No. 17-904

In the Supreme Court of the United States

County of Loudoun, Virginia,
Petitioner,

v.

Dulles Duty Free, LLC,
Respondent.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the International Municipal Lawyers Association (IMLA) is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law.

This case is of particular concern for local government attorneys across the country who advise their jurisdictions on the ability to impose taxes to fund government services. The Supreme Court should grant Loudoun County's Petition for a Writ of Certiorari (the "Petition") because the ability to impose certain taxes authorized by state law is impaired by the conflicting interpretations by state courts of last resort and federal circuit courts of appeals regarding the Import-Export Clause of the United States Constitution. The issues presented in the Petition do not just concern Duty Free, but rather all goods in transit.

The Import-Export Clause of the United States Constitution states:

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel for all parties received timely notice and consented to the filing of this brief.

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

U.S. Const. art. I, § 10, cl. 2. The questions at issue in this case focus on the Court's seminal decisions in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and the conflict amongst the federal circuit courts and state courts of last resort concerning those decisions. In particular, and as outlined in the Petition, decisions of the Eleventh Circuit, Alaska Supreme Court, and West Virginia Supreme Court of Appeals conflict with decisions of the Fifth Circuit, Ninth Circuit, Texas Supreme Court, the Washington Supreme Court, and now the Virginia Supreme Court on an important question of constitutional law. *See* Petition at 16-22. The prevailing confusion and uncertainty about the relationship of *Richfield Oil* and *Michelin* prevent state and local government attorneys from effectively advising their clients on the limits and the restrictions of the Import-Export Clause.

IMLA members and local governments are concerned with the Virginia Supreme Court's apparent dismissal of *Michelin*. They are also concerned that the decision below deepens the divide among the lower courts and adds further confusion. Municipalities located in jurisdictions that have not yet ruled on this

issue need clarification on the current state of the law. Further, the decision below creates a potential loss in tax revenue. It also encourages litigation, as more businesses may rely on the state court's misapplication to escape lawful taxation. Thus, local government lawyers are left with two equally unpalatable options: 1) they can advise their clients to forego a source of revenue out of fear that a court in their jurisdiction will follow the Virginia Supreme Court's flawed rationale; or 2) they can advise their clients to assess the tax, but face the risk of litigation. IMLA members require this Court's guidance concerning the Import-Export Clause so that members can confidently advise their clients about the lawfulness of their respective taxing schemes.

SUMMARY OF ARGUMENT

For years Loudoun County has lawfully imposed a nondiscriminatory Business, Professional and Occupational License ("BPOL") tax on businesses, including several Duty Free stores in Dulles International Airport. *See* Petition at Appendix ("App.") 24a. The Duty Free stores, in the instant case owned by Dulles Duty Free, sell alcohol, tobacco, fragrances, luxury goods, and other products purchased by persons frequenting the airport. *Id*. at App. 24a-25a. The BPOL tax on retail merchants requires persons "with gross receipts of more than two hundred thousand dollars ($200,000.00)" to pay "an annual license tax of seventeen cents ($0.17) per one hundred dollars ($100.00) of gross receipts." *See id*. at App. 49a (citing Loudoun County Ordinance §§ 840.14, 840.14(o)). The County assessed this tax uniformly on all County businesses, including the gross receipt purchases from

Duty Free stores at Dulles, which included purchases made by international travelers. Petition at 13. Based on this Court's longstanding precedent in *Michelin,* this nondiscriminatory tax is lawful because it does not offend the three policies underlying the Framers' creation of the Import-Export Clause.

The Virginia Supreme Court's ruling, in conflict with the Eleventh Circuit, the Alaska Supreme Court, and the West Virginia Supreme Court of Appeals, casts aside *Michelin* to focus on the outdated ruling in *Richfield.* Although not explicitly overruled by this Court, the *Richfield* test should have no application to the modern day Import-Export Clause analysis.[2] Permitting the conflict among the lower courts to continue would create unwarranted confusion for both states and local governments and impact their taxing power.

The Court should grant the Petition for four reasons: (1) local governments require clarification on the parameters of the Import-Export Clause and in particular, the intersection, if any, between *Richfield* and *Michelin*; (2) the Virginia Supreme Court's ruling implicates federalism issues by unduly restricting states and local governments' taxation power; (3) the Virginia Supreme Court's misapplication of the law could have far-reaching financial implications that negatively impact states and localities; and

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[2] A treatise has concluded that "[T]he weight of reason and authority support the view that nondiscriminatory sales and use taxes may be imposed on goods in import or export transit and that *Richfield* is no longer good law." Walter Hellerstein & John A. Swain, *State Taxation* ¶ 5.05[2][a] (3d ed. 2017).

(4) sustaining the ruling would lead to absurd results because potentially every good purchased by an international passenger in transit, or that is ultimately exported, would escape taxation. The clear split between the federal courts of appeals and state courts of last resort exacerbates the lack of clarity for thousands of local governments outside those jurisdictions. The Petition should be granted.

ARGUMENT

I. Local Governments Need Clarification on the Limits of the Import-Export Clause.

The Court should grant this petition to clarify the conflicting and apparent irreconcilable holdings in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and the ensuing split between the lower courts. *See* Petition at 16-22.[3] In 1946, the *Richfield* Court ruled that oil delivered to a hold of a docked vessel and intended for export could not be taxed because such "delivery marked the commencement of the movement of the oil abroad." 329 U.S. at 71-72, 82-83, 86. Further, the Court held: "The

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[3] Referencing *Auto Cargo, Inc. v. Miami Dade County*, 237 F.3d 1289 (11th Cir. 2001); *Department of Revenue v. Alaska Pulp America, Inc.*, 674 P.2d 268 (Alaska 1983); *United States Steel Mining Co., LLC v. Helton*, 631 S.E.2d 559 (W. Va. 2005), *cert. denied*, 547 U.S. 1179 (2006); *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp*., 900 F.2d 816 (5th Cir. 1990); *Connell Rice & Sugar Co., Inc. v. Yolo County*, 569 F.2d 514, 518 (9th Cir. 1978); *Virginia Indonesia Co. v. Harris County Appraisal District*, 910 S.W.2d 905 (Tex. 1995); *Coast Pac. Trading, Inc. v. State*, 719 P.2d 541, 544 (Wash. 1986).

means of the shipment are unimportant so long as the certainty of the foreign destination is plain." *Id*. at 83.

Nearly 30 years later, in *Michelin*, the Court held that an ad valorem property tax on an "inventory of imported tires and tubes"[4] did not violate the Import-Export Clause. 423 U.S. at 278-279; 302. The Court's analysis hinged on three concerns:

> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited 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.

Id. at 285-86 (footnotes omitted). [Emphasis added.]. As the Court noted in *Department of Revenue of*

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[4] "[W]ith the exception of certain passenger tubes that had been removed from the original shipping cartons." *Id*. at 278.

Washington v. Association of Washington Stevedoring Cos.:

> *Michelin* initiated a different approach to Import-Export Clause cases . . . it analyzed the nature of the tax to determine whether it was an 'Impost or Duty.' Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause . . .

435 U.S. 734, 752 (1978) (citation omitted). In *Stevedoring Cos.*, this Court officially recognized that *Michelin* explicitly changed the Import-Export Clause approach that had been used in the past.[5] Therefore, a current analysis of the Clause should focus on the three policy considerations as held in *Michelin*.

The *Richfield* and *Michelin* approaches are at odds. It is essential that this Court provide clear and consistent direction about the limits of taxation power under the Import-Export Clause. The *Richfield* test presumes that "all taxes on imports and exports and on the importing and exporting processes were banned by the Clause" if "the certainty of the foreign destination is plain." *See Stevedoring*, 435 U.S. at 752; *Richfield*, 329 U.S. at 83. Conversely, the *Michelin* test focuses on whether the tax implicates three policy concerns:

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[5] *Id*. at 752-54 (citations omitted) (In interpreting *Michelin*, the *Stevedoring Cos.* Court noted that as long as a tax did not offend the three policies underlying the Import-Export Clause by "usurp[ing] the Federal Government's authority to regulate foreign relations"; "depriv[ing] the Federal Government of [] revenues to which it was entitled"; or "disturb[ing] harmony among the states," it does not violate the Import-Export Clause.).

(1) the Federal Government's sole power to regulate commercial relations with foreign governments; (2) import revenues "should not be diverted to the States"; and (3) promoting harmony among states. 423 U.S. at 285-86.

Courts have acknowledged the murky area in Import-Export Clause jurisprudence and the need for clarification. In finding *Richfield* controlling precedent, the Virginia Supreme Court also recognized that the Supreme Court may "provide additional guidance."[6] Similarly, in his dissent, Justice Benjamin of the West Virginia Supreme Court stated: "one might understandably hope that the United States Supreme Court would take the opportunity to bring a new clarity to this area of constitutional law in the near future." Petition at 18-19 (citing *Helton*, 631 S.E.2d at 580). This Court should oblige.[7]

If judges are confused by the *Michelin* and *Richfield* approaches, then it is unsurprising that state and local government attorneys are as well. Granting the Petition is extremely important for the numerous localities that have international airports, border

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[6] *See* Petition at App. 22a ("It may be that the Supreme Court will provide additional guidance concerning the applicability of the Import-Export Clause to nondiscriminatory taxes like the BPOL tax that would be imposed upon on export goods in transit. Until then, *Richfield Oil* compels the conclusion . . .").

[7] Implicit in this Court's holding, that only it has the power to overrule its decisions, is the Court's obligation to clarify its jurisprudence when a later decision of this Court suggests an earlier holding is no longer applicable. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

crossings, or any businesses that sell goods in transit. As shown by the state court's broad interpretation of *Richfield*, the County's Petition does not simply concern duty free stores in an international airport in Virginia. Rather, it concerns any goods in transit that may ultimately be exported. This issue affects all transportation areas, as well as taxes based on gross receipts[8] or those based on the value of personal property.[9] Only this Court can restore the law's clarity and ensure uniformity on this important question of federal law.

II. The Virginia Supreme Court's Decision Unlawfully Interferes With the State and Local Governments' Taxation Power and Impedes Their Sovereignty.

The Court should grant the Petition because the lower court's ruling would impose a substantial burden on state and local governments' taxation power. The BPOL tax at issue in this case was authorized by state law. *See* Va. Code § 58.1-3700. Therefore, the lower court's ruling not only attacks local governments' taxation power but also states' rights in authorizing taxes.

Longstanding case law illustrates that a state's taxation power is a fundamental attribute of its sovereignty. *See Department of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994); *see also Gregory v. Ashcroft*,

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[8] The tax at issue in *Richfield* dealt with the "gross receipts of retail sales . . . levied on retailers." *Richfield*, 329 U.S. at 83 (citation omitted).

[9] *See Harris County Appraisal District*, 910 S.W.2d 905 (Tex. 1995).

501 U.S. 452, 461 (1991) ("States retain substantial sovereign powers under our constitutional scheme . . ."). The Court has acknowledged that "the taxation authority of state government . . . [is] central to state sovereignty." *ACF Indus.*, 510 U.S. at 345 (citations omitted). The Court has also stated:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. Chicago, 78 U.S. 108, 110 (1870). The Court's recognition of the importance of state sovereignty indicates that central powers, such as the taxation power, cannot just be stripped away without process.

However, the Virginia Supreme Court did not consider taxation power or the purpose of the Import-Export Clause. Rather, it seemed to rest its entire opinion on the fact that "the Supreme Court has not [explicitly] overruled *Richfield Oil*" even though "it has significantly revised its Import-Export Clause jurisprudence. . ." Petition at App. 19a (citations omitted). The lower court's flawed ruling improperly interfered with the state's authority to legislate on taxes and local governments' imposition of such taxes.

Consequently, the Court should grant the Petition because the state court's decision improperly interferes with states and local governments' taxation power as well as their sovereignty.

III. The Virginia Supreme Court's Decision Has Far Reaching Financial Implications That Affect the National Economy.

The Virginia Supreme Court's decision has far-reaching financial implications across the country.

Respondent alone has close to 100 locations across 19 states and the District of Columbia. *See* Petition at 26, n.13, n.14 (stores located in Arizona, California, District of Columbia, Florida, Georgia, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Mexico, New York, North Dakota, Texas, Utah, Vermont, Virginia, and Washington).[10] The Virginia Supreme Court noted: "International sales represent over ninety percent of Duty Free's Sales." Petition at App. 3a. In Loudoun County alone, between 2009-2013, the export sales exceeded $85 million. Petition at 26 (*citing* App. 3a). The aggregate annual sales from these stores is estimated at $4 billion dollars with that number expected to increase to $5 billion by 2020. *See* Petition at 27 n.15. The tax revenue at issue for Loudoun County alone is over $270,000 simply for tax years 2009-2013.[11]

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[10] Although Duty Free America's site lists two duty free store locations in the District of Columbia, these stores are located in Reagan National Airport, which is situated in Arlington County, Virginia.

[11] *See* Remand Order, *Dulles Duty Free, LLC v. County of Loudoun*, No. 90613, (Nov. 3, 2017). Further, sustaining the Virginia Supreme Court's ruling will force Loudoun County to return tax revenue to a private business instead of putting those funds towards important public use projects that all citizens and businesses in the County enjoy, including Duty Free. These

Further, the Virginia Supreme Court's decision enables any businesses engaged in the sale of goods in transit that are ultimately exported to attempt to escape tax liability. Thus, the issue concerns billions of dollars that could potentially be taxed.

Local government lawyers need clarity in the law to advise their clients as to the validity of these tax schemes. Without such clarity, localities risk losing a source of revenue and/or risk increased litigation. This Hobson's choice greatly interferes with the state's authority to enact legislation on taxes and the local governments' ability to financially provide services for their jurisdictions.

Just a few miles from Loudoun County, Arlington County, Virginia, also imposes a BPOL tax.[12] The tax had been imposed on two Duty Free shops at National Airport until the state court's decision.

But the Petition is not just about Virginia. In Texas, there are 25 Duty Free locations, many of which are

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services include "County roads, and benefits from the protection of County fire and rescue, law enforcement, the court system, and other County services." *See* Petition at App. 3a. However, this loss of over a quarter million dollars would be a drop in the proverbial bucket, compared to the total loss in potential tax revenue in the additional jurisdictions. The localities combined would lose the possibility of millions of dollars that could be used to help their local economies.

[12] *See* Arlington County Code § 11-59 "Every person engaging in any of the following business services shall pay an annual license tax of thirty-five cents ($0.35) for each one hundred dollars ($100.00) of gross receipts from the business during the preceding calendar year."

not located in airports, but border cities.[13] These border cities inevitably have stores that sell goods to international passengers. The Texas Supreme Court has stated"[t]he United States Supreme Court has yet to announce whether the new approach set forth in *Michelin* should be applied to a direct tax on imports or exports in transit." *See* Petition at App. 17a (*citing Harris County Appraisal District,* 910 S.W.2d at 910). The lack of clarity in the law interferes with the ability of local governments as authorized by their state law to tax purchases made by international travelers.[14]

In the wake of this uncertainty, many local government attorneys may advise their clients not to assess a perfectly lawful tax that their jurisdiction could use for much needed services out of fear that their tax scheme will be challenged and potentially struck down.[15]

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[13] *See* Petition at 26 n.13.

[14] To this point, Clayton County, Georgia, advised Amicus that it has duty free shops at Hartsfield-Jackson International Airport, the world's busiest international airport. It has forgone assessing its BPOL tax on these entities, because it has assumed that they are exempt. *See Port Authority of New York and New Jersey* "2016 Annual Airport Traffic Report" 32 (April 28, 2017) (http://www.panynj.gov/airports/pdf-traffic/ATR2016.pdf) (list of the world's busiest airports).

[15] The revised Code of Washington State recognizes the ambiguity faced by legislators in attempting to codify the current law concerning the Import-Export Clause. In RCW 82.04.610 "Exemptions –Import or export commerce," the Notes section states: "Because of the uncertainty regarding the constitutional limitations on the taxation of import and export sales of tangible personal property, the legislature recognizes the need to provide

Accordingly, the Court should grant the Petition because the lower court's decision has far-reaching financial implications that negatively impact states' taxation authority and the taxation revenue for local governments around the country.

IV. Allowing the Virginia Supreme Court's Ruling to Stand Would Lead to Absurd Results.

Notwithstanding the financial implications of the state court's decision, if allowed to stand, this ruling would lead to absurdity concerning taxation of goods purchased by international travelers.

The Virginia Supreme Court focused on *Richfield Oil* without considering the practical effects of removing a locality's right to tax goods and the tax's relationship to the Clause's actual purpose. The lower court stated:

> Under *Richfield Oil*, a tax that falls directly on export goods in transit violates the clause . . . *Richfield Oil* compels the conclusion that the BPOL tax is unconstitutionally applied to Duty Free's international export sales.

Petition at App. 20a-22a. This is particularly problematic because this broad interpretation can be extrapolated to any good in transit. From the

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clarity in the taxation of imports and exports. It is the legislature's intent to provide a statutory tax exemption for the sale of tangible personal property in import or export commerce, which is not dependent on future interpretation of the constitutional limitations on the taxation of imports and exports by the courts. . ." [Emphasis added.].

standpoint of Import-Export Clause analysis, goods sold at Duty Free stores are not materially different than goods sold at other stores in international travel stations. Under the lower court's ruling, a locality would be prohibited from taxing any good if it was purchased for use on an international flight because this would be an unconstitutional tax on export sales. *See id*. at App. 22a.

In 2016, Dulles had close to 7.5 million international passengers.[16] Arguably, every good/item that these passengers purchased at the airport, at a duty free store or not, prior to embarking on an international flight is an export good because they are exporting/taking those goods out of the United States. The approach of the decision below creates confusion concerning the purchase of food and/or liquids that are purchased in a U.S. international port but consumed at the port or in transit.

Examining a few common situations provides a picture of the legal chaos that the Virginia Supreme Court's decision would produce.

For instance, a restaurant in an international airport that provides food to an international passenger to consume on a plane would not have to pay a BPOL tax because such tax would "fall directly on export goods in transit." Petition at App. 20a-21a. However, that same restaurant would be required to pay a BPOL tax for purchases consumed by international

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[16] Metropolitan Washington Airports Authority, *Dulles Air Traffic Statistics: Total Operations, Passengers, Mail, & Freight Activities Calendar Years 1962-2016*, http://www.mwaa.com/about/dulles-air-traffic-statistics (last viewed January 18, 2018).

passengers, prior to boarding their flights. Therefore, in order to properly assess the tax, the restaurant would need to determine: (1) if the passenger had an international flight or domestic flight; and (2) if the international passenger planned to eat the food in the airport or on the plane. This two-step analysis for each passenger is just not practical.

Moreover, if an apparel store sells clothing to an international passenger in transit, such clothing could not be taxed because those goods would be defined as export goods in transit.

Lastly, if a passenger purchases a good from a domestic airport, takes a connecting flight to an international airport where he/she has an international flight, would the original store at the domestic airport have to pay a BPOL tax? Technically, the good would be an international export in transit, and thus that good would escape taxation.

The common thread among the foregoing scenarios is not whether the good is an actual import or export, but simply whether the good is purchased by an international traveler. As such, goods made, sold, stored, consumed/used, and purchased in the United States by international passengers, including citizens, would not be taxed, simply because the passenger at some later point travelled internationally.

This approach does not line up and is a far cry from the Court's ruling in *Michelin*. As the Petition correctly observes:

> Under [the Virginia Supreme Court's] logic, almost any tax for which the calculation depends in part on sales of actually-exported goods would

> violate the Import-Export Clause—depriving state and local governments of revenue used to fund services enjoyed by all taxpayers.

Petition at 33. Instead of concentrating on whether the tax implicates any of the three policy concerns underlying the Import-Export Clause, the lower court takes an extreme approach that rejects the wholesale taxing of goods purchased by international passengers in transit. This method not only defies this Court's jurisprudence, as articulated in *Michelin* and *Stevedoring Cos.,* but negatively impacts localities.

Consequently, the conflict among numerous federal courts of appeals and state courts of last resort will lead to even more confusion for local governments and their ability to tax not only duty free stores, but all stores that sell or export goods to international passengers in transit.

CONCLUSION

For these reasons, and those set forth in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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