No.

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

QUESTIONS PRESENTED

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

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

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

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

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

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

STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

lished. The provision was inserted into the Constitution

> to supplement Art. I, § 10, Clause 2 [the Import-Export Clause], denying to the states the power to lay duties on imports or exports * * * by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state * * * . If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.

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

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

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

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

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

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

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

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

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

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

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

423 U.S. at 288 n.7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

must be nondiscriminatory. Further review accordingly is in order.

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

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

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

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

share of an interstate transportation enterprise." *Ibid.* On the other, "the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State," and it has held that States may not "cast their tax burden upon property located beyond their borders." *Id.* at 324, 325.

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

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

[6] The one exception has been oceangoing vessels; the Court has never expressly repudiated the home port doctrine as it applies to such vessels, and therefore has not squarely held that such vessels may be taxed by any jurisdiction other than their State

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

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

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

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of domicile. See *Japan Line*, 441 U.S. at 442 ("In discarding the 'home port' theory for the theory of apportionment, * * * the Court consistently has distinguished the case of oceangoing vessels"); *id.* at 443-444 ("There is no need in this case to decide currently the broad proposition whether mere use of international ports is enough, under the 'home port doctrine,' to render an instrumentality immune from tax in a nondomiciliary State."). In this case, however, petitioner did not contend below that the home port doctrine applies and so does not raise that issue here.

property value *except* to the extent that the taxpayer "prove[s] that the same property may be similarly taxed in another jurisdiction." *Id.* at 613. The Court therefore held that a non-domicile State gets to tax the proportion of the property's value that corresponds to the proportion of the year spent by the property in that jurisdiction, and the domicile state gets to tax the rest.

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

This conclusion follows from the Court's historic treatment of the authority of the property owner's

domicile. The Court has held that property that has no tax situs for a portion of the year should not "escape [property] taxation entirely" for that period. *Central Railroad*, 370 U.S. at 617. This means that taxing authority over such siteless property must either be (1) allocated to the domicile or (2) apportioned proportionately between the domicile and those non-domicile jurisdictions that have acquired tax situs for a portion of the year. As between these two choices, the former is compelled by this Court's decisions. Allowing the domicile to tax for that period accords with the traditional and, so far as we are aware, unchallenged authority of the domicile to tax at full value property that has not acquired *any* actual situs elsewhere. It is an authority premised on the understanding that the domicile provides the property owner unique "'opportunities, benefits, or protection.'" *Id.* at 612 (citation omitted). See *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 297-298 (1944). It follows from that same understanding that the State of domicile possesses authority to tax the *portion* of the property's value that is attributable to time spent outside any tax situs.

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

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

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

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

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

Nothing in *Japan Line* calls into question any aspect of that rule. The case actually was about something very different – whether the same standards that apply to apportionment for *interstate* commerce should apply to *foreign* commerce. The Court concluded in *Japan Line* that it should not "rehabilitate the 'home port doctrine'" to deal with the special issues presented by foreign commerce

(see 441 U.S. at 443), but its solution was not to diminish the taxing power of the domiciliary jurisdiction over either foreign *or* domestic commerce. Instead, *Japan Line rejected* attempts by California to assert *any* taxing authority over the property in question because the property's domicile, Japan, taxed its full value. *Id.* at 451. California in that case occupied the position of Valdez in this one. It therefore would be perverse to read the decision as announcing a new constitutional doctrine eliminating the residual rights of domiciliary States. The Alaska Supreme Court's decision, which read *Japan Line* to do just that, is not supportable: the State of domicile *may* impose a tax on vessels that reaches value also taxed by Valdez, and this danger of duplicative taxation renders the Valdez tax unconstitutional.[8]

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

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

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

3. In addition, and wholly apart from the possibility of duplicative taxation, the apportionment formula used by Valdez is improper because it allows the City to tax values that have no connection to Valdez. It is fundamental that "[t]he Due Process

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

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

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

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

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

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

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

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

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

* * * *

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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