No. 08-310

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ of Certiorari to
the Supreme Court of Alaska

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

REPLY BRIEF FOR THE PETITIONER

The City's brief confirms the aberrational nature of its tax. Valdez is unable to identify any other jurisdiction that imposes vessel-only discriminatory taxes, let alone a judicial decision upholding such a tax. And the City cannot point to any other jurisdiction that refuses to take into account the extent of property's proportionate annual physical presence when determining how much of that property's value is subject to tax. The Constitution precludes the imposition of a tax with such features.

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE.

The City wisely does not assert that its vessel tax may be justified under the Tonnage Clause as a charge for services uniquely rendered to vessels.[1]

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[1] Although Valdez notes generally (Br. 5-8) that it undertakes certain municipal activities because it is a port, it does not contest the trial court's finding "that the tax is not one for specific services to the vessels." Pet. App. 29a. It hardly could; the Valdez City Council was commendably candid in announcing that the tax was imposed to offset a decline in the City's tax base and would be used "for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." *Id.* at 54a. As we noted (Br. 24-25), early congressional action confirms the understanding that a levy on vessels imposed to finance municipal improvements (there, a South Carolina tax to finance construction of a seaman's hospital) is a tonnage duty requiring congressional consent. Valdez responds (Br. 22 n.4) that the South Carolina tax was imposed on the basis of tonnage. But this misses the point; the relevance of the congressional action is its recognition that such a tax for municipal improvements is not a user fee that escapes the Tonnage Clause. The form of the tax is immaterial; as Valdez itself acknowledges, fees denominated by tonnage that *are* for services

Instead, it hangs its case almost exclusively on the contention that property taxes are per se exempt from scrutiny under the Clause, asserting that "this Court has never held an *ad valorem* property tax to be an unconstitutional duty of tonnage." Resp. Br. 10; see *id.* at 15-23. The latter observation is correct as far as it goes; the Court has never had occasion to strike down a vessel tax precisely like the one imposed by Valdez. But the City omits the more interesting part of the story. This Court also has never *upheld* a property tax that discriminates against vessels. Neither, so far as we can determine, has any other court, ever. Indeed, we can find no instance in which any other jurisdiction ever even attempted to *impose* such a tax. There is a reason why Valdez can find no parallel for its tax in more than two centuries of state and municipal practice: its levy is manifestly inconsistent with the Tonnage Clause.

A. Discriminatory Property Taxes Violate The Tonnage Clause.

The City acknowledges that the Tonnage Clause applies to more than levies that fall, in terms, on the tonnage of vessels, recognizing this Court's repeated holdings that "certain fees not measured in tons might also violate the Clause." Resp. Br. 16. Valdez thus accepts that "a flat per-vessel fee that was completely untethered to the provision of any service" (as its tax concededly is untethered to the provision of any service) cannot survive scrutiny under the Clause (*id.* at 17). We must assume that the City likewise agrees that "[i]f [a State] cannot levy a duty or tax * * * graduated on [a vessel's] tonnage * * *, she cannot affect the same purpose by * * * graduat-

rendered to vessels are not proscribed by the Tonnage Clause. *Id.* at 16 n.2.

ing it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries." *The Passenger Cases*, 48 U.S. (7 How.) 283, 458-459 (1849). But the City nevertheless insists that a levy wholly evades review under the Tonnage Clause if it is denominated a property tax, even if that tax is identical in amount and practical effect to a duty falling on a vessel's tonnage. For several reasons, Valdez's wolf in sheep's clothing must be turned away.

1. To begin with, the City's distinction is wholly inconsistent with the Framers' unquestioned intent in adding the Clause to the Constitution.[2] Valdez declares that the Tonnage Clause is "seldom-invoked" (Resp. Br. 1), which is true today. But two centuries ago, the Clause and its companion provision, the Import-Export Clause, were of central importance to the Framers as a principal response to the destructive interstate commercial rivalry that led to the failure of the Articles of Confederation; Madison's graphic image of North Carolina as "a patient bleeding at both arms" from the commercial depredations of neighboring States reflected the seriousness of the Framers' concern. See Pet. Br. 13.

As we explained in our opening brief (at 13-14), the Import-Export Clause addressed this problem by precluding States from taking advantage of favorable geography and superior port facilities by imposing duties on imports or exports and thereby burdening less favorably situated States. As Valdez itself rec-

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[2] It also finds no support in the language of the Clause, which does not distinguish in any respect between the "flat per-vessel fees" that Valdez concedes to be unconstitutional and the property taxes that Valdez says evade review.

ognizes, the Tonnage Clause was "[c]rafted by the Framers to be a loophole-closing complement to the Import-Export Clause[]" (Resp. Br. 16; see Pet. Br. 14-15), intended to prevent the evasion of the latter Clause that would follow if States with superior port facilities were permitted to impose taxes targeted at the vessels that *carry* imports and exports. Absent that rule, the Import-Export Clause "could have been nullified by [States] taxing the vessels transporting the merchandise." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 264-265 (1935).

But it is precisely that nullification that Valdez would permit. It would be a simple matter for States or cities that seek to discriminate against their neighbors to change what all agree to be forbidden tonnage duties on the internal cubic capacity of a particular type of vessel (say, an oil tanker) into property taxes on that same type of vessel, calibrated by the taxing authority to be identical in application, amount collected, and practical effect to the forbidden duty on tonnage. If that evasion were permitted, the undisputed policy of the Tonnage Clause could be frustrated with ease.

That is why this Court has emphasized 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). Where a generally applicable tax falls on all property, including vessels, it is possible to say that it does not "operate to impose" such a charge. But when it falls *only* on vessels that make use of the taxing jurisdiction's

harbor, and is identical in amount and practical effect to one on those same vessels measured by cubic capacity, it surely is immaterial that the State labels the levy one on "property" rather than on "tonnage," "number of masts," "size of engines," or "privilege of port entry." The Court must "look[] past the formal language of the tax statute [to] its practical effect." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310 (1992) (internal quotation marks omitted).

2. Rather than explain *why* the Framers would have prohibited tonnage duties on cubic capacity while permitting otherwise identical property taxes that fall exclusively on vessels, the City simply asserts that "the crucial distinction between a (constitutional) property tax and an (unconstitutional) tonnage duty is that the former is assessed based on the value of the vessel." Resp. Br. 19. This ahistorical contention would have come as a surprise to the Framers of the Tonnage Clause.

In fact, tonnage was selected as the basis for the prohibition of charges on vessels precisely because the Framers understood that tonnage *was* "the customary mode of measuring the value of a ship." S.F. Miller, *Lectures on the Constitution of the United States* 253 (1891). As Justice Miller explained,

> [a] vessel was said to be of so many tons burden, *which meant that it was worth so much money*, carried so much freight, and, therefore, the method generally adopted of imposing a tax upon its tonnage was the readiest way to fix the amount which that species of property should pay.

Ibid. (emphasis added). See Pet. Br. 15. Given that the Framers understood tonnage to be a *proxy for*

value, Valdez's bright-line distinction *between* tonnage *and* value could not possibly explain the Tonnage Clause. That it became more usual in subsequent years to tax vessels by their assessed value rather than by cubic capacity can have no impact on the constitutional principle.

The City gets no further with its related contention that its distinction accords "with the 'spirit and purpose'" of the Tonnage Clause because "a property tax presupposes not only that the vessel has entered the port, but also that the vessel has developed a sufficient relationship with the taxing jurisdiction to justify the assessment of a tax on the vessel's value," and therefore does not fall on the vessel as an "'instrument[] of commerce.'" Resp. Br. 20. This suggestion that property taxes do not fall on vessels as "instruments of commerce" is a non sequitur; in fact, Valdez asserts later in its argument (Br. 52) that it taxes vessels *to the extent* of their "commercial activity" in port.

In any event, the argument is belied by the City's own tax statute, which "conclusively presume[s]" that a vessel is taxable in Valdez if the ship "takes on cargo within the City of Valdez [that has] a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year." Pet. App. 46a-47a. Because oil tankers may carry a million barrels of oil at a time, a single entry into port *invariably* subjects a tanker to tax, meaning that the Valdez levy is identical in practical effect to a port-use privilege fee. Moreover, the notion that the Framers could have had in mind a distinction based on the "development" of a "relationship" between the vessel and the taxing jurisdiction is an anachronism; at the time of the founding, the home-port doctrine forbade any non-

domiciliary jurisdiction from imposing a property tax on a foreign vessel, regardless of the extent of its contacts. And even disregarding those points, the Framers could hardly have thought that a tonnage duty became acceptable so long as it was applied to a vessel that made repeated entries into port – thus *compounding* the injury the Tonnage Clause was intended to avoid.

3. It therefore is no surprise that Valdez errs in asserting that this Court "consistently" has recognized "[t]he inapplicability of the Tonnage Clause to property taxes." Resp. Br. 17-18; see *id.* at 10, 23. What the Court has recognized, instead, is that the Clause does not bar property taxes provided they treat vessels the same as other personal property – which Valdez's tax plainly does not.

The City is unable to identify a single decision – in this Court or elsewhere – in which a discriminatory *ad valorem* tax on vessels has been upheld. And it is able to construct its argument only by omitting from its quotations of this Court's opinions unfavorable or limiting language. In fact, when the Court has discussed the "settled" rule on the constitutionality of generally applicable property taxes, it has explicitly noted that vessels were not treated less favorably than other personal property. See *Moran* v. *New Orleans*, 112 U.S. 69, 74 (1884) (vessels "valued as other property in the State"); *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 284 (1879) (vessels "taxed in the same manner as the other property"); *The Passenger Cases*, 48 U.S. (7 How.) at 402 (vessels treated "the same as other property"); see also Pet. Br. 17-18.

The same is true of the "leading early commentators on the Constitution" invoked by the City. Three

of the four treatises cited by Valdez refer to the nondiscrimination criterion in the very excerpts quoted by the City at Br. 19.[3] The fourth quotation, which Valdez attributes to Justice Story's *Commentaries*, did not, in fact, originate with Justice Story; it is an editor's note to the fifth edition of the Story treatise, published more than 40 years after the Justice's death. See 1 J. Story, *Commentaries on the Constitution of the United States*, at v (M.M. Bigelow, ed., 5th ed. 1891) (explaining the significance of lettered footnotes). That editor deferred to Judge Hare for further discussion of the Tonnage Clause. *Id.* § 1016, at 738 n.(a). Judge Hare, in turn, unequivocally stated that, under the Tonnage Clause, "[s]hips cannot be singled out by a State for taxation." 1 J.I.C. Hare, *American Constitutional Law* 253 (1889).

4. Finally, the City insists (Br. 26) that "[t]he 'anti-discrimination' principle that petitioner proposes has no basis" in the Tonnage Clause. But as we have explained, without such a principle the Clause would be rendered a dead letter; States and municipalities could evade it at will by denominating their tonnage duties "property taxes."

In fact, as we have noted (Pet. Br. 17-19), this Court's Tonnage Clause decisions have expressly endorsed the nondiscrimination rule we advocate here,

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[3] Miller, *supra*, at 254 (a vessel "is liable to be taxed *like any other property* that [the owner] may possess.") (emphasis added); T.M. Cooley, *A Treatise on the Constitutional Limitations* 689-691 (7th ed. 1908) (vessels "may be taxed *like other property*") (emphasis added); W.H. Burroughs, *A Treatise on the Law of Taxation* 91 (1877) ("The prohibition only comes into play where they are not taxed *in the same manner as other property* of citizens of the State * * *.") (emphasis added).

declaring that the Clause "comes into play where [vessels] are not taxed in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. In arguing that the Court really did not mean what it plainly said, the City is reduced to amateur psychoanalysis, asserting (Br. 27) that the Court in *Wheeling* "inadvertently" misstated the rule. This would be an improbable contention in any circumstance. And it is flatly belied here by: (a) the Court's consistent use throughout *Wheeling*, and in other decisions, of a formulation substantially similar to the one labeled an "inadvertent" misstatement by Valdez – a formulation most naturally understood to approve property taxes on vessels only when they are nondiscriminatory (see Pet. Br. 17-18 & n.7); and (b) consistent early practice tying approval of property taxes on vessels to a demonstration that the taxes extended to all personal property. See *id.* at 18-19. Although we made these points in our opening brief, Valdez offers no response.[4]

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[4] The City obtains no support from *Transportation Co.* v. *Parkersburg*, 107 U.S. 691 (1883), which it discusses at Br. 28-29. There, the Court rejected the argument that an assertedly "exorbitant" wharfage fee charged by a city-owned wharf was really a tonnage duty, explaining that "[t]he one [*i.e.*, a tonnage duty] is a commercial regulation * * * having reference to * * * commerce or revenue; the other is a rent charged by the owner of the property for its temporary use." 107 U.S. at 699. That holding has no bearing whatsoever in this case, where the City is not imposing a user fee or a "rent" for use of its facilities. The City's reliance on *Parkersburg* may reflect its misunderstanding of our argument. We nowhere contend, as the City would have it (Br. 29), that courts should "peer into the legislative mind" to determine whether Valdez lawmakers "truly intended" to tax vessels as instruments of commerce. A discriminatory property tax on vessels *is* a tonnage duty and, as under the Commerce and Import-Export Clauses, determining whether a

The City also makes no serious answer to our observation that a Tonnage Clause anti-discrimination requirement follows from the similar rule under the Import-Export Clause. Valdez does not deny that the Tonnage Clause was intended to complement, and must be given a construction parallel to that of, the Import-Export Clause. And while the City dismisses (Br. 30) this Court's embrace of a nondiscrimination rule in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), as "dicta," it cannot really mean to contend that the Import-Export Clause permits property taxes that discriminate against imports or exports.

The City does argue (Br. 30) that, even if the Import-Export Clause contains a non-discrimination principle, its tax would satisfy that test because the levy applies "equally to in-state and out-of-state vessels." But this argument misses the point. The Framers' concern in the Tonnage Clause was not discrimination against out-of-state vessels (which was impossible at the time in the property tax context because of the home-port doctrine); it was that States would tax vessels as a proxy for taxing the *merchandise* they carried, which often originated in or was destined for other jurisdictions. The Clause's prohibition therefore "extends to *all ships and vessels* * * * whether employed in commercial intercourse between ports in different States or between different ports in the same State." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 219 (1871). The dispositive question is whether the tax discriminates against ships and vessels. See also Pet. Br. 19 n.8.

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tax discriminates is a straightforward question of law that does not turn on legislative intent.

B. The Valdez Vessel Tax Is Discriminatory.

The Valdez tax fails that test. In arguing to the contrary, the City declares that "[t]he notion peddled by petitioner that Valdez 'single[d] out ocean-going tankers' for taxation is a canard." Resp. Br. 11. We respectfully suggest that this harsh characterization of our argument is a tad over-caffeinated. It also is just plain wrong: there can be no doubt that Valdez intended to and did single out vessels when it enacted an ordinance "Amending Chapter 3.12 of the Valdez City Code to Enact a Personal Property Tax on Vessels." Valdez Ordinance No. 99-17.

1. The text of the Valdez Municipal Code makes the discriminatory effect of the City's tax clear. In Section 3.12.020(A)(1), under the heading "Taxation of Personal Property," the *only* items listed are certain "[b]oats and vessels of at least ninety-five feet in length." In case it remained unclear that this provision is exclusive, Section 3.12.030(A)(2) – under the heading "Property Exempt from Taxation" – expressly excludes *all* "personal property not subject to taxation under Section 3.12.020(A)(1)." Pet. App. 48a. The City could scarcely have been more explicit in discriminating against large vessels.

2. The City's principal basis for its contention that its "property tax applied to numerous other kinds of property within its jurisdiction" is its claim that it "imposed its *ad valorem* tax on" oil-and-gas property that is taxable under Alaska Stat. § 43.56. Resp. Br. 24. Notably, however, the City has never before in this litigation asserted that it taxes such oil-and-gas personal property – not in its initial presentation to the trial court; not when seeking reconsideration of the trial court's ruling that "large vessels, and only large vessels, are the only personal

property taxed by the City" (Pet. App. 43a); not before the Alaska Supreme Court. And before this Court, the State of Alaska, while supporting the City as an amicus, carefully does not endorse the City's contention that Valdez imposes its *ad valorem* tax on oil-and-gas property. See Alaska Br. 32-33.

The reason for this otherwise surprising omission is that Valdez in fact does *not* tax oil-and-gas property. Alaska Stat. § 43.56 is a *state-level* tax; the State determines what oil-and-gas property is taxable, values it, issues assessment notices, resolves valuation disputes – and has provided that "[a] municipality may not exempt from taxation property authorized to be taxed under [Chapter 43.56]." Alaska Stat. § 43.56.010(b). The City's only role in this process is as collection agent, collecting tax imposed and assessed by the State of Alaska.[5]

The State thus makes the choices regarding Chapter 43.56 property. If it determines that personal property is not taxable oil-and-gas property, that property becomes available for local taxation. If that property is a large, non-exempt vessel, the City taxes it; if it is not, the City exempts it. This regime – in which the relevant taxing authority has exempted *all* personal property under its control from

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[5] The Valdez resolution establishing the apportionment methodology for the vessel tax itself acknowledges that the oil-and-gas tax is "assessed by the State of Alaska." Valdez Resolution No. 00-15 (Pet. App. 53a). The former City Manager thus noted below that "[a] significant portion of the available tax base located in the City of Valdez is oil and gas property *taxed by the State of Alaska under AS 43.56* and subsequently shared with the City." JA 46 (emphasis added).

tax, except for specified vessels – is the very definition of a discriminatory tax.[6]

3. This discrimination is not cured, as Valdez maintains (Br. 24-25) by the City's taxation of mobile homes and trailers. Valdez treats mobile homes and trailers as *real* property, and that is no matter of semantics – the Valdez tax code provides that any mobile home or trailer that is "[n]ot affixed to the site and not connected with utilities[] shall be considered to be personal property and exempt from taxation." Valdez Municipal Code § 3.12.022(B)(2). Thus, contrary to Valdez's claim that the City taxes "various kinds of similar property at the same mill rate" as vessels (Br. 25), Valdez actually exempts all movable personalty other than the disfavored ships.

Smaller boats, large boats docking exclusively at City-owned docks, and large fishing boats are untaxed in Valdez, as are cars and trucks, vans, airplanes, business inventory, jewelry, machinery, and myriad other items of personalty, each of which contributes to the need for police, fire, and other municipal services. The exemption of these forms of

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[6] Even if the tax under Chapter 43.56 were attributed to the City, that levy applies only to property "used or committed by contract or other agreement for use within this state primarily in the exploration for, production of, or pipeline transportation of gas or unrefined oil." Alaska Stat. § 43.56.210(5)(A). It thus falls on a narrow and limited category of property owned almost exclusively by non-residents of Valdez. In no sense is that tax generally applicable. If attributed to Valdez, Chapter 43.56 would show only that the City has two specialized, discriminatory taxes. Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951) (rejecting claim that a local trade restriction did not discriminate against interstate commerce because it also discriminated against certain intrastate commerce).

personalty from taxation, even as large vessels docking at private facilities are subjected to tax, raises just the concerns that underlie the anti-discrimination principle identified in decisions like *Wheeling*. "Nondiscriminatory measures, like [an] evenhanded tax, * * * are generally upheld * * * because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994) (last ellipses inserted by the Court). That check is absent in Valdez, raising the danger that its discriminatory vessel tax is being used to pass the tax burden on to the jurisdictions that receive goods exported through the City. Indeed, Valdez candidly announced that it enacted its tax for just that purpose, making explicit its intent to resolve its municipal budget crisis on the backs of oil tankers that use its port facilities. Pet. App. 54a; see Pet. Br. 4. Such a tax is invalid under the Tonnage Clause.

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

As for the apportionment question, the parties agree on the nature of the problem before the Court. The Valdez tax is imposed on petitioner's oil tankers, which are individual items of physical property. The precise value of each tanker is not in dispute, nor is there controversy about the location of each tanker at various times, or about the portion of the year that each tanker spends in – and away from – Valdez. And the City does not deny that its apportionment formula has the necessary and inevitable effect of assigning to Valdez a share of each tanker's value that

very substantially exceeds the portion of the year that the vessel actually spends in the City.

There also should be no doubt about the basic principles that determine whether this apportionment methodology violates the Constitution. A State or municipality may tax only values that have a fair relationship to the "'protection, opportunities and benefits'" it provides the taxpayer. *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1505 (2008). Where the taxation of personal property is concerned, the owner's *domicile* draws authority to tax from its relationship with the owner and "the benefits which this relation affords" the owner. *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294 (1944). This relationship has always been understood to allow the domicile to tax personalty for periods when it has *no* tax situs. See, *e.g.*, *Central R.R. Co.* v. *Pennsylvania*, 370 U.S. 607, 615-617 (1962). But for *non-domicile* jurisdictions – like Valdez here – "[a]ny [apportionment] formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing [jurisdiction]." *Norfolk & W. Ry.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 325 (1968).

The parties do disagree, of course, on whether the "values connected" to Valdez must bear some relationship to the portion of the year actually spent by the taxed property in the City. Although the City's defense of its tax invokes and attempts to distinguish a great many decisions, its argument on this point ultimately reduces to three related propositions: (a) that the formula used by a non-domicile jurisdiction to apportion a tax on a particular item of physical property need not take account of, and may lead to a result that is entirely unrelated to, the property's ac-

tual proportionate physical presence in the taxing jurisdiction (Resp. Br. 36); (b) that Valdez may premise its apportionment formula on the "supposition" that oil tankers engage in "productive commercial activity" *only* when they load and unload oil, and *not* when they transport the oil from one place to another (*id.* at 34); and (c) that taxing authority over personalty for periods when the property has *no* tax situs should go, not to the owner's domicile, but to all jurisdictions that have, through the physical presence of the property, acquired authority to tax the property for *other* portions of the year (*id.* at 42-44). All of these propositions are wrong.

A. The Valdez Apportionment Formula Systematically Taxes Extraterritorial Values.

1. To begin with, for a non-domicile jurisdiction's tax on a specific item of physical property to bear a "rational relationship" to the "property values connected with the taxing State" (*Norfolk & W. Ry.*, 390 U.S. at 325), it *must* take account of the portion of the year that the property spends in (and out of) the State. That follows as matter of logic and common sense. Generally speaking, for non-domicile States, the extent of the "protection, opportunities and benefits" provided by a State to physical property – the factors that justify the imposition of a tax – is directly related to the extent of the physical presence of the property in the jurisdiction. Indeed, Valdez itself recognizes that the taxable value of physical property is associated with the time spent in the taxing jurisdiction, which is why its formula uses days in port as the numerator of its apportionment fraction; the problem is that the City departs from its own logic when it arbitrarily refuses to take account

of the location of the property outside Valdez during a substantial portion of the rest of the year.

This conclusion is confirmed by the Court's decisions, which (so far as non-domiciliaries of the taxing State are concerned) have always emphasized the tie between extent of physical presence and receipt of the "protection" that justifies imposition of a tax. See, *e.g.*, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905). Thus, when addressing challenges to apportionment of railroad property by non-domicile jurisdictions, the Court has asked whether the tax was applied in a manner that roughly corresponds to the extent of the actual presence of the property within the jurisdiction's borders. See, *e.g.*, *Norfolk & W. Ry.*, 390 U.S. at 325; *Johnson Oil Ref. Co.* v. *Oklahoma*, 290 U.S. 158, 163 (1933); *Union Tank Line* v. *Wright*, 249 U.S. 275 (1919). Apportionment methodologies that have "no necessary relation" to the extent of physical presence are treated as constitutionally suspect. *Union Tank Line*, 249 U.S. at 283; see *Norfolk & W. Ry.*, 390 U.S. at 320.

To escape the force of this precedent, the City insists that decisions involving railroad equipment have no relevance to the taxation of vessels because the railroad cases involved *fleets* of railcars while its tax concerns "a particular piece of property." Resp. Br. 39-40 (emphasis in original). But the City offers absolutely no reason to attach any relevance to this distinction, or to doubt that tying apportionment to the portion of the year actually spent in the jurisdiction is essential when the question is "how to apportion the value of a particular piece of property among

several States in which that specific property had acquired tax situses." *Id.* at 39.[7]

2. The various other arguments advanced by the City and its *amici* for allowing taxation based in part on time when the property is outside the jurisdiction are similarly insubstantial. *First*, Valdez and its *amici* insist that this Court and some lower courts have sustained a "port-day apportionment formula" similar to the City's. Resp. Br. 35; see Alaska Br. 16. But those formulas were used to apportion *income*, not physical property. Although the City attempts to blur the distinction, this Court has always recognized that there are significant differences between the two. See *Hale* v. *Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 106-107 (1937); *New York* v. *Graves*, 300 U.S. 308, 314 (1937).

For this reason, identical apportionment methodologies do not – indeed, cannot – apply to income and property taxes. Apportionable income is typically "earned by a series of transactions beginning with manufacture in [one state] and ending with sale in other states" (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920)), thereby requiring taxing authorities to look outside their borders in determining "the profits earned within the state." *Id.* at 121. Given the many steps of varying importance that go into the generation of income, determining how to apportion that income among the States

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[7] The City also dismisses (Br. 40) the railroad decisions by asserting that "railroad equipment is *always* in some physical location that potentially has authority to tax it." But this Court's jurisprudence is replete with cases in which railroad property left the State of its owner's domicile without acquiring a tax situs everywhere else it went. See, *e.g.*, *New York* v. *Miller*, 202 U.S. 584, 597 (1906); *Central Railroad*, 370 U.S. at, 615-617.

touched by the process necessarily has a subjective or arbitrary quality. In contrast, the location of physical property can be directly ascertained, and (so far as the property of non-domiciliaries is concerned) "the power to tax is predicated upon jurisdiction of the property." *United States* v. *Allegheny County*, 322 U.S. 174, 184 (1944).[8]

Second, the City gets no further with its contention that the Court "has approved a range of apportionment formulas for both property taxes and income taxes" that look, in part, to "the commercial value generated by the property within the jurisdiction." Resp. Br. 36. We have explained why income tax cases provide the City no support. As for the property tax decisions cited by Valdez, several in fact used formulas based exclusively on proportionate physical presence that did not have the effect of allocating to the taxing State any portion of the time spent elsewhere.[9] And in the remaining decisions relied upon by the City, either the Court expressly did not address the propriety of the apportionment method or the *taxpayer* affirmatively sought (and therefore did not challenge) the use of proportionate

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[8] *Luckenbach S.S. Co.* v. *Franchise Tax Bd.*, 33 Cal. Rptr. 544 (Dist. Ct. App. 1963), *appeal dism'd*, 377 U.S. 215 (1964), cited by the City at Br. 35, involved a challenge to an *income* tax apportionment formula resting, in part, on a port-time ratio.

[9] *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169, 173 (1949), and *Pullmans Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 19 (1891) (cited at Resp. Br. 36 n.6), used mileage formulas that compared in-state with total miles traveled for, respectively, fleets of vessels and railcars. Particularly where fleets are concerned, mileage is a close proxy for physical presence. Unlike the Valdez formula, such a formula does not lead to taxation of property for any of its time outside the taxing State.

in-state revenue as one element of the formula.[10] This authority cannot support a departure from the settled, common-sense practice of predicating property-tax apportionment on the property's proportionate physical presence in the jurisdiction.

B. The Stated Basis For The City's Formula Bears No Rational Relationship To The Income-Generating Activities Of Petitioner's Vessels.

The City's argument also fails for another reason: even if the Constitution permitted States and localities to levy an apportioned tax on the property of a non-domiciliary on some basis other than physical presence, it certainly would not tolerate the ap-

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[10] See *Braniff Airways, Inc.* v. *Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 591 (1954) (taxpayer "does not challenge the reasonableness of the apportionment") (cited at Resp. Br. 37); *Great N. Ry.* v. *Weeks*, 297 U.S. 135, 144-145 (1936) (taxpayer proposed use of proportionate in-state gross earnings as partial basis for property tax apportionment and did *not* argue to the State "that the apportionment should be made on the basis of physical property") (cited at Resp. Br. 36-37); *Rowley* v. *Chicago & Nw. Ry. Co.*, 293 U.S. 102, 105 (1934) (taxpayer proposed formula making use of proportionate in-state revenues) (cited at Resp. Br. 36 n.6). In addition, those cases differed from this one in a material respect. *Weeks* and *Rowley* concerned tax imposed on in-state rail track that was part of a larger national system. A revenue component was used in the apportionment formula applied in those cases to determine whether the in-state value subject to tax should be adjusted to take account of differences in value at different points in the system. See *Weeks*, 297 U.S. at 143-144; *Rowley*, 293 U.S. at 109-110. Similar factors were at play in *Braniff*, which involved a tax imposed on a fleet of airplanes; use of a revenue component would tend to account for differences in the size and value of planes used in different States. No such consideration is involved in this case.

proach taken by Valdez. The City premises its "port-time" formula on the "supposition that a vessel's productive commercial activity corresponds closely to the productive time in port." Resp. Br. 34. This effectively presumes that a ship engages in productive commercial activity *only* when it is in port loading or unloading cargo, and that it is not engaging in such activity when it is transporting that property from place to place. This is precisely akin to saying that a transcontinental passenger railroad engages in "productive commercial activity" only in New York where the passengers board and in Los Angeles where they disembark, and not in any of the States in between through which the passengers are transported as the train moves from coast to coast.

This theory is nonsensical. The very essence of a cargo ship's business is to *move* property from one place to another. While it doubtless is true, as Valdez notes (Br. 34), that a tanker must load its "commercially valuable cargo," neither that cargo nor the tanker would have any value if the vessel did not then engage in the "productive commercial activity" of leaving the harbor and traversing the high seas to a location where the cargo is to be used. After all, using a "productive commercial activity" rationale, each of the States through which our transcontinental passenger train passed surely would be justified in imposing a property tax. The presumption upon which the City's apportionment formula rests accordingly is wholly divorced from reality.

Having embraced "productive commercial activity" as a theory of apportionment, the City is no more free arbitrarily to treat as "productive" only the particular activity that takes place within its borders (cargo loading) than it would be to declare that an

activity is productive only if it occurs in a State beginning with the letter "A." But that is what Valdez has done, in the process making use of a formula that is not merely imprecise, but affirmatively designed to achieve malapportioned results. Such a result is insupportable: the Constitution does not "tolerate any result, however distorted, just because it is the product of a convenient mathematical formula." *Norfolk & W. Ry.*, 390 U.S. at 327. The Court need go no further than this to conclude that Valdez is "'taxing property outside of the [City] under a pretense.'" *Id.* at 329 (quoting *Fargo* v. *Hart*, 193 U.S. 490, 500 (1904)).

C. The City's Formula Disregards The Authority Of The Domicile To Tax Personal Property For Periods When It Is Outside A Tax Situs, Thus Subjecting Petitioner's Vessels To An Impermissible Risk Of Duplicative Taxation.

Valdez also takes no account of another element of apportionment doctrine: for well more than a century, the Court has held that the State of the owner's domicile has the authority to tax *all* the value of physical property for periods when the property has no tax situs. See Pet. Br. 32-33, 42. Of particular note here, in *Central Railroad* the Court addressed the authority of Pennsylvania to tax a fleet of railcars owned by a taxpayer domiciled in the State. The Court held that Pennsylvania could not constitutionally tax the percentage of the fleet that had acquired tax situs in New Jersey. 370 U.S. at 613-614. But the Court also held that "Pennsylvania was constitutionally entitled to tax, *at full value*, the remainder of appellant's fleet of freight cars" – including those that spent time outside any tax situs. *Id.*

at 614 (emphasis added). *Central Railroad* thus effectively answers the question in this case: looking at a fleet of railcars, the Court held that the domicile is entitled to tax the full value of the fleet except for the specific portion that is present and subject to tax in another jurisdiction.

In contending that *Central Railroad* is inapposite here, the City asserts that the decision does not hold "that a domicile State retains the exclusive authority to tax property for the time that it spends outside of any tax situs when the property in question has acquired a tax situs both in the domicile State and in another State." Resp. Br. 46. But that is the clear import of the holding. Treating the fleet of railcars as a whole, the Court held that the property could be taxed *in full* by Pennsylvania as the domicile, except for the "daily average" of cars subject to tax in New Jersey (370 U.S. at 614); the Court did not suggest that New Jersey, by virtue of its status as tax situs for a portion of the fleet, was entitled to tax *any other element* of the fleet for periods when it was outside a tax situs. There is no space between that holding and the conclusion that the domicile may tax the full value of a particular item of personal property for the time that it is outside any tax situs, even though the property has acquired another tax situs for a portion of the year.

On this point, the City is quite wrong in saying (Br. 42) that there is no authority for the proposition that the domicile provides the sorts of benefits and protections that justify imposition of a tax for periods when the property is outside its borders but not in another tax situs. To the contrary, the Court has declared expressly and repeatedly that the "relation between [property owner] and [the State of domicile] –

a relation existing between no other State and [the owner] – and the benefits which this relation affords are the constitutional foundation for the [domicile's] taxing power" over physically absent property. *Nw. Airlines*, 322 U.S. at 294; see *id.* at 297-298; *Central Railroad*, 370 U.S. at 612; *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 384 (1952); *Johnson Oil*, 290 U.S. at 161.[11]

Precisely the same rationale accords the domicile the authority to tax property for *periods* when it lies outside any tax situs, even though it is subject to tax in another jurisdiction for a portion of the year. The domicile's authority to tax physically absent property for those periods rests on its relationship with the owner, and that relationship (as well as the benefits and opportunities that flow from it) is just the same whether or not another jurisdiction is the tax situs of the property for a different portion of the year. To be sure, the domicile must yield to another State for periods when property is physically present and subject to tax in that State, to avoid the danger of duplica-

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[11] For this reason, Valdez also is wrong in contending (Br. 41-42) that the domicile engages in extraterritorial taxation; the domicile's authority to tax stems from its relationship with the owner. In nevertheless contending that a domicile has no basis for imposing such a tax, the City relies (Br. 43) on Justice Jackson's concurring opinion in *Northwest Airlines*. But Justice Jackson was writing for himself; the majority expressly grounded the domicile's authority in its relationship with the property owner. Compare *Nw. Airlines*, 322 U.S. at 294, 297-298 (majority), with *id.* at 305-306 (Jackson, J.). In any event, it is surprising that the City endorses Justice Jackson's approach: he would have revived the home port doctrine and applied it to airplanes, giving the domicile the *exclusive* right to tax even airplanes that are habitually used elsewhere. See *id.* at 306-307.

tive taxation. But the taxing authority of a non-domicile State rests exclusively on the physical presence of property in that State. See, *e.g.*, *Union Refrigerator*, 199 U.S. at 204. And the presence of property in a non-domicile jurisdiction like Valdez does nothing either to confer authority on that jurisdiction to tax the property when it is somewhere else (*e.g.*, on the high seas) or to diminish the authority of the domicile to impose a tax for the portion of the value reflected by those periods.[12]

The flip side of this discussion is that Valdez's extraterritorial tax subjects petitioner's ships to an impermissible threat of duplicative taxation. If we are correct that the domicile may tax petitioner's tankers at full value for periods when they are on the high seas, the use of the Valdez formula necessarily would lead to the danger of the same values being taxed twice. The City does not deny that the potential for such duplicative taxation would invalidate its scheme. Instead, invoking *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267 (1978), the City suggests vaguely (Br. 45) that "not all overlapping taxation is unconstitutional." But we are not presented here with an incidental overlap resulting from "rough approximation" of taxable income produced by different formulas attempting to measure the *same* thing, as in *Moorman*, 437 U.S. at 273; instead, inevitable du-

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[12] There is no basis for the City's contention (Br. 49) that *Union Refrigerator* bars domiciles from taxing property that is absent for the entire year. *Union Refrigerator* actually held that domiciles lose authority to tax property that is "permanently located *in a state other than that of its owner*" and "is taxable there." 199 U.S. at 206 (emphasis added). That is a product of the fact that the property is present and taxable in a non-domicile State for 100% of the time.

plication would result in this case from the simultaneous application of two incommensurate methods of taxation. As the Court held in *Central Railroad*, 370 U.S. at 612, 614, such an outcome is indefensible.[13]

CONCLUSION

The judgment of the Alaska Supreme Court should be reversed.

Respectfully submitted.

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[13] Valdez also would duplicate taxes imposed by other jurisdictions where ships are held in port because of strike or for repair. See Pet. Br. 47-49. The City is wrong in saying (Br. 50-51) that this is a new argument; petitioner's challenge always has been directed at all aspects of the Valdez formula, including, explicitly, its treatment of repair time. See JA 8-9 ("First Cause of Action"); 22, 31 (dry-dock time for specific ships).