Valdez, including those of petitioner), the Valdez tax is apportioned between Valdez and the other taxing jurisdictions. The apportionment formula applied by Valdez calculates the value subject to tax in the City by multiplying the total assessed value of the vessel by "a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation." Valdez Resolution No. 00-15 (App., *infra*,

55a) (emphasis added). This approach *excludes* from the denominator of the apportionment formula all time spent by a vessel on the high seas or otherwise outside the jurisdiction of a tax situs. Thus, as the Alaska Supreme Court described the tax, "if we assume that a vessel is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150." App., *infra*, 13a. Because oil tankers invariably spend a significant portion of the year on the high seas, the Valdez formula increases the portion of the vessel's value that is subject to taxation by the City, effectively taxing the vessels while they are on the high seas.

2. Petitioner is a corporation that is organized under the laws of Delaware and that, during the tax years at issue here, had its principal place of business in Long Beach, California; its principal office is now in Houston, Texas. Petitioner's primary business is operating tankers that transport crude oil from a terminal in Valdez to refineries in California, Hawaii, and Washington. Typically, a tanker leaves a port in one of those States and travels across international waters for approximately three to six days on its way to Valdez. It then spends approximately fourteen to twenty-four hours in Valdez to load cargo, followed by three to six days in international waters in transit to a discharge port, and thirty-six to seventy-two hours in that port. After discharging its cargo, the tanker begins the cycle again. Approximately every other year the tanker will be removed from service for a substantial period of time to enter drydock for maintenance and repairs. Such maintenance is not conducted in Valdez. R. Exc. 74, 189-190.

Petitioner challenged the constitutionality of the levy in Alaska state court on two grounds: (1) that the Valdez tax violates the Tonnage Clause because it effectively taxes vessels for the privilege of using the City's harbor; and (2) that the City's apportionment methodology violates the Commerce and Due Process Clauses both by subjecting vessels to the risk of duplicative taxation and by taxing extraterritorial values. In its initial opinion, the trial court held the tax unconstitutional under the Tonnage Clause. It reasoned that "[l]arge vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling on oil tankers along with other types of property. This is a tonnage duty." App., *infra*, 43a. On reconsideration, however, the trial court changed its view and rejected the Tonnage Clause challenge. Although it continued to recognize that "the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (*id.* at 29a), and is not "generally applicable" (*id.* at 30a, the court concluded that "[t]he failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax." *Ibid.*

On the other hand, the trial court held that the City's apportionment method violates the Commerce and Due Process Clauses. App., *infra*, 33a-35a. That is because "the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states." *Id.* at 34a. In the court's view, the State of a vessel's domicile retains the right to include in the measure of any property tax it imposes the value of the property for all the time that the vessel is on the high seas and has no specific tax situs, rendering the "denominator [of the Valdez apportionment formula]

problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters." *Id.* at 34a-35a. Using the example of one of petitioner's co-plaintiffs, the court concluded: "SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation." *Ibid.* The court accordingly held that Valdez could impose its tax only if it made use of an acceptable apportionment formula. *Id.* at 23a-24a.

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

The court specifically rejected the possibility of duplicative taxation in this context, on the ground that the domicile of a vessel's owner (now, in the case of petitioner, Texas) may *not* "extraterritorially tax its vessels for all time spent on the open seas." App., *infra*, 13a n.26. In the Alaska Supreme Court's view, this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), had "repudiat[ed]"

the nineteenth century "home port" doctrine, which had held that *only* the home port of a vessel could subject it to property tax, even if the vessel were habitually used in another jurisdiction. App., *infra*, 13a n.26. That repudiation of the home port doctrine, the Alaska court believed, also precluded the taxation of personal property by the owner's domicile for the period when the property had no specific tax situs. *Ibid*.

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

REASONS FOR GRANTING THE PETITION

The Alaska Supreme Court's decision is manifestly inconsistent with this Court's precedents on two issues that are important to carriers engaged in international maritime transport. This Court has made clear that a state property tax that discriminates against vessels making use of local ports is barred by the Tonnage Clause, yet that is precisely what the Valdez tax does, and indeed was *designed* to do. At the same time, the City's assertion of taxing authority over personal property domiciled in another state for a portion of the time when the property has *no* specific tax situs – as well as the Alaska

court's insistence that the state where the property *is* domiciled *lacks* that taxing authority – rests on propositions that have been rejected by this Court.

A state court's departure from this Court's application of the Constitution would be a serious matter in any setting. And that sort of error is especially troubling when, as here, the state court has allowed a local jurisdiction to export tens of millions of dollars of its tax burden to outsiders in a manner that threatens to foment "interstate rivalry and friction." *Dep't of Revenue* v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 754 (1978). In such circumstances, this Court has acknowledged the importance of enforcing the constitutional directives that "act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova Corp.* v. *Mich. Dep't of Treas.*, 498 U.S. 358, 386 (1991). Because the decision below misapplies the Constitution and misunderstands the controlling decisions of this Court, it should be reviewed and set aside.

I. THE TONNAGE CLAUSE PRECLUDES STATE TAXES THAT DISCRIMINATE AGAINST VESSELS MAKING USE OF THE TAXING JURISDICTION'S PORTS.

1. There should be little doubt that the Valdez tax is inconsistent with the Tonnage Clause, which provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage * * * ." U.S. Const. art. I, § 10, cl. 3. Although questions about the meaning of the Clause have been litigated comparatively infrequently, the general contours of the limits it imposes on state authority are well estab-

lished. The provision was inserted into the Constitution

> to supplement Art. I, § 10, Clause 2 [the Import-Export Clause], denying to the states the power to lay duties on imports or exports * * * by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state * * * . 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.

Clyde Mallory Lines v. *Alabama*, 296 U.S. 261, 264-265 (1935).

As the Court has explained, the purpose of these provisions is made clear by the constitutional debates. Insofar as is relevant here, the Court, quoting James Madison, noted that a "'source of dissatisfaction [under the Articles of Confederation] was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on.'" This "'never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976) (quoting Madison's *Preface to Debates in the Convention of 1787*, in 3 M. Farrand, *The Records of the Federal Convention of 1787*, at 542 (1911)). See *id.* at 285 ("'the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them'") (quoting Farrand, *supra*, at 548). "The Framers of the Constitution thus sought to alleviate [these] concerns" and to preserve "harmony

among the States" by prohibiting "seaboard States, with their crucial ports of entry, * * * from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Ibid.*[1] The Import-Export Clause, and its Tonnage Clause corollary, accordingly were "fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State" (*id.* at 290), so as "to prevent coastal States from abusing their geographical positions" and thus "to prevent interstate rivalry and friction." *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 753, 754.

To effectuate this purpose, the Court has understood the Tonnage Clause to prohibit "levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state." *Clyde Mallory Lines*, 296 U.S. at 265. This restriction proscribes not only state and local taxes that literally fall upon the tonnage of a vessel (see, *e.g.*, *State Tonnage Tax Cases*, 79 U.S. 204, 214-215 (1870)) or that expressly purport to be on the "privilege" of port access, but also "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." *Clyde Mallory Lines*, 296 U.S. at 265-266.

Under this rule, States *may* impose fees or charges for services provided to vessels, "such as pilotage, towage, charges for loading and unloading

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[1] Although the Court in *Michelin Tire* was addressing imports, the same policies apply to exports. See *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 758 ("any tax relating to exports can be tested for its conformance" with the policies identified in *Michelin Tire*).

cargoes, wharfage, storage and the like." *Id.* at 265. See *id.* at 266 (prohibition "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage * * *, or wharfage * * *, or charges for the use of locks on a navigable river * * *, or fees for medical inspection"); *Plaquemines Port* v. *Fed. Maritime Comm'n*, 838 F.2d 536, 545 (D.C. Cir. 1988) (same). And States may charge not only for specific services provided to individual vessels, but also for the "general service" of "securing the benefits and protection of the rules to shipping in the harbor" (*Clyde Mallory Lines*, 296 U.S. at 264, 266); for this purpose, vessels may be subject to personal property tax "based on a valuation of the [vessel] as property." *Transportation Co.* v. *Wheeling*, 99 U.S. 273, 279 (1878). But of particular importance here, "the prohibition" of the Tonnage Clause *does* "come[] into play where [the vessels] *are not taxed in the same manner as the other property of the citizens*." *Id.* at 284 (emphasis added).

This prohibition of discriminatory property taxes on vessels is an essential element of the rule. If property taxes that fall only on vessels making use of the jurisdiction's docks are permissible, it would be an easy matter for States to disguise what really are "tax[es] [on] the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) simply by tweaking the label applied to the charge – thus frustrating the policy of both the Tonnage and the Import-Export Clauses. Presumably for that reason, the Court has given considerable emphasis to the requirement that property taxes in this context be nondiscriminatory, repeating that requirement

five times in *Wheeling* and at least 13 times in *Michelin Tire*.[2]

In fact, in *Michelin Tire* the Court specifically noted, in reference both to ad valorem property taxes and to other types of levies imposed on imported goods after their entry into the United States:

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

423 U.S. at 288 n.7.

While the Court has not had occasion to address the Tonnage Clause in recent years, its Tonnage Clause decisions generally accord with its modern approach in analogous areas, such as the Commerce and Import-Export Clauses. Indeed, the Court's emphasis on the nondiscrimination principle under the Tonnage Clause anticipates modern constitutional

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[2] See *Wheeling*, 99 U.S. at 282 (a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens"); *ibid.* ("the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property"); *id.* at 283 (vessels "may be taxed like other property"); *id.* at 284 ("the prohibition only comes into play where [vessels] are not taxed in the same manner as the other property of the citizens"); *ibid.* ("the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property"); *Michelin*, 423 U.S. at 279-302.

tax doctrine in significant respects. When addressing related constitutional limits on state taxing authority under the Commerce Clause, the Court has come to reject formalistic rules and has emphasized the practical impact of the challenged levies on the taxpayer, while also recognizing that interstate businesses must pay their own way – so long as they are not subjected to discriminatory treatment. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201-202 (1994). And under the Import-Export Clause, the provision of the Constitution that is directly complemented by the Tonnage Clause, the Court's most recent holdings have disavowed old rules based on the formal nature of goods subject to taxation as imports and held instead that "prohibition of *nondiscriminatory* ad valorem property taxation [on imported goods] would not further the objectives of the Import-Export Clause." *Michelin Tire*, 423 U.S. at 293 (emphasis added). See *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("*Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue").

2. The Valdez levy is flatly inconsistent with the Tonnage Clause nondiscrimination requirement because it does not tax vessels "in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. To the contrary, "large vessels, and only large vessels, are the only personal property taxed by the City" (App., *infra*, 43a), and the tax was then further gerrymandered to exclude vessels used primarily in commercial fishing, most of which are local. In fact, the tax plainly seems to have been drafted to apply only to ocean-going tankers, a point that both courts below recognized in acknowledging that the tax was adopted in response to "a serious erosion of

the city's tax base, much of which is oil- and gas-related property." *Id.* at 3a; see *id.* at 38a; see also Valdez Resolution No. 00-15 (App. *infra*, 54a) ("funds received from an ad valorem tax on vessels over 95 feet in length [are] intended to offset the fiscal instability resulting from the continued decline in the Valdez tax base and to be able to obtain fiscal stability").

Moreover, the tax was not designed to charge for services uniquely provided to tankers; the trial court "found that the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (App., *infra*, 29a), and the Valdez City Council made explicit that the tax would "allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." Valdez Resolution No. 00-15 (App., *infra*, 54a); see also App., *infra*, 19a-20a. The tax accordingly is a close Tonnage Clause equivalent of the hypothetical discriminatory tax on imports that the Court in *Michelin Tire* declared impermissible under the Import-Export Clause. The levy purports to be a property tax rather than a tonnage duty, but the reality is that it is uniquely imposed on vessels that dock in Valdez. The property tax label, and the availability of municipal services to vessels that dock in Valdez, should not save such a tax.[3]

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

The Alaska Supreme Court's rationales for upholding the Valdez tax in the face of its discriminatory impact are all patently unpersuasive. *First*, the court opined, in reliance on the *State Tonnage Cases*, that "[a] fairly apportioned property tax is not a tonnage duty"; "[h]aving concluded that the disputed vessel tax is a fairly apportioned ad valorem tax on personal property, we necessarily also hold that it does not violate the Tonnage Clause." App., *infra*, 18a. But that holding misreads this Court's understanding of the provision. The *State Tonnage Cases* held that tonnage fees are *not* permissible property taxes, and therefore cannot be saved by the rule validating property taxes generally. 79 U.S. at 217. *Wheeling* subsequently confirmed that property taxes on vessels may satisfy the Clause, but only when the vessels are "taxed in the same manner as the other property of the citizens." 99 U.S. at 284. The Alaska Supreme Court simply ignored that indispensable part of the rule.

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

Third, addressing *Wheeling*'s "in the same manner" language, the Alaska court read *Wheeling* to stand for "the proposition that a charge based on the

value of property is not a duty of tonnage." App., *infra*, 20a. That analysis is simply wrong; as we have noted, this Court has made clear that the Tonnage Clause proscribes "*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." *Clyde Mallory Lines*, 296 U.S. at 265-266 (emphasis added). The court below also sought to explain away the language of *Wheeling* by opining that "Valdez taxes the vessels' value using the same mill rate it uses for all other property, including real property. It thus taxes the vessels in the same manner as other property, because the tax is based on value." App., *infra*, at 20a (footnote omitted). But this rationale is wrong, too. *Wheeling* indicated that *nondiscriminatory* property taxes are not duties of tonnage, carefully hedging its holding with the caveat that the tax must be levied "upon a valuation as in respect to *all other personal property*." 99 U.S. at 284 (emphasis added). The relevant question therefore goes not to the tax rate, but to the range of property subject to tax. And in Valdez, all personal property other than the disfavored vessels is either not subject to or exempt from personal property tax.

Fourth, the authority relied upon by the Alaska Supreme Court to justify the Valdez tax does not support its holding. The court (at App., *infra*, 19a) principally invoked the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), which rejected a Tonnage Clause challenge to "nondiscriminatory ad valorem property taxes." *Id.* at 258. But even setting aside the fact that the California court's decision in *Japan Line* was *reversed* on Commerce Clause grounds by this Court – which expressly declined to reach the

Tonnage Clause question in light of that disposition (see 441 U.S. at 439 n.3) – the reasoning of the California Supreme Court does not support the decision below. In *Japan Line*, the tax at issue was a *nondiscriminatory* general tax, not directed at shipping containers in particular. See *Japan Line*, 441 U.S. at 437. See also *id*. at 445 (California levy was "an ad valorem tax of general application"). The decision therefore simply did not address the consideration that is crucial in this case: that the challenged tax singles out oceangoing vessels for unfavorable treatment.[4]

3. A state-court decision that so far departs both from this Court's guidance and from constitutional principle warrants further review. The holding of the Alaska Supreme Court allows a State or municipality to single out ocean-going vessels for special charges, thus effectively "taxing goods merely flowing through their port[] to the other States not situated as favorably geographically" (*Michelin*, 423 U.S. at 285-286) and levying a tax that "could only be imposed because of the peculiar geographical situation of [the City] that enable[s] [it] to single out goods destined for other States." *Id.* at 290. The tax thus plainly is intended to export the local tax burden to out-of-state entities. And the Alaska Supreme Court's decision upholding the tax disregards clear direction from this Court, which has emphasized in several related contexts that such property taxes must be nondiscriminatory. Further review accordingly is in order.

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[4] The same distinction applies to the tax upheld by the Vermont Supreme Court in *Bigelow* v. *Dep't of Taxes*, 652 A.2d 985, 987-988 (Vt. 1994), which also was invoked by the Alaska court (at App., *infra*, 18a n.43).

II. THE VALDEZ APPORTIONMENT FORMULA THREATENS TO IMPOSE DUPLICATIVE TAXATION AND IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUES.

Even if the Valdez tax could survive scrutiny under the Tonnage Clause, it remains constitutionally flawed because the City apportions the levy in a manner that violates the Commerce and Due Process Clauses. Under the City's apportionment methodology, the fraction of total value of the property subject to tax that is allocated to Valdez reflects the number of days a ship spends in Valdez as compared to the number of days it spends in any port that is a tax situs. The formula accordingly omits from the denominator all time that a vessel is *not* in a tax situs. The upshot of this formulation is that Valdez effectively is claiming the right to tax vessels that dock in the City for a portion of the time that they spend on the high seas (or in ports that do not qualify as a tax situs), even though the vessels are not domiciled in Alaska.

This claim cannot be squared with the Constitution in two respects. It risks imposing duplicative taxation on vessels because they *are* subject to being taxed *in full* by their States of domicile for time spent outside a tax situs. And it asserts taxing authority over property that is located outside Alaska's jurisdiction.

1. "Established principles are not lacking in this much discussed area of the law." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). On the one hand, "[i]t is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise." *Ibid.* On the other, "the Court has insisted for many

years that a State is not entitled to tax tangible or intangible property that is unconnected with the State," and it has held that States may not "cast their tax burden upon property located beyond their borders." *Id.* at 324, 325.

To accommodate these rules, under both the Commerce and the Due Process Clauses the values subject to a state or local tax, including a property tax, must be apportioned among all jurisdictions in which the property has acquired tax situs, which is defined for property tax purposes as existing when there has been "habitual employment [of the property] within the jurisdiction." *Central Railroad Co. of Pa.* v. *Pennsylvania*, 370 U.S. 607, 613 (1962).[5] Although this requirement was developed in cases involving railroad rolling stock, it has been applied to virtually all movable property, including vessels. See, *e.g.*, *Japan Line*, 441 U.S. at 442; *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).[6] And it is settled that property that has

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[5] The Court applies a four-part test under the Commerce Clause: a state tax must (1) be applied to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided to the taxpayer by the state. See *Complete Auto*, 430 U.S. at 279. Insofar as is relevant in this case, however, the requirements of the Commerce and Due Process Clauses substantially overlap. See generally *Mead-Westvaco Corp.* v. *Illinois Dept. of Revenue*, 128 S. Ct. 1498, 1505 (2008).

[6] The one exception has been oceangoing vessels; the Court has never expressly repudiated the home port doctrine as it applies to such vessels, and therefore has not squarely held that such vessels may be taxed by any jurisdiction other than their State of domicile. See *Japan Line*, 441 U.S. at 442 ("In discarding the 'home port' theory for the theory of apportionment, * * * the

not acquired *any* tax situs elsewhere may be taxed at its full value by the domicile of the owner, even if the property spends a portion of the tax year outside the domicile's jurisdiction. See *Central Railroad*, 370 U.S. at 612; *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U.S. 158, 161 (1933).

The question here is how these rules apply to the apportionment of taxes on property that may be taxed by more than one jurisdiction but has no identifiable tax situs for a portion of the year. Specifically, it is whether the domicile State has the right to tax *all* the value for periods when there is no established tax situs (as we maintain), or whether nondomicile jurisdictions that have acquired tax situs regarding the property for a portion of the year also may tax a portion of the value attributable to periods when the property had no situs (as Valdez asserts and the Alaska Supreme Court held).

That is a question this Court has answered. In *Central Railroad*, the Court held that the Due Process and Commerce Clauses do *not* "confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's border." 370 U.S. at 612. Instead, the domiciliary State is empowered to tax the full property value *except* to the extent that the taxpayer "prove[s] that the same property may be similarly

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Court consistently has distinguished the case of oceangoing vessels"); *id.* at 443-444 ("There is no need in this case to decide currently the broad proposition whether mere use of international ports is enough, under the 'home port doctrine,' to render an instrumentality immune from tax in a nondomiciliary State."). In this case, however, petitioner did not contend below that the home port doctrine applies and so does not raise that issue here.

taxed in another jurisdiction." *Id.* at 613. The Court therefore held that a non-domicile State gets to tax the proportion of the property's value that corresponds to the proportion of the year spent by the property in that jurisdiction, and the domicile state gets to tax the rest.

The problem was presented in *Central Railroad* from a different angle than that here: in *Central Railroad*, the State of *domicile* (Pennsylvania) asserted that it had authority to tax the *entire* value of the property at issue (a fleet of rail cars); here, a *non-domicile* jurisdiction asserts that it is entitled to tax a portion of the value for which the property has no tax situs. Nevertheless, the same principles govern both situations. The *Central Railroad* Court carefully defined the scope of the domicile State's authority in a case where another jurisdiction also had acquired tax situs regarding the property for a portion of the year. The Court held that the value of the rail cars "could not constitutionally be included in the computation of th[e] Pennsylvania tax" for the period when they were actually subject to another state's tax jurisdiction (*id.* at 614), but that "Pennsylvania was constitutionally permitted to tax, at full value, the remainder of [the taxpayer's] fleet of freight cars," including cars that spent time moving "outside the domiciliary State." *Id.* at 614, 616. The Court's holding therefore was that non-domicile jurisdictions are entitled to tax property in proportion to the portion of the year that the property spent in that jurisdiction, while the State of domicile gets to tax the value of the property for all other periods.

This conclusion follows from the Court's historic treatment of the authority of the property owner's domicile. The Court has held that property that has no tax situs for a portion of the year should not "es-

cape [property] taxation entirely" for that period. *Central Railroad*, 370 U.S. at 617. This means that taxing authority over such siteless property must either be (1) allocated to the domicile or (2) apportioned proportionately between the domicile and those non-domicile jurisdictions that have acquired tax situs for a portion of the year. As between these two choices, the former is compelled by this Court's decisions. Allowing the domicile to tax for that period accords with the traditional and, so far as we are aware, unchallenged authority of the domicile to tax at full value property that has not acquired *any* actual situs elsewhere. It is an authority premised on the understanding that the domicile provides the property owner unique "'opportunities, benefits, or protection.'" *Id.* at 612 (citation omitted). See *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 297-298 (1944). It follows from that same understanding that the State of domicile possesses authority to tax the *portion* of the property's value that is attributable to time spent outside any tax situs.

2. Against this background, the Alaska Supreme Court's decision embodies two fundamental errors. First, it subjects the vessels taxed by Valdez to the danger of duplicative taxation. As the court below correctly acknowledged, duplicative taxation is unconstitutional and "[a] tax may be invalid even if it creates only a risk of duplicative taxation." App., *infra*, 11a (citing *Central Railroad*, 370 U.S. at 614). Here, as the Alaska court also noted, "[a] risk of multiple taxation" would exist "if * * * [petitioner's] domicile can extraterritorially tax its vessels for all time spent on the open seas." *Id.* at 13a n.26. And for the reasons explained above, the doctrine of *Central Railroad* means that the domicile State may indeed tax its vessels for all time spent on the high

seas and away from any port. If that is so, the Valdez tax creates potential for impermissible duplicative taxation as both Valdez and the domicile State seek to tax the value of the vessels for time spent on the high seas.[7]

In ruling to the contrary, the Alaska Supreme Court rejected the idea that the domicile may tax vessels for all time spent on the high seas. It believed that the domicile's historic authority to tax property for periods when it is not physically present in the jurisdiction is traceable to the home port doctrine. But it concluded that "the Supreme Court in *Japan Line* * * * recognized the home port doctrine has yielded to a rule of fair apportionment among situs states." App., *infra*, 11a-12a (citing *Japan Line*, 441 U.S. at 442). The Alaska court added that "[m]odern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers" – *i.e.*, no more power than any other tax situs jurisdiction – to tax vessels for time spent on the high seas. *Id.* at 13a n.26. The court therefore found that petitioner's "view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*." *Ibid.* And if that is so, the court concluded, there is no danger of unconstitutional duplicative taxation here.

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[7] We note that the rule of *Central Railroad* – that only the domiciliary state may apportion to itself time spent on the high seas – would not necessarily lead to lower taxes for the vessel owner. That would depend on whether the domiciliary state (1) taxed based on all operations for which there was no other tax situs and (2) had a higher or lower tax rate than the average of other tax situs states.

The Alaska Supreme Court's ruling, then, turns on the ideas that (1) the domicile's special taxing authority derives from the home port doctrine, and (2) *Japan Line* worked a sea change in Commerce Clause analysis by not only repudiating the home port doctrine but also by retiring entirely the domicile preference. See App., *infra*, 13a n.26. But that analysis is wrong on both points and reflects a plain misreading of this Court's decisions. As the Court explained in *Japan Line*, the home port doctrine was a variant of the ancient rule that treated personal property as "being taxable in full at the domicile of the owner" even if that property were used in another jurisdiction for a substantial portion of the year. 441 U.S. at 442. As the Court also noted, it had repudiated the application of that approach to most forms of "moving equipment" long before *Japan Line*, replacing it with the "rule of fair apportionment among the States." *Ibid*. But that does not mean that the State of domicile is stripped of all special taxing powers. To the contrary, these decisions left the Court free to rule, as it did in *Central Railroad*, that while the State of domicile must yield to the taxing powers of other States to the extent property is used in those States, it may tax all values that are not subject to tax in another jurisdiction. See, *e.g.,* 370 U.S. at 612 (citing *Ott*, 336 U.S. at 174).

Nothing in *Japan Line* calls into question any aspect of that rule. The case actually was about something very different – whether the same standards that apply to apportionment for *interstate* commerce should apply to *foreign* commerce. The Court concluded in *Japan Line* that it should not "rehabilitate the 'home port doctrine'" to deal with the special issues presented by foreign commerce (see 441 U.S. at 443), but its solution was not to di-

minish the taxing power of the domiciliary jurisdiction over either foreign *or* domestic commerce. Instead, *Japan Line rejected* attempts by California to assert *any* taxing authority over the property in question because the property's domicile, Japan, taxed its full value. *Id.* at 451. California in that case occupied the position of Valdez in this one. It therefore would be perverse to read the decision as announcing a new constitutional doctrine eliminating the residual rights of domiciliary States. The Alaska Supreme Court's decision, which read *Japan Line* to do just that, is not supportable: the State of domicile *may* impose a tax on vessels that reaches value also taxed by Valdez, and this danger of duplicative taxation renders the Valdez tax unconstitutional.[8]

Indeed, in cases both before and after *Japan Line*, state courts have held that the State of domicile may tax the full value of property except to the extent that it has acquired a taxable situs elsewhere. Although not addressing the precise question presented here, these decisions are substantially at odds with the Alaska Supreme Court's analysis. See *Gulf Caribe Maritime, Inc.* v. *Mobile County Revenue Comm'r*, 802 So. 2d 248 (Ala. Ct. Civ. App. 2001) (applying *Central Railroad* to conclude that a domi-

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

cile State may levy its full tax if no other tax situs can be identified); *East West Express, Inc.* v. *Collins*, 449 S.E.2d 599, 600 (Ga. 1994) ("the U.S. Supreme Court has ruled that the Due Process and Commerce Clauses of the United States Constitution require that ad valorem tax on property engaged in interstate commerce must be apportioned if the taxpayer bears its burden of demonstrating that its property has acquired a tax situs in another state"); *Jet Fleet Corp.* v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744, 746 (Tex. Ct. App. 1988) ("As a matter of due process, the state of domicile has jurisdiction to tax the personal property of its corporations unless some measurable portion of the property has acquired a permanent location or 'taxable situs' elsewhere."); *Ice Capades, Inc.* v. *County of Los Angeles*, 56 Cal. App. 3d 745, 755 (1976) (holding that, for property domiciled in California, having a taxable situs in New Jersey, and touring through a variety of other states without acquiring a taxable situs, "a formula will be valid if it apportions to the County of Los Angeles, as the domicile of Ice Capades, the proportion of the value of the property which the period of the tax year during which the property was not present in New Jersey bears to 365 days"); see also *Thomas Truck Lease, Inc.* v. *Lee County ex rel. Mitchell*, 768 So. 2d 870, 874 (Miss. 1999) (holding – apparently in error – that a domicile state may levy an *unallocated* ad valorem property tax), cert. denied, 531 U.S. 812 (2000).

3. In addition, and wholly apart from the possibility of duplicative taxation, the apportionment formula used by Valdez is improper because it allows the City to tax values that have no connection to Valdez. It is fundamental that "[t]he Due Process and Commerce Clauses forbid the States to tax 'ex-

traterritorial values.'" *MeadWestvaco*, 128 S. Ct. at 1502; accord *Asarco Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). A State may tax "only its fair share of an interstate transaction" (*Goldberg* v. *Sweet*, 488 U.S. 252, 261 (1989)), which, in the context of a property tax, is defined as "the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State." *Norfolk & W. Ry.*, 390 U.S. at 323. The "question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. * * * Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on in the State." *Ott*, 336 U.S. at 174. See *Quill*, 504 U.S. at 306 (citation omitted) ("income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State'").

Here, the Valdez tax is not fairly apportioned to the commerce carried on in the City and has no practical connection to the benefits the City provides the taxpayer. The Court has held, in decisions like *Central Railroad*, that a State may apportion movable property for tax purposes by taxing the percentage of the property's value that corresponds to the portion of the year that the property spends in the taxing jurisdiction. Under that rule, the percentage of time that a vessel spends in Valdez should be measured by dividing the number of days spent in Valdez by the total number of days in the year. But that is not what the City does. Instead of computing the percentage of time that a vessel spends in Valdez, the City computes the relative proportion of days spent by a vessel within Valdez's jurisdiction and days spent *in any port*. Thus, days spent outside the jurisdiction of Valdez but also spent outside any other

jurisdiction are excluded from the denominator. Decreasing the denominator, of course, has the necessary effect of increasing Valdez's property base and, by definition, leads Valdez to tax the property for time that it is outside the City's jurisdiction. Because Alaska is not the State of domicile, this formula has no "relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott*, 336 U.S. at 174.

Consider the most extreme case – a vessel domiciled in California that spends one day out of the year docked in Long Beach, one day docked in Valdez, and the other 363 days of the year on the high seas. Valdez asserts the right to tax half the value of that vessel. It is apparent that, even apart from the danger of duplicative taxation, Valdez is trying to assign itself an authority to tax that simply is not rationally related to values connected with the City.

To be sure, "the States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders." *Norfolk & W. Ry.*, 390 U.S. at 324. But the problem here is not that the Valdez formula is inexact; it is that, by its structure, the formula necessarily taxes extraterritorial values. After all,

> [t]he taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders." Any formula

> used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State.

Id. at 325 (footnotes and citations omitted) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)). It may be that "[t]he facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula." *Id.* at 327. The Valdez tax therefore reflects "an unconstitutional attempt to exercise state taxing power on out-of-state property." *Id.* at 321.

Like its parallel error regarding the Tonnage Clause, the Alaska Supreme Court's holding under the Commerce and Due Process Clauses warrants review. This Court has acknowledged that the taxation of interstate commerce "provide[s] the opportunity for a State to export tax burdens and import tax revenues" (*Trinova*, 498 U.S. at 374), making it essential that "[t]he Commerce Clause prohibit[] this competitive mischief." *Ibid.* The Alaska Supreme Court disregarded that mandate, in the process misunderstanding *Japan Line*, ignoring the relevant portion of *Central Railroad*, and challenging the continuing validity of a doctrine – the rule recognizing the authority of the domicile to tax all property to the extent it does not have a situs elsewhere – that has been endorsed, and never called into question, by this Court. That is especially notable because other state courts have continued to recognize and apply the domicile preference. Such a holding should be set aside.

* * * *

One final point bars emphasis. This Court has recognized its special role in policing state actions that disadvantage and discriminate against the interests of other States. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy," the Court, in language that applies equally to the Tonnage, Commerce, and Due Process Clauses, has explained that

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Valdez's] statute represents would invite significant inroads on our "national solidarity."

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564, 595 (1997) (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

In light of this important principle, the Court has acknowledged its "'duty to determine whether the statute under attack, whatever its name may be, will in its practical operation'" contravene constitutional principle. *West Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)). For this reason, the Court has granted review and reversed in many such cases, even when

the challenge was brought to a unique tax or regulatory regime and there was no square conflict in the lower courts about the constitutionality of such a system.[9] Certainly, a tax like the one levied by Valdez should not be insulated from review simply because it so far departs from constitutional requirements that it has few parallels.

Here, the discriminatory impact of the Valdez tax is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of confusion, and addresses legal issues that are of considerable practical importance, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[9] See, *e.g.*, *Trinova Corp.*, 498 U.S. at 386 ("Michigan is the first and, the parties tell us, the only State to have enacted a VAT as a tax on business activity."); *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000).

APPENDICES

APPENDIX A

THE SUPREME COURT OF
THE STATE OF ALASKA

Nos. S-12218/12223

CITY OF VALDEZ,
Appellant and Cross-Appellee,

v.

POLAR TANKERS, INC.,
Appellee and Cross-Appellant.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Appearances: Debra J. Fitzgerald and William M. Walker, Walker & Levesque, LLC, Anchorage, for Appellant and Cross-Appellee. Leon T. Vance, Faulkner Banfield, P.C., Juneau, and Susan Orlansky and Eric T. Sanders, Feldman Orlansky & Sanders, Anchorage, for Appellee and Cross-Appellant.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Carpeneti, Justices. [Bryner, Justice, not participating.]

EASTAUGH, Justice.

III. INTRODUCTION

The City of Valdez adopted an ad valorem property tax on large vessels docking at private facilities in Valdez, and the city council thereafter adopted an apportionment formula based on days spent in port for taxing large vessels engaged in interstate commerce. Several transporters of oil, including Polar Tankers, Inc., challenged the tax in superior court, alleging that it violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. We hold that the apportionment formula does not create a risk of duplicative taxation; it was therefore error to declare the ordinance unconstitutional as applied.

IV. FACTS AND PROCEEDINGS

A. Factual History

In 1999 the City of Valdez adopted Ordinance No. 99-17, an ad valorem property tax ("vessel tax") on certain large vessels docking at private facilities in the city. Part A of the ordinance describes the affected vessels:

> 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.[1]

The city subsequently interpreted the exception for vessels docking exclusively at the Valdez Container Terminal to also apply to vessels docking exclusively at other city-owned docks. Part B of the ordinance provides for taxation on an "apportionment basis" and for adoption of assessment formulas:

> 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.[2]

The vessel tax was proposed to address what was described as a serious erosion of the city's tax base, much of which is oil- and gas-related property. For several years before passage of the ordinance, the portion of the city's tax base consisting of oil and gas property had been declining rapidly, and it would continue to decline under a depreciation formula negotiated between the State of Alaska and the owners of the Trans Alaska Pipeline System (TAPS).

In accordance with Part B of the 1999 vessel tax ordinance, in 2000 the city council adopted a resolu-

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[1] Valdez Ordinance 99-17 (codified as Valdez Municipal Code (VMC) 03.12.020(A) (1999)).

[2] *Id.*

tion containing an apportionment formula. Section 1 of Resolution No. 00-15 adopted a tax apportioned on the days spent in port:

> 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.[3]

We refer to this as a "port-day" apportionment formula. The formula also exempts "periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs."[4] Section 2 of the 2000 resolution contingently provides for adoption of "another apportionment formula that will more fairly represent how value should be apportioned."[5] It provides:

> 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.[6]

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[3] Valdez, Alaska, Resolution No. 00-15 (May 1, 2001).

[4] *Id.*

[5] *Id.*

[6] *Id.*

Polar Tankers, Inc. operates tanker vessels that transport crude oil from the TAPS terminal in Valdez to ports in Washington, California, and Hawaii. In Valdez, Polar loads crude oil at the Alyeska Marine Terminal, a private dock owned by a consortium of oil companies—the TAPS owners. Polar is a wholly owned subsidiary of ConocoPhillips Company. The city issued tax statements for each of the assessed vessels in early July of 2000, 2001, 2002, 2003, and 2004. Polar paid the assessed taxes under protest each year. The taxes it paid each year were: $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.

B. Procedural History

After the city enacted the apportionment resolution in 2000, Polar sued the city in superior court, claiming the vessel tax violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. Polar was initially joined by several other tankship companies. Over the next three years, the city settled with all of the plaintiffs except Polar and SeaRiver Maritime, Inc. In 2004 the superior court granted these plaintiffs' motion for summary judgment, holding that the vessel tax was an unconstitutional duty on tonnage. The city moved for reconsideration. The superior court granted the reconsideration motion, vacated its earlier ruling, and directed the parties to brief seven legal and factual questions. In January 2005 the superior court issued a decision and order ruling that the apportionment method violated the Due Process and Commerce Clauses. It declined to rule on the Tonnage Clause issue. The city moved for summary judgment on that issue, and the superior court granted the city's motion in July and

concluded that, assuming the vessel tax was fairly apportioned, the tax would not violate the Tonnage Clause.

In January 2006 the superior court issued its final judgment holding that the tax did not violate the Tonnage Clause, but that the port-day apportionment formula, as applied to the plaintiffs, violated the Due Process and Commerce Clauses. The judgment permitted the city to levy the vessel tax as soon as it adopted a constitutional apportionment formula, and required the city to repay all taxes overpaid by the plaintiffs, as calculated using the new apportionment formula. The city moved for clarification of the final judgment. The court denied the clarification motion but stayed the judgment and ordered that the city could not "levy against Plaintiffs any amount of tax beyond the amount that would be due using this apportionment formula: Days in Valdez/365." The court ordered that the amount be paid into a court-supervised account until the appeal was terminated by agreement of the parties or decision of this court. Finally, the superior court denied all parties' motions for attorney's fees.

Three parties appealed. SeaRiver eventually dismissed its appeal, and the city's and Polar's appeals were consolidated. On appeal, the city challenges the Due Process and Commerce Clause rulings and Polar challenges the Tonnage Clause ruling.

V. DISCUSSION

A. Standard of Review

We review summary judgment rulings on constitutional issues such as the Due Process, Commerce, and Tonnage Clauses de novo.[7]

B. The Vessel Tax Apportionment Formula Does Not Violate the Due Process Clause or the Commerce Clause.

Polar contends that the vessel tax violates the Due Process and Commerce Clauses of the Federal Constitution.[8] The superior court held that the tax, Valdez Ordinance 99-17, was constitutional, but that the port-day apportionment formula contained in Valdez Resolution 00-15 violated the Due Process and Commerce Clauses.[9]

Due process requires that: (1) the property taxed have a physical presence and minimal connections with the taxing sovereign (thus giving it a tax situs)[10]; and (2) the tax be fairly apportioned to "opportunities, benefits, or protection conferred or afforded by the taxing [authority]."[11]

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[7] *Lewis* v. *State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006).

[8] U.S. CONST. amend. XIV § 1; U.S. CONST. art. I, § 8, cl. 3.

[9] In its final judgment, the superior court stated that the port-day apportionment formula is contained in Valdez Resolution 00-19. This appears to be a typographical error as the port-day apportionment formula is contained in Valdez Resolution 00-15. We therefore refer to Valdez Resolution 00-15 here.

[10] *Atlantic Richfield Co.* v. *State*, 705 P.2d 418, 430 (Alaska 1985).

[11] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949) (holding that ad valorem property tax apportioned using

In *Complete Auto Transit, Inc.* v. *Brady* the United States Supreme Court laid out the test for determining whether a tax on mobile property used in interstate commerce satisfies the Commerce Clause.[12] *The Complete Auto* test requires that: (1) the property taxed have a "substantial nexus" with the taxing jurisdiction; (2) the tax be fairly apportioned; (3) the tax not discriminate against interstate commerce; and (4) the tax be fairly related to the services provided by the jurisdiction.[13]

The Supreme Court has noted that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well … due process requirement[s]."[14] We therefore consider minimal connection/substantial nexus and fair apportionment under both clauses simultaneously.

1. There is a substantial nexus between Valdez and the vessels, such that Valdez has become a tax situs.

The parties agree that Polar's presence and activities in Valdez are sufficient to permit the city to tax its vessels, and that Valdez is therefore a tax situs for Polar. Ample evidence supports this conclusion. There is a direct and significant economic connection between the city and Polar. Most of Polar's business involves the oil it loads at the Alyeska Marine Terminal in Valdez, and the parties seem to

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miles traveled in state divided by total miles traveled did not violate Commerce or Due Process Clauses).

[12] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (upholding sales tax challenged by motor carrier transporting cars into Mississippi from out of state).

[13] *Id*. at 279.

[14] *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313 n.7 (1992).

agree that Polar's tankers spend an average of about forty-two port days in Valdez per year. Furthermore, the city provides many services to Polar. The city assists the Coast Guard in regulating traffic on dedicated "tanker lanes." The significant presence of the Coast Guard in the city is primarily due to the operations of Polar and the other oil shippers. The city tells us the Alyeska Marine Terminal, which is privately owned by the TAPS owners, was "financed by $1.3 billion in tax-exempt revenue bonds issued by the City."

Polar has at least one employee permanently located in Valdez, and Polar's employees, including the vessel crews, have access to all the services provided by the city, such as police protection, airport, roads, and hospitals. The city is involved in oil spill contingency plans. As demonstrated by the EXXON VALDEZ oil spill in 1989, the city is heavily affected by oil spills; following the EXXON VALDEZ spill, cleanup efforts continued to consume city resources for more than three years. All of these factors create a substantial nexus between the city and Polar such that Valdez has acquired the status of a tax situs for purposes of the Due Process and Commerce Clauses.

Because we agree with the parties that a substantial nexus exists, we also agree that Valdez is a tax situs for Polar.[15]

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[15] *See Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989) (upholding excise tax under *Complete Auto* test and stating that because "all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test").

2. The vessel tax is fairly apportioned.

The superior court concluded that the city's port-day apportionment formula by which the tax is calculated violates the Due Process and Commerce Clauses because the formula creates a risk of multiple taxation and is therefore not fairly apportioned. We disagree.

The "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."[16] There is no single correct method of apportionment; rather, a tax is deemed fairly apportioned if it is both internally and externally consistent.[17] Because both parties agree that the vessel tax is internally consistent (i.e., if all taxing jurisdictions used the same formula, a vessel would be taxed for one hundred percent of its value), we address only external consistency.

External consistency is the principle that looks "to the economic justification for the state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state."[18] According to Hellerstein & Hellerstein, "the external consistency test in substance is nothing more than another label for the fair apportionment requirement."[19]

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[16] *Id*. at 260-61.

[17] *Id*. at 261.

[18] I JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 4.15[2], at 4-142 (3d ed. 1998) (citing *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)).

[19] *Id*.

The superior court concluded that the vessel tax was not fairly apportioned because the apportionment formula created a risk of duplicative taxation. A tax may be invalid even if it creates only a risk of duplicative taxation. In *Central Railroad of Pennsylvania* v. *Commonwealth of Pennsylvania*, the Supreme Court stated that a "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."[20] We have similarly stated that "the Commerce Clause is triggered only upon an affirmative showing that property taxed by one jurisdiction has another taxable situs and could be taxed elsewhere."[21]

Polar admits that Valdez is a proper taxing situs. But Polar nonetheless argues that Valdez's taxing authority is subordinate to the taxing authority of Polar's domicile and that Valdez's apportionment scheme is unfair because it impinges on the domicile's taxing authority, creating the risk of multiple taxation. Polar asserts that California is its commercial domicile.

Under the home port doctrine, a vessel was subject to property taxation in full at the domicile of the owner and not elsewhere.[22] But the Supreme Court

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[20] *Cent. R.R. of Pa.* v. *Pennsylvania*, 370 U.S. 607, 614 (1962) (emphasis added).

[21] *Kenai Peninsula Borough* v. *Arndt*, 958 P.2d 1101, 1103 (Alaska 1998) (emphasis added) (holding that Commerce Clause was not violated because vessel's tax status became fixed for full tax year on date of its assessment and it therefore could not be taxed elsewhere, even after being sold).

[22] *S. Pac. Co.* v. *Kentucky*, 222 U.S. 63, 68-69 (1911); *see also* HELLERSTEIN & HELLERSTEIN, supra note 18, at ¶ 4.12[2][c].

in *Japan Line, Ltd.* v. *County of Los Angeles* recognized that the home port doctrine has yielded to a rule of fair apportionment among situs states.[23] The Court there noted that if the containers at issue in *Japan Line* were instrumentalities of purely interstate commerce, a rule of fair apportionment would have been applied.[24]

Therefore, a rule of fair apportionment must be applied to the taxation of Polar's ships. As we discuss below, an apportionment formula is fair if it apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Our determination that Valdez has adopted one of the many potential fair apportionment schemes it could choose from renders Polar's assertion of home port superiority irrelevant.[25]

Valdez' s apportionment formula apportions the full value of a ship between the taxing jurisdictions

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[23] *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 442 (1979).

[24] *Id*. at 445-46. Although it appears that some of Polar's vessels, for some of the years at issue, might have acquired a taxing situs in a foreign nation, Polar does not argue that the international aspect of its commerce affects the Valdez tax. We recognize that *Japan Line* imposes an additional test for taxation of the instrumentalities of foreign commerce, *id*. at 446-49, but we do not reach that test because the parties did not raise this issue on appeal.

[25] Polar's claim of home port superiority is not compelled by the cases that Polar cites. For example, the holding in *Central Railroad*, 370 U.S. at 611-12, 614, that a domiciliary situs cannot tax property to the extent that it could be taxed by another situs, does not define the limits of a non-domiciliary's right to tax.

in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Thus if we assume that a tanker is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150. There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction. This result is different, however, from Polar's contention that any jurisdiction is taxing for days spent at sea.[26]

The port-day formula resembles the formula that was involved in *Braniff Airways* v. *Nebraska State Board of Equalization & Assessment*, and whose reasonableness was not challenged.[27] The *Braniff* for-

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[26] Polar's apportionment argument rests on this characterization of the Valdez tax. There is no risk of multiple taxation if Valdez uses a port-day formula and other jurisdictions use a port-day formula, voyage-day formula (number of days in jurisdiction divided by total days in a year), or voyage-distance formula (distance traveled in a jurisdiction divided by total distance). A risk of multiple taxation only exists if we accept Polar's assertion that its domicile can extraterritorially tax its vessels for all time spent on the open seas.

Polar provides no compelling reason for us to accept this assertion. Modern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers. The *Japan Li*ne Court announced that the special status traditionally accorded a domicile "can claim no unequivocal constitutional source." *Id*. Polar's view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*.

[27] *Braniff Airways* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 593 & n.4, 597-98 (1954). While Polar argues that the *Braniff* Court's reasoning should not be extended to ocean-going vessels, the Court's later decision in *Ja-*

mula involved the ratio of aircraft landings in the taxing jurisdiction as compared to all landings in all potential taxing jurisdictions.[28] There is not too much difference between landings and dockings, nor between dockings and days in port. Each of these measures assesses the extent of activity in the taxing jurisdiction relative to the activity in all taxing jurisdictions. This satisfies the goal of apportionment, which is "to ensure that each State taxes only its fair share of an interstate transaction."[29] Most importantly the *Braniff* formula taxed the whole aircraft in accordance with the ratio indicated by the formula without carving out some separate quantum of value for the aircraft's "home port." The home port received no special consideration even though the planes likely spent time flying over non-situs states.[30]

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pan Line largely eliminated the distinction between ocean-going vessels and other instrumentalities of interstate commerce. *Japan Line*, 441 U.S. at 442. It is notable that the *Japan Line* Court specifically cited *Braniff* in its discussion of prior opinions whose language distinguishing ocean-going vessels based on the home port doctrine the Court rejected. *Id*. (citing *Braniff*, 347 U.S. at 600).

[28] *Braniff*, 347 U.S. at 593 n.4.

[29] *Goldberg*, 488 U.S. at 260-61.

[30] A variation on *Braniff* more dramatically illustrates the point: if an airline domiciled in New York only has flights between New York City and Los Angeles, the airline would not be subject to taxation by any jurisdiction other than New York and California. The *Braniff* apportionment formula of number of landings would accord California and New York even powers of taxation. Under the home port superiority method urged by Polar, New York, the state of domicile, would have the ability to tax a plane for all times the plane was not in California.

The formula in *Ott* v. *Mississippi Valley Barge Line Co.*[31] also supplies an analogy. In that case the apportionment ratio compared the number of barge miles in Louisiana to the total number of barge miles in all state waters concerning the routes in question.[32] No special status, or even mention, was given to the vessels' home ports. In *Ott* the vessels' routes were from port to port on navigable rivers.[33] But if instead a vessel's regular route was from St. Louis, Missouri through New Orleans, Louisiana to Tampa Bay, Florida, it is hard to imagine that the denominator would have to include miles traveled on the high seas outside the taxing authority of any state.

There are of course many conceivable apportionment formulaé that might be fair.[34] The port-days formula is but one such example. Because the formula is fair, and accordingly a valid formula for Valdez to use, and because Valdez's permissible tax necessarily limits the taxing authority of Polar's domicile, there is no concern about the risk of duplicative taxation.[35] Because the tax is fairly apportioned, the tax is also externally consistent.

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[31] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

[32] *Id*. at 171.

[33] *Id*. at 170.

[34] *See Goldberg*, 488 U.S. at 261 (" '[W]e have long held that the Constitution imposes no single [apportionment] formula on the States,' and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " (quoting *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164, 171 (1983))).

[35] *See Cent. R.R.*, 370 U.S. at 614.

3. Polar waived claims of discrimination against interstate commerce and fair relation between the tax and services provided.

On appeal, Polar only devotes a single sentence to the third element of the *Complete Auto* test—whether the tax discriminates against interstate commerce—stating in its brief, "unfair apportionment itself is a form of discrimination against interstate commerce." Given the cursory nature of Polar's failure to argue this issue separately, we consider it waived.[36]

Even if we were to consider the issue on its merits, it does not appear that the vessel tax discriminates against interstate commerce. In *Moorman Manufacturing Co.* v. *Bair*, the United States Supreme Court held that a tax did not violate the Commerce Clause even if it resulted in an out-of-state company paying a greater portion of its income in taxes because the tax apportionment method "treat[ed] both local and foreign concerns with an even hand."[37] According to the Court, any "alleged disparity" was "the consequence of the combined effect" of multiple state statutes, and a single state was not responsible for that combined effect.[38] Like

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[36] *Petersen* v. *Mut. Life Ins. Co.*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal."); *Lewis* v. *State,* 469 P.2d 689, 691-92 (Alaska 1970).

[37] *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274, 278 n.12 (1978) (upholding Iowa apportionment formula for income tax on interstate business against Due Process and Commerce Clause challenges).

[38] *Id*.

the tax in *Moorman*, the city's vessel tax applies equally to in-state and out-of-state vessels. Any effect on interstate commerce is incidental.

Polar also waived any argument regarding the fourth element of *Complete Auto*—whether the tax is fairly related to the services provided. Polar asserts that the tax is not fairly related to the services provided because the city's apportionment method "effectively treats a portion of [out-of-Valdez] time as if the tankers were present in Valdez." But because Polar has not briefed the issue we decline to address it.

Because Polar has attained a taxable situs in Valdez, and because the vessel tax is fairly apportioned, we hold that neither the tax nor the apportionment formula violates the Due Process Clause or the Commerce Clause.

C. The Vessel Tax Does Not Violate the Tonnage Clause.

In its cross-appeal Polar asserts that the tax violates the United States Constitution's Tonnage Clause,[39] which prohibits taxes that "operate to impose a charge for the privilege of entering, trading in, or lying in a port."[40] The superior court initially found that the tax violates the Tonnage Clause, but after vacating that judgment the superior court concluded that the tax does not violate the Tonnage Clause. In so ruling, the superior court noted that it had originally "misunderstood the taxpayer's argument on this matter." Because the parties agreed

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[39] U.S. CONST. art. I, § 10, cl. 3.

[40] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935) (holding fee exacted to fund regulation of harbor not unconstitutional duty of tonnage).

that no trial concerning the Tonnage Clause claim was necessary, and because (as the superior court noted) "counsel for the taxpayers … clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers," the superior court dismissed Polar's Tonnage Clause challenge.

The United States Constitution forbids the states from, "without the Consent of Congress, lay[ing] any Duty of Tonnage."[41] A duty of tonnage is any tax or duty that "operate[s] to impose a charge for the privilege of entering, trading in, or lying in a port," regardless of whether it is measured by the tonnage of the vessel.[42] A fairly apportioned property tax is not a tonnage duty.[43]

Having concluded above that the disputed vessel tax is a fairly apportioned ad valorem tax on personal property, we necessarily also hold that it does not violate the Tonnage Clause. The vessels are taxed based on their value, and only those vessels that have acquired a taxable situs in Valdez are taxed.[44] Polar concedes that it has acquired a taxable situs in Valdez.

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[41] U.S. CONST. art. I, § 10, cl. 3.

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

[43] *In re State Tonnage Tax Cases*, 79 U.S. 204, 212-14 (1870) (stating that vessels owned by individuals and used for commercial purposes are considered property and are allowed to be taxed by states and do not fall under Tonnage Clause); *Bigelow* v. *Dep't of Taxes,* 652 A.2d 985, 987-88 (Vt. 1994) (holding that Vermont's tax was not tonnage tax because it taxed property used, not privilege of using Vermont's ports).

[44] VMC 03.12.020(A).

In *Japan Line, Ltd.* v. *County of Los Angeles*, the California Supreme Court sustained an ad valorem property tax on cargo containers against a Tonnage Clause challenge.[45] The California Supreme Court reasoned that the cargo containers were "not being taxed while in transit [but r]ather they [were] being taxed on an apportioned basis for their continuous presence in the state."[46] Like the containers in *Japan Line*, no single vessel is in the taxing situs of Valdez year-round, but as a group the tankers form a continuous presence in the city. As the California Supreme Court noted, the presence of these vessels "involves the constant use of many services provided by the (state and, here, the county); e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection."[47] Similarly, the Vermont Supreme Court upheld a personal property tax on vessels in Vermont, noting that "[t]he tax relates to police, fire, and environmental protection afforded to those who use vessels in this state."[48] Polar does not deny that municipal services are available to it in Valdez, including police, airport, civic center, and medical services. The vessel tax is therefore a le-

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[45] *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), *rev'd on other grounds*, 441 U.S. 434 (1979). The United States Supreme Court held that the tax, as applied to Japanese shipping companies' cargo containers that were based, registered, and subjected to property tax in Japan, and were used exclusively in foreign commerce, violated the Commerce Clause. *Japan Line*, 441 U.S. at 453-54. The Court therefore did not reach the Tonnage Clause question. *Id.* at 439 n.3.

[46] *Japan Line*, 571 P.2d at 258.

[47] *Id.*

[48] *Bigelow*, 652 A.2d at 988.

gitimate property tax levied to support the services available to all taxpayers in the city, including Polar.

Polar argues that the vessel tax is invalid because it is a general revenue tax imposed only on specific vessels. But the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property. Alaska Statute 29.45.050(b)(2) provides that "[a] municipality may by ordinance … classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes."

Citing *Transportation Co.* v. *Wheeling*,[49] Polar argues that in order to be valid, the tax must be applied to the vessels "in the same manner" as it is applied to other property. It reasons that because the vessel tax is the only personal property tax in effect in Valdez, the vessels are not being taxed in the same manner as other property. We disagree. *Wheeling* stands for the proposition that a charge based on the value of property is not a duty of tonnage.[50] Valdez taxes the vessels' value using the same mill rate it uses for all other property, including real property.[51] It thus taxes the vessels in the same manner as other property, because the tax is based on value.

Polar contends that the vessel tax is no more than a charge for entering the Valdez port to access private facilities. Polar argues that the tax "applies

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[49] *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 283-84 (1878) (noting that tax is only impermissible duty of tonnage when it is taxed as instrument of commerce without reference to value of property).

[50] *Id.*

[51] VMC 03.12.022(A), .010, .060, .170.

only to vessels that call at the three private docking facilities in Valdez," and that it is "therefore … a charge for being in port and not using the City's docking facilities." (Emphasis in original.) It compares the tax to one struck down by the California Supreme Court in *City of Oakland* v. *E.K. Wood Lumber Co.*[52] But *E.K. Wood Lumber* is inapt. The fee there was a flat fee, not a tax based on the value of the property.[53] The fee was imposed on all vessels landing at Oakland, regardless of whether they had obtained a taxable situs there.[54] *E.K. Wood Lumber* therefore does not persuade us that the city's ad valorem property tax is an unconstitutional duty of tonnage.

D. Other Issues

The city asserts that the final judgment is defective because it violates separation of powers and "fails to sustain Valdez's vessel tax in accordance with the law." The city also contends that the ruling should have been modified to clarify that it applies only to Polar. Because we are reversing the judgment below and remanding for entry of judgment for the City of Valdez, we do not need to address these arguments.

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[52] *City of Oakland* v. *E.K. Wood Lumber Co.*, 292 P. 1076, 1080 (Cal. 1930) (holding that "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" and thus was unconstitutional duty of tonnage).

[53] *Id*. at 1077-78.

[54] *Id*.

Reversal also makes it unnecessary to consider Polar's argument concerning attorney's fees. On remand the city will be the prevailing party for purposes of Alaska Civil Rule 82.

VI. CONCLUSION

We therefore REVERSE the judgment below and REMAND for entry of judgment for the City of Valdez.

APPENDIX B

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

FINAL JUDGMENT

January 10, 2006

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-19 violates the Due Process and Commerce Clauses and therefore is unconstitutional as applied to Polar Tankers, Inc., and SeaRiver Maritime, Inc.

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code §3.12.020, does not violate the Tonnage Clause and therefore can remain in full force and effect; however, until the City adopts a constitu-

tional apportionment formula, it can not collect any further tax under Ordinance 99-17 from Polar Tankers, Inc., or SeaRiver Maritime, Inc.

3. The City is permitted to levy the vessel tax under Ordinance 99-17 against Polar Tankers, Inc., and SeaRiver Maritime, Inc., once a constitutional apportionment formula is adopted.

4. The City shall adopt a constitutional apportionment formula and use that constitutional apportionment formula to recalculate all taxes paid by Polar Tankers, Inc., and SeaRiver Maritime, Inc., respectively, under the unconstitutional apportionment formula contained in Resolution 00-15. For each tax year, the difference between the amount of tax previously paid by Polar Tankers, Inc., and the recalculated amount will constitute the refund the City shall pay to Polar Tankers, Inc., and the difference between the amount of tax previously paid by SeaRiver Maritime, Inc., and the recalculated amount will constitute the refund the City shall pay to SeaRiver Maritime, Inc.

5. Interest shall accrue on the refund amounts at the rate of 8% per annum from the date of each individual tax payment as provided in AS 29.45.500(a). The total of all refunds and interest due Polar Tankers, Inc., as of the date of this judgment will be known as the "Polar Base Refund", and the total of all refunds and interest due SeaRiver Maritime, Inc., as of the date of this judgment will be known as the "SeaRiver Base Refund".

6. Attorneys' fees and costs may be sought by any party believing they have a right to them pursuant to the Civil Rules.

7. The total of the Polar Base Refund plus the attorneys' fees and costs awarded to Polar Tankers, Inc., if any, will be known as the "Polar Total Judgment", and the total of the SeaRiver Base Refund plus the attorneys' fees and costs awarded to SeaRiver Maritime, Inc., if any, will be known as the "SeaRiver Total Judgment". Post-judgment interest at the rate of 8% per annum as provided in AS 29.45.500(a) shall accrue on the Polar Total Judgment and on the SeaRiver Total Judgment from the date of this judgment.

DATED at Anchorage, Alaska this 10th day of January, 2006.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX C

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

ALASKA TANKER COMPANY, LLC, ET AL.,
Plaintiff,

v.

CITY OF VALDEZ
Defendant.

ORDER

July 28, 2005

The constitutionality of an *Ad valorem* property tax is contingent upon the taxed property being physically within the taxing jurisdiction. Earlier in our history, courts took the position that only the home port could tax vessels. Though other jurisdictions could charge vessels for services rendered, general taxes could not be obtained from vessels passing through a jurisdiction just to do business.

As the world has changed, so has the law. Our courts now recognize that the economic value of a vessel is in the business that it does, and that those jurisdictions within which it does business should be

allowed to tax the vessel—at rates commensurate with rates paid by locals—for the proportionate period that the vessel is within the taxing jurisdiction.

The first of these notions—the home port doctrine—goes to the power to tax. One would not expect Wisconsin to try to impose real estate taxes on properties in South Dakota. But for property in Wisconsin the power to tax is a given. With real estate the question is pretty simple.

Movable property is more complicated. The United States Constitution prohibits taxing vessels for merely being in a State. The "tonnage clause" only allows fees to be charged to a vessel for particular services rendered to it. This provision protects an important means of interstate and international commerce. While this taxing power was reserved to the Congress, Congress could allow states to impose a tonnage tax.

As the means of commerce became railroads, trucking, and airplanes, as well as vessels, the meaning and application of the tonnage clause to these new means of carriage was tentatively applied. The economic need for States to tax the instrumentalities of wealth-gathering led courts to ultimately reject the home port doctrine for vessels. The law now allows a fairly-imposed and apportioned *ad valorem*, or "property tax," on vessels as well as other personal property.

Thus, the vessels here are lawfully subject to *ad valorem* tax for the period of time during which they do business in Alaska. But they are not subject to tax, for example, for merely passing through the inland passage of Alaska. The limit on such taxes is that they be fairly imposed and apportioned.

The tonnage clause under modern taxation law really only arises if a tax fails to conform to the requirements of Commerce and Due Process Clauses of the U.S. Constitution.

This court made a ruling on January 31, 2005 granting, in effect, partial summary judgment to the taxpayer plaintiffs on the tax at issue. The ruling held that the Valdez tanker tax ordinance failed to conform to constitutional requirements because it apportions the Valdez tax in such a way that Valdez improperly taxes for periods the tankers are not within its jurisdiction.

This court found the ordinance to run afoul of the due process and commerce clause because of its apportionment scheme. But, as noted by the City in its objection to the taxpayers' proposed judgment, the Municipal Code's severability clause saves the tax itself. The court's April 19, 2005 order interlineating the City's draft recognized the viability of the tax once a proper apportionment was established.

The parties sought a status hearing, the plaintiffs asking for a ruling that the tax violates the tonnage clause. The City argued that the tonnage tax doctrine is inapplicable, because the court has already analyzed the tax using the due process clause.

The City reaches this point by observing that if there is sufficient nexus between the taxed property and the taxing jurisdiction then the property is simply subject to taxation like any other property in the jurisdiction. Though the City gently chides the taxpayers with trying to restore the now defunct "home port doctrine," in some respects the concept is reinvigorated and relied on by the City itself with an added twist: a vessel is "at home" wherever it is.

When thinking about "home port" that way, of course, it is no longer the home port doctrine as understood in the law, but it may help taxpayers and taxing jurisdictions to understand the justification and extent allowable for the taxation of objects which may be here one day and there the next.

A remnant of the "old" home port doctrine survives to the extent that it is the home port that has taxing authority when the vessel is not in any other taxing authority.

The parties agree that a trial related to the tonnage tax is unnecessary. The court had apparently misunderstood the taxpayer's argument on this matter. The court understands and has found that the tax is not one for specific services to the vessels, such as docking fees or "wharfage." The court misunderstood the taxpayers to be arguing that no public services of the City which are paid for by the tax were available to the vessels. Perhaps the court should have rejected the argument as a matter of law, since, necessarily, a general revenue tax goes to fund all municipal services. In any case, the court took the vessels' argument to be that the various benefits or municipal services elsewhere listed by the City were not available to the vessel At argument on May 26, 2005 counsel for the taxpayers further clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers and that general City services were provided to the taxpayers.

North Slope Borough v. *Puget Sound T & Barge*, 598 P.2d 924, 926 (Alaska 1979), stands for proposition that even involuntary presence may result in being subject to taxation. There, a vessel caught in arctic ice in the borough could be taxed though some

things in the borough were not taxed. Use of services of the borough was irrelevant as long as they were "available." 598 P.2d at 928.

The City agrees there are no material facts at issue and for that reason the court vacates its conclusion that a trial is necessary. No material facts are in dispute on this issue of the complaint.

Under recent modern law the tonnage clause has rarely arisen, due primarily to the predominance of due process and commerce clause justification for taxes on vessels.

The heart of the taxpayers' objections to the tax is the narrow tailoring of it so that it is primarily paid by oil tankers in interstate commerce. The tax is certainly designed to insure it captures a part of the wealth created by the vessels. It is clearly not as generally applicable as the City argues.

Nevertheless, the tax does apply to all vessels over a certain length that don't utilize the City's dock and are not engaged in a fishery. The failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax.

Summary judgment is granted to the City on the tonnage tax issue.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 28th day of July, 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX D

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

SUMMARY JUDGMENT RULING

April 19, 2005

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-15 is unconstitutional as applied to Polar Tankers, Inc. and SeaRiver Maritime, Inc.;

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code § 3.12.020, remains in full force and effect unless and until a court of competent jurisdiction invalidates it; until a constitutional apportionment formula is adopted no further tax may be col-

lected under it until a constitutional apportionment funds is adopted no for other tax may be collected under it.

3. Valdez is permitted to levy the vessel tax under Ordinance 99-17 once a constitutional apportionment formula is adopted; and

4. The court has not heard argument on the amount of tax that may lawfully be retained and cannot determine the question in a vacuum.

5. The parties are to hold a teleconference with the court at their convenience to discuss the status of the case need for trial of issues related to tonnage, settlement prospects, etc.

DATED this 19th day of April, 2005.

/s/ Peter Michalski
Peter Michalski
Superior Court Judge

APPENDIX E

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

DECISION AND ORDER

January 31, 2005

Parties agree that the tax at issue is an ad valorem property tax raising general revenue funds for the City of Valdez, which is a tax situs, but not a domicile, of the Plaintiffs' ships. On reconsideration, the Court has considered parties' original and supplemental briefings and oral arguments.

In order to pass Constitutional muster, the tax must conform to the Tonnage, Due Process, and Commerce Clauses. To avoid a finding that the tax violates the Tonnage Clause, the tax must not "impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines* v. *State of*

Alabama ex. rel. State Docks Commission, 296 US 261, 266 (1935). A tax will not violate the Tonnage Clause if it is imposed "for services rendered to and enjoyed by the vessel, such as pilotage, wharfage, or charges for the use of locks on a navigable river, or fees for medical inspection." *Id*. (citations omitted). Also, the Tonnage Clause will not invalidate charges to compensate a local jurisdiction for the cost of providing emergency support services to ships, even if those ships do not actually call upon such services. *New Orleans Steamship Association* v. *Plaquemines Port, Harbor & Terminal Dist.*, 690 F.Supp. 1515 (E.D. La., 1988).

To survive scrutiny under the Due Process and Commerce Clauses, the tax must be fairly apportioned by not creating even the risk of taxation by both a domiciliary state and a non-domiciliary state. *See Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania*, 370 US 607 (1962). The burden rests on the taxpayer to show the risk of multiple taxation. *Id*. at 613.

Parties dispute, as a factual matter, whether the City provides services to the ships so as to escape a finding that the tax is an unconstitutional tonnage duty.

However, there is no need for the Court to rule on this factual matter because the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states, and is therefore unconstitutional under the Due Process and Commerce Clauses.

The problem with the tax is its method of calculating apportionment. Valdez' apportionment formula is: (time a ship spends in Valdez) / (all time minus time spent in international waters). This de-

nominator is problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters. *See Central Railroad*, 370 US 611 (1962) ("This Court has consistently held that the State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere") (citations omitted).

For example, SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation.

Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 31st day of January 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX F

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

July 26, 2004

Plaintiffs Polar Tankers, Inc., and SeaRiver Maritime, Inc. ("Plaintiffs") have moved for summary judgment on the issues in this case. The basis for the motion is that the City of Valdez's Ordinance 99-17, codified at Valdez Municipal Code Section 3.12.020 (the "Tanker Tax"), violates the Tonnage, Due Process, and Commerce Clauses of the United States Constitution. Defendant City of Valdez ("the City") opposes plaintiffs' motion and cross-moves for summary judgment. The City argues that it is entitled to judgment as a matter of law that the Tanker Tax does not violate the Tonnage, Due Process, and

Commerce Clauses of the U.S. Constitution. The plaintiffs' motion is **GRANTED**, and the City's cross-motion is **DENIED**. This court finds that the City's Tanker Tax violates the Tonnage Clause of the Constitution because it effectively charges only oil tankers, docking at private docks, for the privilege of entering municipal waters. Because the Tanker Tax violates the Tonnage Clause, this order does not consider whether the tax also violates the Due Process and Commerce Clauses.

DISCUSSION:

VII. Factual Background

A. The Tanker Tax

The City of Valdez imposes a property tax on property not exempted from taxation by city, state, or federal law. Prior to the 2000 tax year, the City exempted personal property from the property tax. In November 1999, effective in the 2000 tax year, the City adopted an ordinance that repealed the personal property tax exemption for a limited class of property:

> 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 fair value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Con-

> tainer Terminal where is subject to municipal dockage charges.[1]

All other personal property remained exempt from taxation.

The City thus targeted a specific class of personal property for taxation: federally documented vessels of at least 95 feet in length. From the limited class the City then exempted from taxation vessels engaged in some aspect of commercial fishing and those that dock exclusively at the Valdez Container Terminal, where they pay the City municipal docking charges. The City subsequently interpreted the second exemption to also apply to vessels that dock exclusively at other City-owned docks.

This enactment climaxed a long-term effort by the City to address a serious financial dilemma. A significant portion of the available tax base located in the City is oil and gas property including a section of the Trans Alaska Pipeline System ("TAPS") and the Valdez Marine Terminal of the Pipeline (the "TAPS Terminal"). This property is assessed by the State of Alaska under AS 43.56 and then taxes are shared with the City. For several years, this portion of the City's tax base had been declining rapidly and was scheduled to continue to do so pursuant to a depreciation formula negotiated between the State of Alaska and the TAPS Owners (a consortium of oil pipeline companies that own the TAPS Terminal) in the mid-1980s. During the five years before the enactment of the Tanker Tax, municipal budgets had decreased by approximately 25%. In fact, in 1997, an

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[1] Valdez Ordinance 99-17 (codified at Valdez Municipal Code 3.12.020 A).

earlier version of the tax had been enacted to address this revenue decline but was withdrawn in an effort to work out a compromise with the effected shippers. But at the end of 1999, the City Council decided that the Tanker Tax needed to be reinstated.

B. Application of the Tanker Tax to Plaintiffs

In closed tax years 2000, 2001, 2002, and 2003 (and the current tax year), the plaintiffs owned or operated vessels subject to the Tanker Tax. Specifically, the plaintiffs own or operate tankers that take on cargoes of crude oil at the Valdez Marine Terminal of the Trans Alaska Pipeline System (the "TAPS Terminal").

The TAPS terminal is located within the territorial boundaries of the City of Valdez on the south shore of Port Valdez. The TAPS Owners own the terminal, including tanks, tanker berths and related facilities. The TAPS Owners' acquisition of the TAPS terminal site and the construction of the terminal facilities were financed in large part by tax-exempt revenue bonds issued by the City of Valdez.

Plaintiff Polar Tankers, Inc. ("Polar") is a corporation organized under the laws of Delaware with its principal place of business in Long Beach, California. Its primary business is the operation of tankers that transport cargoes of crude oil taken on at the TAPS Terminal. Polar is a wholly owned subsidiary of ConocoPhillips Company. Polar makes one of the tankers it operates available at the TAPS Terminal within a specified time frame and then delivers the cargo of crude oil to locations identified by the customer in the mainland United States or Hawaii.

Plaintiff SeaRiver Maritime, Inc. ("SeaRiver") is a corporation organized under the laws of Delaware with its principal place of business in Houston, Texas. SeaRiver has engaged in various aspects of tanker and barge transportation of crude oil and refined oil products, primarily for ExxonMobil Corporation. SeaRiver is a wholly owned subsidiary of ExxonMobil Corporation. SeaRiver is subject to the Tanker Tax because it makes one of its vessels available at the TAPS Terminal to take on crude at a time specified by ExxonMobil. It then delivers the cargo of crude to a location specified by ExxonMobil in the mainland U.S., Hawaii, or a foreign country.

The tankers operated by the plaintiffs on which they have paid the Tanker Tax have varied somewhat over time, but all have been documented vessels over 95 feet in length. The homeports of the tankers for purposes of documentation vary, but no vessel has had Valdez as her homeport.

Consistent with the requirements the City imposed, the plaintiffs reported to the City the information it used to apportion the assessed values to the City. The City levied taxes based on the apportionment factors for tax years 2000 through 2003.[2] The plaintiffs paid these taxes under protest.[3] Plaintiffs bring this action on the grounds that the Tanker Tax violates the Tonnage, Due Process, and Commerce Clauses of the U.S. Constitution.

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[2] In 2000, the Tanker Tax was assessed on 28 vessels. Of the 28 vessels, 24 were oil tankers. The total tax paid for the year 2000 was $1,833,709.39, which constituted about 10.1% of the total tax revenues received by the City for that year.

[3] In 2000, Polar paid $440,221.24, and SeaRiver paid $529,670.60.

VIII. Standard of Review

Under Alaska Rule of Civil Procedure 56(c), summary judgment is proper when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Issues concerning the constitutionality of a law are questions of law.[4]

IX. The Tonnage Clause

The Tonnage Clause provides in part: "No state shall, without the consent of Congress, lay any duty of tonnage … "[5] The purpose of this prohibition is to supplement the prohibitions against duties on imports and exports, also contained in Article I, Section 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.[6]

The prohibition extends to all ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between ports in the same state, and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state.[7]

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[4] *Hickel* v. *Cowper*, 874 P.2d 922, 926 (Alaska 1994).

[5] United States Constitute, Article I, Section 10.

[6] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Commission*, 296 U.S. 261, 265 (1935).

[7] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

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.[8] The United States Supreme Court has ruled that 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.[9]

The prohibition, however, does not extend to charges made by a state or local authority, even if graduated by tonnage, for services rendered to and enjoyed by vessels, for the use of facilities locally provided, or for the purpose of meeting the expense incident to the general supervision of the port and the execution of rules and regulations for the proper accommodation and safety of vessels at the port.[10] But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, or without the enjoyment of any special benefits, and from the mere fact that it has arrived in a port of the state, it is a charge of tonnage, and therefore not collectible.[11]

The City's Tanker Tax violates the Tonnage Clause. The City admits that the tax was instituted as a means to generate general revenue, not to collect compensation for specific services. The United

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[8] *Id*. (citations omitted).

[9] *Id*. at 265-66.

[10] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

[11] *Id*. (citations omitted).

States Supreme Court has held that the Tonnage Clause prohibits reliance on tonnage duties to raise general revenues.[12]

The City argues that the Tanker Tax is not a tonnage duty. Instead, the City asserts that it is a fairly apportioned, nondiscriminatory *ad valorem* personal property tax, based on the value of the property. However, while the term "tonnage" refers to the internal cubic capacity of the vessel, the prohibition is not limited to exactions imposed on the basis of capacity.[13] Regardless of the form of tax the City instituted, the reality of the tax is that it almost exclusively burdens large oil tankers that dock at private facilities merely for coming within the City's territorial boundaries. In fact, large vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling upon oil tankers along with other types of property. This is a tonnage duty.

But even tonnage duties are constitutionally permissible in some circumstances. As described above, charges made by state or local authorities are allowed, even if graduated by tonnage, for services made available to vessels. While the City cites the many services it offers the tankers, admittedly the

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

[13] *See supra* fn. 12. *See also Scandinavian Airlines System, Inc.* v. *Los Angeles County*, 363 P.2d 25, 40 (Cal. 1961)(fact that case involved an *ad valorem* tax rather than tax based upon tonnage did not alter underlying principle that duty imposed upon instrumentalities of commerce, which is not a charge for a specific services rendered, amounts to an impermissible tonnage duty levied as condition to being allowed to enter or leave port).

purpose of the Tanker Tax was not to charge the oil tankers for the use or potential use of these services, but instead was to raise general revenue. Thus, the tax operates to charge the tankers for the mere fact that they have arrived in the City's port. Therefore, the tax is an impermissible charge of tonnage and not collectible.

The court rules that Ordinance 99-17 is unconstitutional and invalid due to its violation of the Tonnage Clause of the United States Constitution. The City of Valdez is ordered to refund the plaintiffs all sums plaintiffs have paid to the City of Valdez under Ordinance 99-17. The City is ordered to cease from imposing or collecting from plaintiffs taxes based upon Ordinance 99-17.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 26th day of July, 2004.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX G

CITY OF VALDEZ, ALASKA
Ordinance No. 99-17

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VEHICLES

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

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.

B. Trailers and mobile homes. The words "trailers and mobile homes" include all forms of housing adaptable to being moved by a power con-

nected thereto, and which are or can be used for residential, business, commercial or office purpose; provided, however, that those trailers which are:

1. Used for camping or recreational purposes only; or

2. Not affixed to the site and not connected with utilities, shall be considered to be personal property and exempt from taxation.

C. Conclusive presumption. A trailer or mobile home is conclusively presumed to be affixed to the land and real property for the purposes of taxation when it has remained at a fixed site for more than ninety (90) days.

D. Ownership. When the ownership of a trailer or mobile home and attachments and appurtenances is different from the land upon which it rests, the city may, in its discretion assess and tax the ownership separately.

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);

3. The real property owned and occupied as the primary residence and permanent place

of abode by a resident sixty-five(65) years of age or older is wholly exempt from taxation. Only one exemption may be granted for the same property and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the assessor may be appealed under A.S. 44.62.560-44.62.570.

a. An exemption may not be granted under subsection (A)(3) of the this section except upon written application for the exemption on a form approved by the state assessor for use by local assessors. The claimant must file the application no later than January 15 of the assessment year for which the exemption is sought. The city council for good cause shown may waive during a year the claimant's failure to make timely application for exemption for that year and authorize the assessor to accept the application as if timely filed. The claimant must file a separate application for each assessment year in which the exemption is sought. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of this section. If a

> failure to file by January 15 of the assessment year has been waived as provided in this subsection and the application for exemption is approved, the amount of tax that the claimant has already paid for the assessment year for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right and amount of an exemption claimed under subsection(A)(3) of this section. The assessor may require proof under this section at any time.

Section 4: Section 3.12.070(E) of the Valdez City Code is hereby repealed and reenacted to read as follows:

> The assessor may require each person having ownership or control of or an interest in property to submit a return in the form prescribed by the assessor, based on property values existing on January 1, except as otherwise provided in this chapter. By written notice, the assessor may require a person to provide additional information within 30 days.

Section 5: Section 3.12.070(F) of the Valdez City Code is hereby enacted to read as follows:

> The assessor is not bound to accept a return as correct. The assessor may make an independent investigation of property returns or of taxable property on which no return has been filed. In either case, the assessor may make the assessor's own valuation of the

taxable property and this valuation is prima facie evidence of the value of the property.

1. For investigation, the assessor or the assessor's agent may enter a premise during reasonable hours and may examine property on the premise. The assessor or the assessor's agent may examine all property records involved. A person shall, on request, furnish to the assessor or the assessor's agent every facility and assistance for the investigation. The assessor may seek a court order to compel entry and production of records needed for assessment purposes.

2. An assessor may examine a person on oath. On request, the person shall submit to examination at a reasonable time and place selected by the assessor.

Section 6: Section 3.12.072 of the Valdez City Code is hereby enacted to read as follows:

Violations: Penalties.

For knowingly failing to file a tax statement required by the assessor, or knowingly making a false statement required by this chapter relative to the amount, location, kind, or value of property subject to taxation with intent to evade the taxation, a person having ownership or control of or an interest in the property subject to taxation shall be subject to a fine up to $1,000 or imprisonment for 90 days.

Section 7: This ordinance takes effect January 1, 2000.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, this 15th day of November, 1999.

CITY OF VALDEZ, ALASKA
By: /s/ David S. Cobb
David S. Cobb, Mayor

APPENDIX H

CITY OF VALDEZ, ALASKA
Resolution No. 00-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA ESTABLISHING A METHODOLOGY FOR APPORTIONING THE PERSONAL PROPERTY TAX ON VESSELS OVER 95 FEET IN LENGTH

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.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, THIS 1st DAY OF May, 2000.

CITY OF VALDEZ, ALASKA
/s/ David C. Cobb
David C. Cobb, Mayor