No. 08-310

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The City's formulaic recitation of catch-phrases like "factbound" and "unremarkable" in its brief opposing the petition should not obscure the troubling character of its tax – a character that comes clear from the City's own description of the levy. Large vessels are the *only* form of personal property subject to tax in Valdez; by design, Valdez is using its "peculiar geographical situation" to impose a tax that falls almost exclusively on vessels used to export "goods destined for other states." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286, 290 (1976). And the City acknowledges, albeit elliptically, that it taxes the value of the vessels for a portion of the time that they spend on the high seas. See Opp. 15-16. This Court has never approved a tax of this kind, which cannot be reconciled with either the Constitution's Tonnage Clause or with the apportionment requirement of the Due Process and Commerce Clauses.

The Court *has* acknowledged a special duty to review actions by a State (or municipality) that improperly enlarge its power and wealth at the expense of other States and the United States. See Pet. 30-31. And although the City correctly observes that courts have not had much opportunity to address discriminatory vessel taxes that purport to assert jurisdiction over ships traveling on the high seas (Opp. 6), we noted in the petition that a tax cannot be insulated from this Court's review simply because it departs so far from constitutional requirements that it has few parallels; the Court not infrequently grants review in such circumstances. See Pet. 30-31 & n.9. Here, Valdez offers no basis for leaving undisturbed its unconstitutional vessel tax. Accordingly, further review is warranted.

A. The Valdez Vessel Tax Violates The Tonnage Clause.

The Tonnage Clause complements the Import-Export Clause by preventing coastal States from taxing vessels instead of the goods they carry. To be sure, not every levy against a vessel offends the Tonnage Clause. As we explain in the petition, States may legitimately tax vessels in several ways for the services described by the City in its brief in opposition (at 4, 8-10). They may impose fees for services "such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like." *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935). And they may impose a *nondiscriminatory* levy, including a personal property tax, that falls both on vessels and on other types of personal property. See *Transportation Co.* v. *Wheeling*, 99 U.S. 273, 284 (1878). But the City has taken neither of those courses; its personal property tax is not a charge for vessel-specific services[1] and falls *only* on certain vessels that are engaged in the export of oil from Alaska. The City's attempts to defend this discriminatory tax are insupportable.

1. Valdez first argues that the Tonnage Clause serves only the "limited purpose" of ensuring that taxes on vessels are proportional to their value and not their volume. Opp. 7-8. Under this view, property taxes *per se* "are not duties of tonnage" and

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[1] The Tonnage Clause exception for pilotage and wharfage fees accordingly is not relevant to this case. As the trial court found, the Valdez tax is not a fee for services rendered to tankers. Pet. App. 29a. Instead, according to the Valdez City Council, its intent in enacting the vessel tax was "to offset the fiscal instability resulting from the continued decline in the Valdez tax base [in order] to be able to obtain fiscal stability." Pet. App. 54a.

there accordingly is no Tonnage Clause concern even when a State levies a tax for the purpose of capitalizing on the fortuity of its coastline to fill its general coffers. Opp. 7, 8. But this extraordinary assertion surely is wrong: the Court has expressly declared that the Clause is implicated by "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.

2. As a fallback, Valdez maintains that there is no nondiscrimination requirement under the Tonnage Clause and that, if there is, the Valdez vessel tax somehow satisfies the requirement. Neither argument can be squared with this Court's precedent.

Only one type of personal property is taxable in Valdez: vessels over 95 feet in length that are not primarily used for commercial fishing. Pet. App. 45a. Thus, smaller boats and large fishing boats are untaxed, as are cars and trucks, airplanes, and business inventory, each of which equally requires municipal services such as police and fire protection and hospital access. Valdez's intent in levying a tax against vessels was not to charge them for the services they use; rather, its intent was to compensate for "a serious erosion of the city's tax base." Pet. App. 3a.[2] In light of this evidence, and trial court's

[2] That some *real* property in Valdez is also taxed (Opp. 11-12) is immaterial. A discriminatory personal property tax that falls only on vessels is not saved simply because the jurisdiction imposes *other* taxes on other entities. Based on the plain text of the Valdez tax ordinance and its implementing resolution (see Pet. App. 53a-55a), there is no plausible explanation for the vessel tax other than the intent to use vessels engaged in inter-

explicit finding, there can be no serious claim that the vessel tax is generally applicable. The tax therefore cannot be squared with the understanding that the tonnage tax proscription "comes into play where [the vessels] *are not taxed in the same manner as the other property of the citizens*." *Wheeling*, 99 U.S. at 284 (emphasis added).[3]

As we explain in the petition (at 11-13), this nondiscrimination requirement is an essential element of the Tonnage Clause exception for *ad valorem* property taxes. Otherwise, coastal States could tax "the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) through discriminatory property taxes directed only at vessels. Indeed, under Valdez's view, there is no reason why the City could not tax *only* vessels visiting the

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state commerce, and specifically in the export of goods through Valdez, to subsidize general local expenditures.

[3] Valdez reads the Court's statement in *Wheeling* to mean that *any* tax on a vessel comports with the Tonnage Clause so long as it is based on valuation of the vessel, even if other, comparable property is untaxed. Opp. 12. But that, of course, is *not* what the Court said in the quoted passage, and it is not what it said in the many other passages of the *Wheeling* opinion that repeated the nondiscrimination requirement. See, *e.g.*, 99 U.S. at 282 (State may tax a vessel "the same * * * as other property"); *ibid*. (vessel may be taxed "upon a valuation as for other personal property")' *id.* at 283 (vessel "may be taxed like other property"); *id*. at 284 (vessel taxed "upon a valuation as in respect to all other personal property"). In fact, the City *acknowledges* (Opp. 13 n.4) that *Wheeling* stated a rule of nondiscrimination, but blithely asserts that the Court "inadvertently" misstated the rule by misreading an 1877 treatise. As noted above, the City's broad contention is inconsistent with the rest of the *Wheeling* opinion. But if this Court in fact got something wrong in one of its decisions, the correction should be made by the Court and not by the City of Valdez.

Port of Valdez, forcing them to shoulder the entire annual tax burden for the municipality. But the Tonnage Clause was intended to prevent coastal States from benefiting from their location at the expense of the other States, a matter of considerable importance to the Framers of the Constitution. See Pet. 8-10. Valdez's interpretation of the Clause takes no account of this purpose or the historical basis for the Clause's inclusion in the Constitution.

As we explain in the petition, in like circumstances, where this Court has considered the complementary Import-Export Clause, it has relied upon the same nondiscrimination principle. See *Michelin Tire*, 423 U.S. at 288 n.7. Valdez attempts to minimize the discussion in *Michelin Tire* as "a footnote of dicta." Opp. 13-14. But the nondiscrimination principle in *Michelin Tire* is an essential part of the holding of that case (see Pet. 12 & n.2), and this Court has subsequently characterized *Michelin Tire* as concerning "nondiscriminatory ad valorem taxes." *United States* v. *IBM Corp.*, 517 U.S. 843, 853 (1996).[4] The City also asserts that the Import-Export Clause has no bearing here because that Clause "prohibits taxing imports as such" while "the Tonnage Clause prohibits only a certain kind of fee." Opp. 14. But the holding of *Michelin Tire* itself proves that only certain kinds of taxes on imports are

[4] Valdez complains that *Michelin Tire* was not cited in briefs before the Alaska Supreme Court. But the Tonnage Clause issue was briefed before and decided by that court, where petitioners argued that the vessel tax is impermissibly discriminatory. Under such circumstances, there is no obstacle to this Court's consideration of any precedent bearing on the issue. Cf. *Braniff Airways* v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590, 598-599 (1954).

unconstitutional, just as only certain types of taxes on vessels are improper. The key point is that an identical nondiscrimination rule applies under each Clause to differentiate taxes that are permissible from those that are not.[5]

In short, there would be no meaningful purpose served by the Tonnage Clause if it did not guard against taxes targeted against interstate trading vessels in circumstances like those here. Valdez cites no decision of any court upholding such a discriminatory tax and does not deny, as we showed in the petition (at 16-17 & n.4), that the decisions relied upon by the Alaska Supreme Court are inapposite because they involved challenges to generally applicable property taxes that did *not* discriminate against vessels. Here, Valdez imposes a discriminatory tax against vessels to subsidize its taxpayers. Because Valdez did not first seek the consent of Congress, its levy is unconstitutional.

B. The Valdez Vessel Tax Violates The Commerce Clause And The Fourteenth Amendment's Due Process Clause.

As we showed in the petition, the formula used by Valdez to apportion its tax also runs afoul of the Commerce Clause and the Fourteenth Amendment's Due Process Clause because it (1) allows Valdez to tax vessels for periods when they are on the high

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[5] Chief Justice Marshall explained that "[a] duty of tonnage is as much a tax as a duty on imports or exports; and the same reason which induced the prohibition of those taxes, extends to this also." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824). That observation belies Valdez's suggestion (Opp. 14) that the Tonnage Clause fundamentally differs from the Import-Export Clause.

seas and outside the City's jurisdiction; and (2) subjects those vessels to the danger of duplicative taxation if their domicile chooses to tax them for the same periods. Pet. 18-29. The City recognizes that its tax has this effect. It states that apportioning the tax according to the portion of the year that vessels actually are in Valdez "would permit the City to collect about half" of the tax it actually collects (Opp. 15) – which means that it is now collecting *twice as much* as it should. And it acknowledges that its tax would be duplicated if petitioners' domicile taxed the vessels for the time that they spend on the high seas. *Id.* at 21. Whether these features render the tax unconstitutional is hardly a "factbound" question, as the City asserts (*id.* at 16); it is a pure, important, and potentially recurring issue of law. Yet the City's defense of its tax is fundamentally flawed.

First, the City asserts that it taxes only its fair share of the vessels' value because its apportionment percentage (approximately 25%) corresponds to the percentage of the total "time in port" that the vessels spent "in the City's port." Opp. 18. But this argument begs the question whether the appropriate denominator is the time the vessels spend *in port* or the time that the vessels spend *anywhere*. See Pet. 28. Valdez does not address why the port-time denominator is appropriate; instead, it lists services provided to ships—such as emergency services, docking facilities, a hospital, roads, and a post office. Opp. 18. Notably, these services share one thing in common: they are *not* used by vessels when they are on the high seas. The City also tries to justify its tax by arguing that its services "account[] for at least one-quarter of [the] vessels' * * * functionality and profitability." *Ibid.* But that certainly is not true. The vessels' "functionality and profitability" derives from

their transportation of oil from one place to another, and much of that occurs on the high seas.

Second, we showed in the petition (at 20-21) that, under *Central Railroad Co. of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607 (1962), and related decisions of this Court, the domicile State may tax the value of moving property for *all* the time that the property has no tax situs, while other States may tax that property for the period actually spent in those other States. The City denies that this is so (Opp. 18-19), but it is wrong. This Court held expressly in *Central Railroad* that the value of the rail cars at issue in that case "could not constitutionally be included in the computation of th[e] [domicile State's] tax" for the period when they were actually subject to another State's tax jurisdiction (*id.* at 614), but that the domicile State "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 (emphasis added). Although the City asserts (Opp. 18-19) – without explanation – that the Court in *Central Railroad* did not address the domicile State's authority to tax property for periods of the year when the property has no tax situs if that property also acquired tax situs for part of the year in another State, that in fact is *exactly* what *Central Railroad* held in the passage quoted above.

Under this principle, the domicile State is entitled to tax property for periods when the property has no tax situs, and other States are not. The Valdez tax plainly is inconsistent with this rule, subjecting petitioner's vessels to the danger of duplicative taxation and asserting the City's power to tax over values with which it has no substantial connection.

As we explained in the petition (at 19-20, 21-22), the Valdez apportionment formula also is in obvious tension with the unchallenged understanding that the domicile State provides unique opportunities, benefits, and protections to the property owner, and to the corresponding rule that allows the domicile State to tax the *entire* value of property for periods when that property lies outside the domicile State, so long as the property has acquired no other tax situs. At that point, the domicile relinquishes its taxing authority *only* to the extent that the property is physically present in a non-domicile tax situs. The City entirely fails to address this point.[6]

Third, the City fundamentally misunderstands the due process apportionment requirement when it asserts (Opp. 20-21) that it is not taxing extraterritorial values because it has contact with petitioner's vessels. The City appears to believe that the constitutional proscription against extraterritorial taxation applies only when the taxpayer has no contact with the jurisdiction at all, or at least insufficient contact to establish a tax situs. See *id.* at 20. But if that were so, apportionment would never be necessary, at least as a matter of due process; so long as a State had jurisdiction to tax, there would be no limit on the values subject to tax. That, of course, is not the rule. Instead, when values subject to tax (whether income

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[6] *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949), and *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891), cited by the City at Opp. 19-20, addressed circumstances where taxation of movable property was apportioned by comparing miles traveled in the taxing state to all miles traveled everywhere – a formula that corresponds to what we are seeking here (that is, comparing days in Valdez with all days in the year).

or property) are generated by activity in more than one State, apportionment determines the portion of those values that are fairly attributable to the taxing State and thus that may be taxed by it. See Pet. 18-19, 26-27. And taxing property for time spent on the high seas surely does not "appropriately ascertain[]" the value of "tangible assets permanently or habitually employed in the taxing State." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968).

Fourth, for this apportionment analysis, it makes no difference whether the domicile of the vessels in fact exercises its right to tax them. Instead, a taxing jurisdiction "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." *Central Railroad*, 370 U.S. at 614 (emphasis in original). Thus, contrary to the City's contention (Br. in Opp. 21), petitioner's claim is currently ripe and the constitutional harm is squarely presented. Valdez contends that the savings clause in its tax ordinance could operate to prevent actual instances of multiple taxation by giving petitioner an opportunity to seek use of a different apportionment formula in the event of actual multiple taxation. Whether another tax situs actually exercises its power to tax the vessels, however, is constitutionally immaterial.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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