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

BRIEF IN OPPOSITION

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Debra J. Fitzgerald
William M. Walker
Counsel of Record
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. Petitioner's Tonnage Claim Does Not Merit Review 7

A. Property Taxes On Vessels Do Not Violate The Tonnage Clause. 7

B. There Is Nothing About The City's Tax That Warrants Adopting A New Rule That Property Taxes Can Violate The Tonnage Clause 10

II. Petitioner's Commerce And Due Process Clause Argument Does Not Merit Review .. 15

A. The City Taxes Only Its Fair Share Of The Value Of Petitioner's Vessels. 16

B. The Tax Resolution's Savings Clause Renders Petitioner's Double Taxation Argument Purely Hypothetical 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 21

Asarco Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) 20

Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232 (1890) 11

Braniff Airways v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 12

Cent. R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962) 16, 17, 18, 19

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 8, 11, 14

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 15

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 17

Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 14

Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980) 8

Goldberg v. Sweet, 488 U.S. 252 (1989) 17

Huse v. Glover, 119 U.S. 543 (1886) 7, 14

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 17

MeadWestvaco Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498 (2008) 20

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 12, 13, 14

Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803 (2003) 21

New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist., 690 F. Supp. 1515 (E.D. La. 1988) 14

Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317 (1968) 16, 17, 18

Ott v. Miss. Valley Barge Line Co., 336 U.S. 169 (1949) 17, 20

Packet Co. v. Catlettsburg, 105 U.S. 559 (1881) 14

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) 19

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 11

Smith v. Turner, 48 U.S. (7 How.) 283 (1849) 8

Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 17

Transp. Co. v. Wheeling, 99 U.S. 273 (1878) .. 8, 12, 13

Constitutional Provisions

U.S. Const. art. I, § 10, cl. 3 7

Statutes

Alaska Stat. § 29.45.050(b)(2) 4

Alaska Stat. § 29.45.070 11

Alaska Stat. § 29.45.080 ..... 3, 11

Alaska Stat. § 43.56.010 ..... 3, 11

Valdez Municipal Code § 3.12.010 ..... 3, 4

Valdez Municipal Code § 3.12.020 ..... 3, 4

Valdez Municipal Code § 3.12.022 4

Valdez Municipal Code § 3.28.010 ..... 4, 11

Valdez Municipal Code § 3.28.020 ..... 4, 11
Valdez Municipal Code § 3.12.020(A)(1) 4
Valdez Municipal Code § 3.12.070(A) 8

Other authority

Burroughs, W.H., *A Treatise on the Law of Taxation* (1877) 12
City of Valdez, Draft Budget (2009), *available at* www.ci.valdez.ak.us/documents/2009DraftBudgetCouncilReview.pdf 9

STATEMENT OF THE CASE

1. The City of Valdez is a municipality of about 4500 people situated on Prince William Sound, Alaska. The southern terminus of the Trans-Alaska Pipeline System (TAPS) and Port Valdez are within City limits. Due to its location, the City has a substantial and continuous relationship with oil tankers and related vessels. Through subsidiary shipping companies, the five oil companies that collectively operate TAPS – Exxon Mobil, British Petroleum, ConocoPhillips, Koch Industries, and Unocal (now Chevron) – load hundreds of millions of barrels of crude oil each year at Port Valdez, and then transport the oil to various West Coast refineries.

The oil shippers' activities impact the City in significant ways. The regular presence of oil shipping vessels places an average of an extra 550 people within the City each year. Dft's Alaska S. Ct. Reply Br. 2. This represents a more than ten percent increase in the City's total population. As oil company executives have acknowledged (Exc. 441), oil company employees enjoy the benefits and services that the City provides its residents, including use of roads, publicly financed healthcare providers, and hospitals and emergency facilities. Dft's Alaska S. Ct. Br. 19-20. Oil companies also use the municipal airport to facilitate crew changes, where crew members of vessels switch out before vessels depart Port Valdez. Exc. 477.

The continuous presence of oil tankers also requires the City to expend resources specifically aimed at facilitating the commerce in which the tankers are engaged and responding to their

environmental impacts. For example, the City provides docking facilities for oil tankers to use when being repaired, or when there is not enough room in the TAPS Terminal. The City also assists in maintaining the flow of marine traffic by advertising and posting notices directed at clearing out non-tanker traffic. Dft's Alaska S. Ct. Br. 18-19.

The most serious environmental event occasioned by the tankers occurred in 1989. In March of that year, the *Exxon Valdez* ran aground on a reef in Prince William Sound, just twenty miles outside of the City. The vessel spilled eleven million gallons of toxic crude oil, coating parts of the shoreline of Prince William Sound and the Gulf of Alaska. During the ensuing three years, thousands and then hundreds of clean-up workers inhabited the City. These workers stayed on a vessel docked at a City-owned facility and consumed City resources. Their presence stressed landfill and sewage ponds beyond existing capacities; City administration officials held staff meetings twice daily to coordinate the workers' clean-up efforts; and City employees were diverted from their regular jobs to attend to clean-up duties. Dft's Alaska S. Ct. Br. 21 & n.41.

In response to the *Exxon Valdez* disaster, the City adopted a number of new emergency response measures. The City now allows the oil shipping companies to use its Civic Center for emergencies and emergency preparedness purposes. Dft's Alaska S. Ct. Br. 20 n.37. It coordinates with oil shippers, including petitioner, in holding periodic "oil spill drills" at the City's Civic Center, diverting its law enforcement and managerial personnel to participate in the drills. The City also makes its police,

firefighters, emergency response teams, and medical resources available to oil shippers in the event of oil spills. *Id.* at 20 & n.37.

Finally, the City has stepped up its national security services in the wake of the terrorism attacks of September 11, 2001, to protect the pipeline and the Port. In collaboration with the federal government, the City has installed and operates an infrared surveillance system. Expanded "security zones" in Port Valdez limit residents' free enjoyment of their natural resources. In December 2003, pursuant to a national "Code Orange" alert, Port Valdez was shut down, and the City's law enforcement personnel guarded vessels on rotating twelve-hour security shifts, diverting them from other tasks. Dft's Alaska S. Ct. Br. 18-19 n.34.

2. Like countless other municipalities across the country, the City assesses an ad valorem property tax on certain property within its jurisdiction. The City applies a single mill rate (twenty mills or two percent) to all property it taxes, including mobile homes, trailers, recreational vehicles, oil and gas production and pipeline property,[1] and (as elaborated below) certain vessels. *See* Valdez Municipal Code

---

[1] In the trial court, the Valdez City manager stated, using imprecise language, that oil and gas property within Valdez's city limits is "taxed by the State of Alaska under [Alaska Statute] 43.56 and subsequently shared with the City." Exh. A to Dft's Mem. in Support of Summary Judgment. In fact, the City levies and collects this tax and then the State gives the taxpayer a credit towards its taxation of the same property. *See* Alaska Stat. §§ 29.45.080, 43.56.010; Valdez Municipal Code §§ 3.28.010-.020.

§§ 3.12.010-.022, 3.28.010-.020; Pet. App. 45a-47a; Dft's Alaska S. Ct. Reply Br. 36. The City uses revenue generated from the tax to pay for the various municipal services it provides, including the community hospital, sewage systems, utilities, roads, municipal airport, law enforcement services, and emergency response systems.

For over two decades, the City provided all of the benefits listed above at no cost to oil shipping companies. But in 1999, the City extended its property tax to cover oil tankers and certain other non-oil-shipping vessels over ninety-five feet in length.[2] The 1999 ordinance instructed the City Assessor to "allocate to the City the portion of the total market value of [each covered vessel] that *fairly reflects its use in the City.*" Pet. App. 46a (emphasis added). In a subsequent resolution, the City approved the City Assessor's default formula of taxation, which apportions value according to the number of days spent in Port Valdez divided by the number of days in all ports, or tax situses. *Id.* at 55a. The Resolution further provides that a taxpayer may petition the City for a different apportionment formula if it feels the apportionment method "does not reasonably represent the portion of the total value of the vessel that should be" attributed to the

---

[2] The tax exempts vessels used "primarily in some aspect of commercial fishing" and vessels that dock at the Valdez Container Terminal. (The latter already are subject to a separate municipal dockage charge. Valdez Municipal Code § 3.12.020(A)(1)). A state statute allows cities to exempt "some or all types of personal property from ad valorem taxes." Alaska Stat. § 29.45.050(b)(2).

City as a tax situs. *Id.* at 56a. The ordinance took effect in 2000. *Id.* That year, tax revenue from vessels constituted less than eleven percent of the City's tax revenue.

3. Petitioner Polar Tankers, Inc., is the oil shipping company that ConocoPhillips owns for purposes of transporting TAPS oil to ports in Hawaii, Washington, and California. Polar's principal place of business during the tax years in question was California. Pet. for Cert. 4.

The City is the only tax situs that imposes a property tax upon petitioner's vessels that call at Port Valdez. Exc. 385; Dft's Alaska S. Ct. Br. 9. Under the City's apportionment formula, petitioner paid taxes from 2000 to 2004 on only about twenty-six percent of its vessels' value. Dft's Alaska S. Ct. Reply Br. 5. During those years, that amounted to between $400,000 and $1.7 million annually. Pet. App. 5a.

4. Unhappy with this system, petitioner sued the City, challenging the constitutionality of its property tax for the tax years 2000 to 2004. Petitioner argued, among other things, that the property tax was an unconstitutional duty of tonnage because it effectively charged for the privilege of entering and using the City's port. Petitioner also claimed that the tax violated the Due Process and Commerce Clauses because the City's apportionment formula allowed it to tax too high a percentage of the oil tankers' value.

The trial court held that the tax violated the Due Process and Commerce Clauses insofar as its apportionment formula created a "risk of multiple taxation." Pet. App. 34a. After further proceedings,

the court found that the tax – to the extent it is fairly apportioned – does not violate the Tonnage Clause because it is "a general revenue tax [that] goes to fund all municipal services" to petitioner's vessels and their personnel. Pet. App. 29a-30a.

The Alaska Supreme Court upheld the property tax in its entirety, reversing the trial court's Commerce and Due Process Clause ruling and affirming its Tonnage Clause ruling. *See* Pet. App. 1a-22a. The Alaska Supreme Court first determined that the City's tax easily satisfied this Court's Commerce Clause jurisprudence. As is most relevant here, the court held that the tax is "fairly apportioned" in that it does not impinge on any other situs's right to tax the vessels. Pet. App. 10a-15a. With respect to the Tonnage Clause, the Alaska Supreme Court recognized that a fairly apportioned property tax is not a duty of tonnage. *Id.* at 18a. Because petitioner's vessels were "taxed based on their value," consistent with a typical property tax, the court held that this Court's precedents "necessarily" dictated that the Tonnage Clause was not violated. *Id.*

REASONS FOR DENYING THE WRIT

There is no need for this Court to review the modest municipal property tax at issue in this case. Petitioner concedes that there is no "square conflict in the lower courts about the constitutionality" of a property tax similar to the City's. Pet. for Cert. 31. In fact, and in more plain terms, petitioner is unable to cite a single court that has ever held that a property tax assessed against vessels violates the Constitution. Nor does the tax present a question of

national importance. It is an unremarkable property tax issued by a single municipality. Petitioner paid well under $2 million in the tax years at issue on vessels worth hundreds of millions of dollars, carrying cargo worth billions of dollars. These are reasons alone to deny review.

Petitioner nonetheless argues that certiorari is warranted because the Alaska Supreme Court's decision upholding the tax is "manifestly inconsistent with this Court's precedents." Pet. for Cert. 7. Petitioner fails to make such a showing. It is well settled that a property tax levied against vessels does not run afoul of the Tonnage Clause. And nothing in this Court's jurisprudence renders the "port day" apportionment method the City uses a violation of the Commerce or Due Process Clause.

I. Petitioner's Tonnage Claim Does Not Merit Review.

The Alaska Supreme Court rejected petitioner's Tonnage Clause argument in an unremarkable ruling that does nothing more than apply long-settled law. This Court has squarely held that property taxes are not duties of tonnage, and there is nothing special about this tax that should subject it to some new kind of constitutional scrutiny.

A. Property Taxes On Vessels Do Not Violate The Tonnage Clause.

The Tonnage Clause prohibits states or municipalities from "laying a duty of tonnage." U.S. Const. art. I, § 10, cl. 3. A duty of tonnage is a fee imposed "upon a vessel, according to its tonnage, *as an instrument of commerce*, for entering or leaving a

port, or navigating the public waters of the country." *Huse v. Glover*, 119 U.S. 543, 549-50 (1886) (emphasis added); *see also Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265 (1935) (duties of tonnage are "levies upon the privilege of access by vessels or goods to the port"). By forbidding states from imposing duties on ships for the use of ports and harbors, the Tonnage Clause prevents states from "taxing vessels [only for] transporting merchandise" without any connection to services the taxing state provides. *Clyde Mallory Lines*, 296 U.S. at 265.

In light of the Tonnage Clause's limited purpose, it is "too well settled to admit of question" that property taxes on vessels do not violate the Clause. *Transp. Co. v. Wheeling*, 99 U.S. 273, 279 (1878). In the course of upholding a property tax used for municipal purposes in *Wheeling*, this Court explained that states, consistent with the Tonnage Clause, "may tax a ship or other vessel used in commerce the same as other property owned by its citizens." *Id.* at 282 (discussing *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849)).

As the Alaska Supreme Court recognized, the tax at issue, in both label and function, is a property tax "based on the[] value" of the property at issue – here, vessels. Pet. App. 18a. The City assesses all taxable property, including vessels, at its "true and full" market value. Valdez Municipal Code § 3.12.070(A). The City tax code further mandates that "all assessments [] be uniform and equal and based upon the actual value of the property assessed." *Id.*

As with other property taxes, the City uses the revenue obtained through the property tax – about eleven percent of which came from vessels during

2000 – to fund myriad services offering the "advantages of a civilized society," *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 228 (1980) (citation omitted), to the City's residents and visitors, including petitioner's employees. The property tax revenue enables the City – now, as in the tax years at issue here – to provide police protection, fire protection, a local hospital with ambulance services, a municipal airport, construction and maintenance of roads and transportation facilities, a post office, sanitation and refuse disposal facilities, and maintenance of other city infrastructure. Dft's Alaska S. Ct. Br. app. A; City of Valdez, Draft Budget (2009), *available at* www.ci.valdez.ak.us/documents/2009DraftBudgetCouncilReview.pdf. In addition, the City maintains a school district, community college, animal control department, library, local parks and recreation facilities, and supports various community service organizations, such as the Valdez Arts Council, Valdez Senior Citizens, and the Valdez Museum. City of Valdez, Draft Budget (2009).

As the terminus of the Trans-Alaska Pipeline, the City also provides services specifically to petitioner to facilitate the transport of hundreds of millions of barrels of crude oil leaving Alaska each year. The City allows petitioner to use its municipal airport to facilitate crew changes. Exc. 477. When vessels need divers to repair leaks, both personnel and supplies travel through the municipal airport. Dft's Alaska S. Ct. Br. 19 n.36. And through advertising and notices, the City maintains an orderly flow of marine traffic. *Id.* at 19.

The City uses the revenue it obtains from its property tax to plan for and respond to

environmental impacts of the presence of the oil shippers. The City coordinates emergency "oil spill drills" with petitioner and other oil shippers at the Civic Center. Dft's Alaska S. Ct. Br. 20 & n.37. These drills require the participation of the City Manager and police personnel. *Id.* at 20. Police, firefighters, emergency response teams, and medical resources are all made available to petitioner in the event of an oil spill. *Id.*

Finally, in the wake of the attacks of September 11, 2001, the City expends significant resources to secure and protect its Port. The City has installed and operates an infrared surveillance system for the port. The City also supports the federal government's doubled Coast Guard presence. Under a national "Code Orange" alert in December 2003, the federal government ordered Port Valdez to shut down, and the City's law enforcement officers worked to protect the port in rotating twelve-hour shifts. Dft's Alaska S. Ct. Br. 18-19 n.34.

B. There Is Nothing About The City's Tax That Warrants Adopting A New Rule That Property Taxes Can Violate The Tonnage Clause.

Notwithstanding the settled principle that municipalities may impose property taxes on vessels, petitioner contends that the City's property tax violates the Tonnage Clause because "it is uniquely imposed on vessels that dock in Valdez." Pet. for Cert. 14. This is incorrect. The City imposes a property tax at the same rate upon other property within its jurisdiction. But even if this Court were to

find that the City did single out vessels for this tax, that would not violate the Tonnage Clause.

1. The City's property tax applies not just to vessels but to numerous other kinds of property. The City taxes, among other things, certain private residences, trailers and mobile homes, and "lean-to and similar structures attached or contiguous thereto." Pet. App. 47a. It also taxes "oil and gas production and pipeline property" located within its jurisdiction, including vehicles, aircrafts, barges, and other chattel. Valdez Municipal Code §§ 3.28.010-.020; *see also* Alaska Stat. §§ 29.45.080, 43.56.010 (defining and granting municipalities authority to tax such property). And the City taxes all of these items at the same mill rate. Pet. App. 20a.

To be sure, the City (following state law) denominates these other pieces of property as "real property" or "Alaska Statutes Chapter 43.56 property." Pet. App. 47a; *see also* Alaska Stat. § 29.45.070. But as petitioner itself recognizes, "'the formal language of [a] tax statute'" is not important; what matters is "'its practical effect.'" Pet. for Cert. 14 n.3 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992)); *accord Clyde Mallory*, 296 U.S. at 265-66. The practical effect of the City's property tax regime is to tax various different kinds of similar property. The fact that it taxes vessels under a different statutory provision than other property

such as mobile homes and oil transportation vehicles is irrelevant.[3]

2. In any event, petitioner is incorrect that this Court's decisions in *Wheeling* and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), establish a "nondiscrimination principle" under which the city must tax property other than vessels in order to tax vessels. Pet. for Cert. 12. Neither decision does so.

In *Wheeling*, a city levied a tax on certain property within its jurisdiction, including plaintiffs' steamboats. Plaintiffs argued that the tax was an unconstitutional duty of tonnage insofar as it applied to ships because ships "are not subject to [s]tate taxation in any form." *Wheeling*, 99 U.S. at 285. The Court unequivocally rejected that argument, holding that taxes levied on vessels "as property based on a valuation of the same as property . . . are not within the prohibition of the Constitution." *Id.* at 279. In other words, this Court held that cities may impose taxes on vessels in the "same [manner] as in the case of other personal property." *Id.* at 285. This Court never suggested that a city had to tax non-vessel property in order to tax vessels.[4]

---

[3] It does not matter that the City also exempts certain property from its property tax. It is perfectly constitutional to exempt categories of property from taxation. *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Indeed, this Court has upheld taxes rife with exemptions without ever suggesting that exemptions might offend the Constitution. *See, e.g., Braniff Airways v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 592-93 (1954).

[4] The *Wheeling* Court cited W.H. Burroughs' treatise on taxation as support for the proposition that a property tax on

Nor did this Court establish any such rule in *Michelin Tire*. In that case, a city imposed a property tax on business merchandise, including the plaintiff's inventory of imported tires. *Michelin Tire*, 423 U.S. at 278-79. The plaintiff complained that the tax on the goods violated the Import-Export Clause. *Id.* at 279. The Court rejected the claim, holding that generally applicable property taxes do not violate the Import-Export Clause because they do not "severely hamper commerce or constitute a form of tribute by seaboard States to the disadvantage of other [s]tates." *Id.* at 286. "There is no reason," this Court continued, "why local taxpayers should subsidize the services used by the [shipper]; ultimate consumers should pay for such services as police and fire protection accorded the goods." *Id.* at 289.

Petitioner never cited *Michelin Tire* to the Alaska Supreme Court. Nor did it even argue that cases interpreting the Import-Export Clause bore on how to interpret the Tonnage Clause. *See* Pltf's Alaska S. Ct. Br. 9-16. Petitioner nonetheless insists now that a footnote of dicta in *Michelin Tire*

---

vessels does not violate the Tonnage Clause. Burroughs' treatise states: "The prohibition only comes into play where [vessels] are not taxed in the same manner as other property of citizens of the State, *but* where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel." W.H. Burroughs, *A Treatise on the Law of Taxation* § 63, at 91 (1877) (emphasis added). The Court inadvertently changed the "but" to an "or," *Wheeling*, 99 U.S. at 284, but the meaning of the passage is clear: the tonnage inquiry focuses on whether the vessel is taxed as property based on its value, not on whether property besides vessels is taxed.

establishes a "nondiscrimination principle under the Tonnage Clause," under which vessels cannot be singled out for taxation. Pet. for Cert. 12. The footnote says that a hypothetical law taxing the retail sale of imported but not domestic goods would be "invalidated as a discriminatory imposition that was, in fact, an import." *Michelin Tire*, 423 U.S. at 288 n.7.

Even if this Court were inclined to consider this new argument, petitioner's suggestion is unavailing. The footnote deals not with the Tonnage Clause but with the Import-Export Clause. The Import-Export Clause prohibits taxing imports as such. But the Tonnage Clause does not prohibit all taxation of vessels as such. *See Clyde Mallory*, 296 U.S. at 265-67 (holding that a port fee levied exclusively on vessels to fund "services facilitating commerce" is "neither within the historic meaning of the phrase 'duty of tonnage' nor the purpose of the constitutional prohibition"); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881) (same with respect to fee for use of wharf); *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515, 1524 (E.D. La. 1988) (same with respect to port tariff imposed to fund emergency services). Rather, the Tonnage Clause prohibits only a certain kind of fee; a charge "for entering or leaving a port, or navigating the public waters of the country." *Huse*, 119 U.S. at 549-50.

Finally, the main reason for scrutinizing taxes exclusively on imports or exports is to ensure that states do not hamper interstate commerce. *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 753-54 (1978). Since the tax at issue here

applies equally to vessels engaged in interstate and intrastate commerce, there is no risk of such favoring of local interests.

II. Petitioner's Commerce And Due Process Clause Argument Does Not Merit Review.

A tax satisfies the Commerce and Due Process Clauses if it: (1) is imposed upon property with a "substantial nexus with the taxing [s]tate"; (2) is "fairly apportioned"; (3) does "not discriminate against interstate commerce"; and (4) is "fairly related to the services provided by the [s]tate." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Petitioner does not dispute that the City's tax satisfies the first, third, and fourth components of this test: the vessels have a substantial nexus to the City, thus rendering the City a constitutional tax situs, Pet. App. 8a; the tax applies equally to intrastate and interstate commerce; and it is related to the extensive services the City provides. Pet. App. 16a-17a; *see supra* pp. 1-3. Petitioner argues only that the City's tax fails the second part of the *Complete Auto* test – namely, that the tax "be fairly apportioned." Pet. for Cert. 19 n.5; *see also id.* at 18.

The City uses an apportionment method that taxes the portion of each vessel's value represented by dividing the number of days the vessel spends in Port Valdez by the total number of days it spends in other ports that are tax situses. Petitioner acknowledges that even under its interpretation, the Commerce and Due Process Clauses would permit the City to collect about half of this tax – the amount the City would collect if it divided the number of days

in Port Valdez by 365 instead of the total number of port days. *See* Pltf's Alaska S. Ct. Br. 27. But petitioner claims that the City cannot collect the remainder because this portion of the tax "risks imposing duplicative taxation." Pet. for Cert. 18. While no other jurisdiction taxes the vessels at all and no double taxation would occur if all ports imposed taxes identical to the City's, petitioner asserts that the vessels' domicile could impose a tax using a more aggressive apportionment forumula than the City does. Specifically, petitioner argues that California could have imposed a tax during the years at issue here not only for its fair share of port days but also for *all* days in which the vessels are on the high seas. Pet. for Cert. 20.

As with its Tonnage Clause ruling, the Alaska Supreme Court's rejection of this argument is a factbound holding that is not sufficiently important to warrant this Court's review. Furthermore, nothing in this Court's precedent supports petitioner's argument. And even if a domicile could tax for all of the days that vessels are out of port, Section Two of the Valdez tax resolution, which allows a taxpayer to petition for an adjustment of the apportionment formula, would render petitioner's claim of double taxation – even as a prospective matter – purely speculative and hypothetical, and thus unfit for current consideration.

A. The City Taxes Only Its Fair Share Of The Value Of Petitioner's Vessels.

1. The Commerce Clause requires the value of interstate property to be "apportioned among all jurisdictions in which the property has acquired tax

situs," Pet. for Cert. 19, so that each situs may "tax . . . its fair share of an interstate transportation enterprise." *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968) (citations omitted); *see also Cent. R.R. Co. v. Pennsylvania*, 370 U.S. 607, 614 (1962) (noting that "the [s]tate through which the regular traffic [of an interstate transportation enterprise] flowed could impose a property tax measured by some fair apportioning formula").

In applying this general rule of fairness, this Court has never adopted a "single constitutionally mandated method" for allocating the value of interstate property among various situses. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983)). To the contrary, this Court has recognized that jurisdictions need "considerable latitude" to devise tax schemes that account for the contribution of each situs. *Norfolk & W. Ry. Co.*, 390 U.S. at 324. The only formulae that raise constitutional concerns are those a claimant can demonstrate allow for "multiple taxation" of the same portion of a piece of property. *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *see also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979); *Central Railroad*, 370 U.S. at 612 ("It is only 'multiple taxation of interstate operations' that offends the Commerce Clause.") (quoting *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952)).

2. The Alaska Supreme Court correctly held that the City's tax collects only "that portion of the value [of petitioner's property] that is fairly attributable to activity within [it]." Pet. App. 10a. In 2000, for example, petitioner's vessels spent roughly one-

quarter of their time in port in the City's port. And the City's apportionment imposed taxation based on only approximately one-quarter of the vessels' value. Dft's Alaska S. Ct. Reply Br. 5. In exchange, the City provided petitioner services that accounted for at least one-quarter of its vessels' "going-concern" – that is, their functionality and profitability. *Norfolk & W. Ry. Co.*, 390 U.S. at 323. The City provided (and continues to provide) emergency services – including allocating City employees to drills and resources to purchase warning systems – needed in the wake of the *Exxon Valdez* oil spill and for security purposes. Dft's Alaska S. Ct. Br. 18 & n.34, 20. The City also maintains petitioner's ability to access Port Valdez, directing traffic away from tanker lanes and building and maintaining docking facilities for vessel repair. *Id.* at 18, 19 n.36. Moreover, petitioner's employees have access to and use of the City's hospitals, roads, post office, airport, waste systems, and utilities. *Id.* at 19-21. Finally, petitioner and its crews rely on all of these resources and services in order to make their interstate transportation enterprise profitable and sustain themselves in between ports. *See* Pet. for Cert. 4 (noting that petitioner loads all of its oil at Port Valdez).

3. Contrary to petitioner's objection, nothing about this analysis either runs afoul of this Court's holding in *Central Railroad* or allows the City to tax in an "extraterritorial" manner.

a. This Court did not hold in *Central Railroad* – as petitioner would have it – that "a non-domicile [s]tate 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." Pet. for Cert. 21. Rather, *Central Railroad* considered whether a domicile could tax the claimant's property, railcars, "despite the fact that a considerable number of such cars spend a substantial portion of the tax year . . . outside the [s]tate." 370 U.S. at 608. The Court answered that the domicile could tax this property, *as long as "the facts in the record disclose [no] possible tax situs in some other jurisdiction."* *Id.* at 614 (emphasis added). This Court did not define the "domicile [s]tate's authority [to tax] in a case where another jurisdiction also ha[s] acquired tax situs regarding the property," as is the case here. Pet. for Cert. 21.[5]

Indeed, in the section of *Central Railroad* in which this Court considered the domicile state's tax on property that *had* acquired a tax situs in another state, this Court reiterated the right of the non-domicile situs to impose "an *apportioned* ad valorem tax." *Central Railroad*, 370 U.S. at 613. While again refraining from providing a formula to apportion property among situses, this Court held that "any domiciliary ad valorem tax" that interferes with a non-domicile situs's claim of taxation would be "render[ed] unconstitutional." *Id.* at 614.

What is more, in *Pullman's Palace Car Co. v. Pennsylvania*, this Court held that it *was* a "just and equitable method of assessment" for a non-domicile

---

[5] None of the lower court cases petitioner cites, *see* Pet. for Cert. 25-26, adopts any rigid formula governing this circumstance either, much less invalidates a tax similar to the City's.

situs to tax railroad cars according to the miles traveled in that state. 141 U.S. 18, 26 (1891). This formula would have allowed the domicile state (and all other situses) to tax the cars according to the number of miles traveled there. This Court upheld a similar taxation formula in *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949). Nothing in these opinions suggested that a domicile state could charge for more than its relative contribution measured by miles traveled in the domicile state.

Nor should that be the case here. Petitioner's vessels were domiciled during the tax years at issue in California. Under the City's apportionment formula, that domicile was fully entitled to tax the vessels in exactly the same manner as the City, without risking duplicative taxation. This Court has never held that the Constitution requires anything more.

b. Nor does the City's tax allow it to "to tax values that have no connection to Valdez." Pet. for Cert. 26. A jurisdiction improperly imposes an "extraterritorial" tax when it taxes value that is in no way "generated by the intrastate and extrastate activities of a multistate enterprise." *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008); *see also Asarco Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 334 (1982) (O'Connor, J., dissenting) ("The constitutionality of a state tax levied on extraterritorial business operations thus turns on whether the out-of-state business activity can be characterized as a separate business with no in-state contacts or whether instead it is a part of a unitary enterprise doing business in the State."). Because petitioner's vessels use the City's port to

load all of their oil, the value generated through the vessels' interstate transportation – regardless of whether they are in port or at sea at any given moment – derives in large part from their contacts with the City.

B. The Tax Resolution's Savings Clause Renders Petitioner's Double Taxation Argument Purely Hypothetical.

Even if petitioner's Commerce and Due Process Clause challenge to the City's "port day" formula had some merit, the tax resolution's savings clause would sap the challenge of any practical importance. Section Two of the City's tax resolution allows any shipowner that believes its tax "does not reasonably represent the portion of the total value of the vessel that should be apportioned to the [City] . . . [to petition for] the use of another apportionment formula." Pet. App. 56a. Consequently, if petitioner's domicile ever were to assess a tax against its vessels that actually subjected it to double taxation, Section Two would allow petitioner to ask the City to reapportion the tax and would allow the City to act accordingly. Even if the existence of this Section Two procedure does not render this dispute entirely "abstract" and thus jurisdictionally unripe, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)), it surely counsels putting off any review of the City's tax at least until the constitutional harm that the "double taxation" doctrine is designed to prevent actually occurs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Debra J. Fitzgerald
William M. Walker
Counsel of Record
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

November 10, 2008