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 Writ of Certiorari to
the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Import-Export Clause provides that "No State shall . . . lay any Imposts or Duties on Imports or Exports." U.S. Const. art. I, § 10, cl. 2. Under the plain meaning of this provision, the Supreme Court of Virginia held that the county tax in this case cannot be applied to tax Dulles Duty Free's goods in export transit. After all, in two hundred years this "Court has never upheld a state tax assessed directly on goods in import or export transit." *United States v. IBM*, 517 U.S. 843, 862 (1996). Petitioner asks this Court to change the law so that this case can be the first.

The question presented is whether this Court should obliterate the longstanding bright-line rule that the States may not directly tax goods moving in import or export transit, and instead expand the *Michelin* test—a three-prong policy test fashioned to address taxes *not* on goods in transit.

CORPORATE DISCLOSURE STATEMENT

Respondent Dulles Duty Free, LLC, is a privately held company and no publicly traded company owns any part of it.

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INTRODUCTION

The Import-Export Clause bars state and local governments from "lay[ing] any Imposts or Duties on Imports or Exports." U.S. Const. art. I, § 10, cl. 2. Under this Clause, in two hundred years, this "Court has never upheld a state tax assessed directly on goods in import or export transit." *United States v. IBM*, 517 U.S. 843, 862 (1996).

Here, a county government tried to tax the value of duty free goods undisputedly moving in export transit at Dulles Airport. A unanimous Supreme Court of Virginia refused to allow the tax to be applied to duty-free export sales.

In doing so, the Virginia court followed a seventy-year-old precedent from this Court: *Richfield Oil Corp v. State Board of Equalization*, 329 U.S. 69 (1946). In *Richfield Oil*, the Court held that California could not levy a gross-receipts tax (exactly like the tax here), on the sale of oil being loaded into a ship for export. *Richfield Oil* was precisely on point and correctly followed.

Petitioner, the county government, makes no effort to distinguish *Richfield Oil*. Nor does Petitioner identify any case that overrules it—and none does. Petitioner seeks certiorari because it wants this Court to change the law. This Court should reject that suggestion. Import-Export Clause jurisprudence is not broken and does not need to be fixed.

Petitioner argues that there is a circuit split. The Petition discusses three cases it says conflict with the decision below here. None of those cases were decided within the past decade. None are widely cited. Two of the three are distinguishable on their most key fact—the taxes in those cases did not fall directly on goods in import or export transit. *Cf.* Pet. 27 (admitting that the goods in this case "were clearly 'in transit'"). The last case Petitioner discusses should have been decided on clear alternative grounds and based its holding on a misquote of this Court. These cases pose no jurisprudential problem.

Equally important, the financial scope of this case (and this issue) is small. The total amount of tax in question here is no more than $41,600 per year—in a county with annual revenues of over a billion dollars. Even the exact tax at issue here is constitutional in more than 99 percent of its applications.

Nor is Petitioner obligated by State law to measure its tax in a way that violates the Import-Export Clause. Virginia statutes already permit localities to use "Virginia taxable income," rather than gross receipts, as the tax basis if they so choose. Va. Code § 58.1-3702. Similarly, many other jurisdictions could or already do impose business taxes in ways that no one would contend violate the Import-Export Clause.

At the same time, Dulles Duty Free pays roughly $100,000 per year in *undisputed* state and local taxes. This case is not about whether a certain type of retailer should be exempt from tax. It is about whether a *specific* local tax can be measured a *specific* way against *specific* goods that qualify as exports under a federal duty-free regime.

As this Court recognized seventy years ago, taxes that fall directly on the value of goods moving in export transit violate the Import-Export Clause. *Richfield Oil*, 329 U.S. at 86. The rule was correct generations ago and is still correct today.

This Court should deny the Petition.

STATEMENT OF THE CASE

Dulles Duty Free, LLC, is a duty free retailer operating several shops inside Dulles International Airport. Duty Free's shops are all within the "sterile" area of the airport, inside security. App. 2a. The shops sell alcohol, tobacco, luxury gifts, fragrances, bags, watches, and other products. App. 2a.

The entire duty-free operation is "highly regulated with significant federal oversight primarily through United States Customs and Border Protection." App. 24a. Federal law authorizes Duty Free's shops. 19 U.S.C. § 1555(b)(8)(A). Federal law also defines "duty-free merchandise" as goods "sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory." 19 U.S.C. § 1555(b)(8)(E). To preserve its duty-free status, Duty Free must comply with 19 U.S.C. § 1555 and its implementing regulations. Its goods are kept in bonded warehouses and transported using a "highly regulated, scrutinized, and controlled" process in which U.S. Customs shares custody of the goods. App. 25a.

When Duty Free sells a good to a *domestic* traveler, or anyone who wishes to consume their purchase in the airport, it handles the sale in a normal retail way. App. 2a. The purchaser receives his goods immediately. He pays Virginia sales tax and any necessary federal duty. *Id.* Duty Free has always acknowledged that these sales—outside the export process—are subject to all ordinary taxation. *Id.*

Export sales are handled differently. Travelers must show their passports and boarding passes to Duty Free's cashier. The cashier then accepts payment without charging sales tax and hands the traveler a receipt. App. 3a, 25a–26a. Later, a Duty Free cartman meets the traveler at the departure gate, at the jetway entrance, and hands over the goods immediately as the traveler boards the airplane. *Id.* Under this system, travelers receive their goods *after* the airline clears them to board. 19 U.S.C. § 1555(b)(3)(F)(i)(II). "Duty Free ensures that the items are in fact for export." App. 26a. If the traveler does not board the plane, Duty Free keeps the goods and voids the transaction. App. 3a, 26a.

Petitioner Loudoun County charges a "business, professional, and occupational license," or BPOL, tax, authorized by state law. Va. Code §§ 58.1-3702, -3703. Localities may choose whether to impose BPOL taxes based on gross receipts or on Virginia taxable income. *Id.*

Loudoun County has elected to charge its BPOL tax based on gross receipts. County Code § 840.14(o), § 840.01(k). The tax assesses all retail merchants who have sales over $200,000 per year at a rate of seventeen cents ($0.17) per one hundred dollars of all gross receipts. County Code § 840.14(o); App. 4a. In other words, if the tax applies here, for every $100 bottle of scotch Duty Free exports, it must pay 17 cents in tax to the County. The more it exports, the more it pays.

Duty Free's gross receipts from export sales at Dulles Airport ranged from $13.8 million in 2010 to $20.2 million in 2013. App. 3a. As a result, the County imposed between $25,600 and $41,600 per year in BPOL taxes on Duty Free's export goods. Nov. 3 Order on Remand. During the same period, Duty Free also paid undisputed state and local taxes of around $100,000 per year. S. Ct. of Va. JA 32.

Invoking the Import-Export Clause, Duty Free sought a refund of the annual taxes charged based on the value of its goods sold in export transit. After appropriate administrative appeals, the Loudoun County Circuit Court refused to grant a refund. App. 23a–46a.

The Supreme Court of Virginia reversed, and ordered the refund. App. 22a. The court traced the history of this Court's Import-Export Clause jurisprudence. It observed that this Court had "never upheld a state tax assessed directly on goods in import or export transit." App. 15a–16a (quoting *IBM*, 517 U.S. at 862). Noting that the tax undisputedly fell on exports in transit, the court ruled that the "BPOL tax is indistinguishable from the prohibited gross receipts tax in *Richfield Oil*." App. 20a. The court concluded "on the present facts" that "the bright line *Richfield Oil* test, rather than the policy based *Michelin* test, supplies the rule of decision" here. App. 16a. The court held that the tax could not be applied to Duty Free's gross receipts from its export sales. App. 22a.

REASONS FOR DENYING THE WRIT

I. The Virginia court handled this case exactly right.

Petitioner says this Court should address a "long-open" and "unsettled" question. Pet. 2–3. But it really asks this Court to overrule the most longstanding principle of Import-Export Clause jurisprudence: that the Clause bars taxes directly on goods moving in import or export transit. There is no reason to do this.

The holding below flows from at least a hundred years of Import-Export Clause jurisprudence. It is a unanimous ruling that follows an on-point decision from this Court.

A. The Import-Export Clause has always barred state taxes that fall directly on goods in export transit.

Contrary to Petitioner's assertions, the Import-Export Clause has a coherent jurisprudence. There are two rules—one for taxes directly on goods in transit; another for all other taxes. Thus, *Richfield Oil* and *Michelin* each serve a proper, separate role. *Richfield Oil* represents a categorical ban on taxes that directly fall on goods in transit. *Michelin* created a policy-based analysis to address other taxes that affect imports and exports. When a case presents facts like those in *Richfield Oil*, that case governs. Otherwise, the test announced in *Michelin* applies.

The Petition wrongly suggests that these rules cannot coexist. *Contra* Pet. 2, 3 (referring to "long-open" and "unsettled questions" about *Richfield Oil* and *Michelin*). Petitioner urges that *Richfield Oil* is outdated and would crumble rapidly under this Court's scrutiny. But as this Court has recognized several times, *Richfield Oil* has its place. Import-Export Clause case law is not broken and does not need to be fixed.

First, the Clause—as it has for two hundred years—categorically bars state taxes that fall directly on goods moving in import or export transit.

This rule has a long history. A hundred years ago, in *Crew Levick Co. v. Pennsylvania*, the Court recognized that "imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect . . . an impost or duty upon exports." 245 U.S. 292, 295–96 (1917). *Richfield Oil* later said essentially the same thing: that a tax on the sale price of a good in transit—in that case, oil being sold as it was pumped into the hold of a ship to be taken overseas—was taxing the good-in-transit itself and thus barred by the Clause. 329 U.S. at 83–84 ("a tax on the sale of an article, imported only for sale, is a tax on the article itself") (quoting *Brown v. Maryland*, 25 U.S. 419, 444 (1827) (Marshall, C.J.)).

In the 1990s, this Court referred to the "prohibition on the direct taxation of imports and exports 'in transit,'" as "the rule we followed in *Richfield Oil*." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 77 (1993) (holding that in that case, the tax was not levied on the goods themselves). In *IBM*, the Court stated that its holdings "do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit." 517 U.S. at 861.

This rule also fits the plain meaning of the Import-Export Clause. By its plain terms, "No State shall . . . lay any Imposts or Duties on Imports or Exports" prevents taxation directly on goods moving in import or export transit. *See Itel Containers*, 507 U.S. at 81 (Scalia, J., concurring in part and in judgment) (noting that this *Richfield Oil* rule "has [a] firm basis in a constitutional text"). As even *Michelin* recognized, "the characteristic common to both 'imposts' and 'duties' was that they were exactions directed at imports or commercial activity as such." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 291–92 (1976).

Thus, taxes directly on goods in transit fall into the core of the constitutional text and its plain meaning. "[W]hen the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889). There is no need for a *Michelin*-type inquiry into the policy goals underlying the Clause when its text yields a clear result.

Moreover, within this heartland of Import-Export Clause cases, it is good to have a bright-line rule. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974) (observing that "simplicity has its virtues" under the Import-Export Clause, because both shippers and states need a clear rule about what goods can be taxed and when).

Second, the *Michelin* test plays a different role. It applies to taxes about which the Import-Export Clause is ambiguous—*i.e.*, taxes on goods *no longer* in transit, or on *services* that relate to the export process, such as taxes on stevedores who load ships.

In *Michelin*, the Court faced a challenge to a property tax imposed on warehoused tires previously imported. The tires "were no longer in transit." 423 U.S. at 302. The *Michelin* Court expressed doubt that a tax on goods no longer in transit was an "impost or duty." *Id*. at 291–92. The Court thus held that, in the context of taxes on goods *not* in transit, "Imposts or Duties" was "sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate." *Id*. at 293–94.

Thus, the *Michelin* Court established a test based on "three policy considerations leading to the presence of the Clause." *Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978). That three-part policy test inquires whether the state tax would undercut the federal government's ability to speak with one voice in international commerce; whether the tax would divert import revenue from the federal government to the state; and whether "harmony among the States might be disturbed" by the tax. *Michelin*, 423 U.S. at 285–86.

The *Michelin* policy test is useful to address (and often uphold) taxes at the fringe of the Import-Export Clause—taxes not directly falling on goods in transit, but arguably burdening them or the transit process. After all, it makes sense that a nondiscriminatory tax imposed on stationary, stored, post-import goods is *not* an "impost or duty" on "imports or exports." Likewise, taxing stevedores paid to load and unload ships is not a tax on the goods themselves. *Washington Stevedoring*, 435 U.S. at 757.

For that reason, the Court has applied *Michelin only* to taxes that do not directly fall on goods in transit. *E.g., Washington Stevedoring*, 435 U.S. at 755, 757 (applying *Michelin* after holding that "the tax does not fall on the goods themselves" and was "distinct from the goods and their value"); *Itel Containers*, 507 U.S. at 77 (applying *Michelin* where the tax "is not levied on the containers themselves or on the goods being imported in those containers"). Indeed, the Court has suggested that a tax on "goods in transit [might] be an 'Impost or Duty' even if it offended none of the policies behind the Clause"—that is, regardless of the *Michelin* test. 435 U.S. at 755.

In its most recent occasion to address the Import-Export Clause, this Court stated that "Our holdings in *Michelin* and *Washington Stevedoring* . . . do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit." 517 U.S. at 861. This Court added that "*Michelin* . . . suggested that the Import-Export Clause would invalidate application of a nondiscriminatory property tax to goods still in import or export transit." *Id.* (approvingly citing *Va. Indonesia Co. v. Harris Cnty. Appraisal Dist.*, 910 S.W.2d 905, 915 (Tex. 1995), which had "invalidat[ed] application of a nondiscriminatory ad valorem property tax to goods in export transit"). This Court denied that "our Import-Export Clause jurisprudence now permits a State to impose a nondiscriminatory tax directly on goods in import or export transit." 517 U.S. at 862.

Treatises also address both *Richfield Oil* and *Michelin*, and the proper sphere for each. After tracing the path of the jurisprudence, Professor Tribe recognized that the Import-Export Clause still bars states from levying "even a nondiscriminatory sales tax that applies to sales of goods in transit." Laurence H. Tribe, *American Constitutional Law* § 6-26 at 1165 (3d ed. 2000) (citing *Richfield Oil*). Professor Tribe summarized the case law as "permit[ting] facially nondiscriminatory taxes [under *Michelin*]—on items before or after their movement, but not while in transit." *Id.* at 1163.

In sum, the "peculiar definitional analysis [in] *Michelin*," 517 U.S. at 858, has not, need not, and should not overrun the entire range of the Import-Export Clause. *Richfield Oil* remains sound in rejecting taxes directly on goods in transit.

B. ***Richfield Oil* is on point here.**

Richfield Oil is precisely on point. Petitioner does not try to distinguish it. *See* Pet. 28–33.

Both *Richfield Oil* and this case involved a business privilege tax measured using gross receipts. In *Richfield Oil*, the oil being sold was pumped into a tanker headed overseas. 329 U.S. at 71. Here, the goods being sold are handed to international travelers as they board flights overseas. App. 3a. In both cases, the goods were moving in export transit. 329 U.S. at 82–83 (citing "certainty that the goods are headed to sea" and "certainty of the foreign destination" as proof the export had begun). And in both cases, the gross receipts measure taxed the value of the goods themselves, thus directly taxing those goods. 329 U.S. at 84; *Washington Stevedoring*, 435 U.S. at 756 n.21 (citing *Richfield Oil* and noting that "the Court had always considered a tax on the sale of goods to be a tax on the goods themselves"). The *Richfield Oil* Court struck down California's tax as applied to the oil in that case.

This Court has never overruled *Richfield Oil*. Even Petitioner's amici admit this. *See* Br. of IMLA Amicus at 4; Br. of Tax Professors Amicus at 3 (both admitting that *Richfield Oil* has never been overruled).

During the forty years since *Michelin* and *Washington Stevedoring*, this Court has hardly had occasion to revisit the issue (despite Petitioner's assertions that this is a major and recurring problem). In 1996, the Court rejected an argument premised on expanding *Michelin* to goods in transit. The Court reminded the parties that its "Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit." *IBM*, 517 U.S. at 862.

The Supreme Court of Virginia recognized both that *Richfield Oil* had not been overruled and that it was on point. App. 19a ("the Supreme Court has not overruled *Richfield Oil*"); App. 20a ("The County attempts to distinguish the BPOL tax from the tax the Court invalidated in *Richfield Oil*. We find the

County's arguments unpersuasive."). Therefore, the court followed *Richfield Oil* and struck down the application of the BPOL tax to the fraction of Dulles Duty Free's sales that occur in export transit.

Stare decisis looms large here. "Even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *IBM*, 517 U.S. at 856 (refusing to overrule an 80-year-old Export Clause precedent). Likewise, *Richfield Oil* dates back more than seventy years, and follows a line of precedent that goes back much further. *Richfield Oil* stands undisputedly on point here, and a unanimous state supreme court properly followed it.

II. There is no split of authority worthy of this Court's attention.

Forty years have passed since *Michelin* and *Washington Stevedoring*. During that time, a stream of cases have recognized that the Import-Export Clause still bars States from directly taxing goods in import or export transit. *Coast Pac. Trading, Inc. v. State Dep't of Revenue*, 719 P.2d 541, 544 (Wash. 1986) ("The parties . . . correctly point out that *Michelin* and *Washington Stevedoring* have not overruled decisions that struck down taxes levied directly on goods that had reached the export stream. These decisions include *Richfield*."); *La. Land & Expl. Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 819 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990) ("*Richfield* has never been overruled"); *Va. Indonesia Co.*, 910 S.W.2d at 912, *cert. denied*, 518 U.S. 1004 (1996) ("the United States Supreme Court has not overruled" the goods-in-export-transit cases).

Petitioner discusses three cases it claims conflict with the opinion below here. Pet. 16–19. None is from this decade. None is widely cited. Two of them hold that the taxes in question were *not* imposed directly on goods in export transit, precisely the opposite of the tax here. *See* Pet. 27 (admitting that the "goods at issue here were clearly 'in transit'"). A third case analyzed the wrong part of the Import-Export Clause and premised its ruling on an embarrassing misquote of this Court. None of these cases show a split of authority that merits this Court's attention.

First, Petitioner unearths a 35-year old case from Alaska. *State Dep't of Revenue v. Alaska Pulp Am., Inc.*, 674 P.2d 268 (Alaska 1983). There is no conflict between this case and *Alaska Pulp* because *Alaska Pulp* did not address a tax on goods in transit.

In *Alaska Pulp*, the Alaska court applied *Michelin* and upheld a state tax on dividends and commissions flowing between related corporate entities. The Alaska court did not say or even imply that *Richfield* was bad law. On the contrary, the court ruled that the tax in question was not imposed on goods in export transit. *Id.* at 280 ("the [state] has not assessed a tax on goods moving in foreign trade"). The court then cited *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1951), which embraced the rule that direct taxes on exports in transit cannot stand. *Canton Railroad*, 340 U.S. at 513 ("If this were a tax on the articles of import and export, we would have the kind of problem presented in . . . *Richfield*"). But in *Alaska Pulp*, foreign trade transactions were not taxed, "only the intrastate transactions between [export companies] and their parent corporations." *Id.* at 279.

Applying *Michelin* to dividends and commissions flowing between Alaska business entities has nothing to do with the decision in this case. *Alaska Pulp* is an unremarkable application of the Import-Export Clause—as evidenced by the fact that in the last 35 years it has *never once* been cited by any court for any constitutional principle or holding.

Similarly, the Supreme Court of Appeals of West Virginia applied *Michelin* and upheld a state coal severance tax in *United States Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W.Va. 2005), *cert. denied*, 547 U.S. 1179 (2006). There is no conflict between *Helton* and this case, as the opinion below recognized.

As the Supreme Court of Virginia observed, the "West Virginia [court] accepted *Richfield Oil* as binding, but held that the goods were not placed in export at the time a coal severance tax applied (when the coal was extracted . . .)." App. 17a.; *see also Helton,* 631 S.E.2d at 562 n.4 (distinguishing *Richfield* because "the coal severance taxes at issue in the instant case are not imposed on goods after they have been loaded, nor after they have clearly been started on their journey").

West Virginia imposed its severance tax on the value of the coal as it was being processed and loaded into rail cars. The court held that "the initial process of loading of coal by the mining and processing company at a coal preparation facility is properly viewed as part of the coal production/mining and processing process," and not as part of export transit. *Id.* at 564–65. As a result, "severance taxes like West Virginia's are based upon and imposed upon activity that occurs prior to the mined and processed coal's entry into export transit." *Id.* at 567.[1]

Two dissenters in *Helton* thought that the coal *was* in export transit and thus could not be taxed under *Richfield Oil*. 631 S.E.2d at 570 (Maynard, J., dissenting); *id.* at 583 (Benjamin, J., dissenting in part). But the debate over whether coal being loaded at a mine had reached export transit only shows the difference between *Helton* and this case.

Here, export transit status is undisputed and mandated by federal law governing duty-free enterprises. *See* App. 20a ("There is no dispute that the merchandise Duty Free sells to international travelers constitutes export goods in transit."); App. 3a (describing the process in which Duty Free finalizes its sales and delivers its goods to passengers on the jetway as they board flights overseas); Pet. 27 (admitting that the "goods at issue here were clearly 'in transit'").

Lastly, Petitioners cite *Auto Cargo, Inc. v. Miami Dade County*, 237 F.3d 1289 (11th Cir. 2001).

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[1] The *Helton* majority also noted several times that the coal was not "merely" in transit through West Virginia, but was mined there, *id.* at 568 & n.7, and that the tax was imposed at the mine, not an international port. *See Canton Railroad Co.*, 340 U.S. at 515 (observing that export "begin[s] . . . at water's edge" and does not "lead back to every forest, mine, and factory in the land").

Auto Cargo upholds a $7.50 “inspection fee” imposed by the port of Miami on each used car being exported through the port. The inspection fees paid for vehicle inspections done to ensure stolen vehicles are not exported, and to pay for related anti-theft efforts by local and federal law enforcement. 237 F.3d at 1291. *Auto Cargo* applied *Michelin* and upheld the inspection fee.

Auto Cargo is a head-scratcher in several ways. Perhaps for that reason, case law over the past 17 years has ignored its Import-Export Clause analysis. The certiorari filings here examine *Auto Cargo* far more deeply than any judicial opinion ever has.

First, the “inspection fee” challenged in that case was constitutional regardless of the issue presented here. The Import-Export Clause permits a state to impose charges “absolutely necessary for executing its inspection laws.” U.S. Const. art. I § 10 cl. 2. Accordingly, this Court has long allowed fees spent on inspecting goods (as opposed to creating general revenue for the state or local government). *See, e.g., Turner v. State of Maryland*, 107 U.S. 38 (1883) (upholding an inspection fee imposed by Maryland on hogsheads of tobacco being exported).

The *Auto Cargo* district court made all necessary findings to support such a holding. It ruled that the inspection fee was “not instituted to generate revenue to maintain governmental services offered to the general public. Instead, it is a specific charge . . . to defray the costs relative to Customs’ vehicle inspections.” Order, No. 1:96-cv-2138, Dkt. 83 at 11 (S.D. Fla. June 11, 1999). The court added that the fee is charged "for a service distinct from the goods and their value," *id.* at 13, and that the charges are "used solely to defray the County's costs for providing and maintaining the inspection facility." *Id.* at 18. In short, the *Auto Cargo* court never needed to, and should not have, even *considered* the sole issue presented in this case. The Port of Miami "inspection fee" is an obvious inspection fee.

Second, *Auto Cargo* based its decision to apply *Michelin* on two glaring mistakes.

At the outset, *Auto Cargo* badly misquoted *IBM*. According to *Auto Cargo*, the "Supreme Court has interpreted the Import-Export Clause to permit states to impose 'generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports.'" 237 F.3d at 1292 (quoting 517 U.S. at 852). The quote is a bad splice. What this Court *actually* said is that "*The Government argues* . . . that States may impose generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports." 517 U.S. at 852 (emphasis added). This Court then promptly shot that argument down. "Contrary to the Government's contention, this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit." 517 U.S. at 862; *id.* at 861 ("Our holdings . . . *do not* interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit.") (emphasis added).

Next, *Auto Cargo* stated that "since *Michelin*, courts . . . have relied exclusively on *Michelin's* analysis." 237 F.3d at 1293. That was false, even at the time. *See, e.g., Va. Indonesia Co.*, 910 S.W.2d at 912 (discussing at length whether the *Richfield Oil* rule survived *Michelin*, concluding it did, and applying it to strike down a tax).

In short, *Auto Cargo* focused on the wrong part of the Import-Export Clause, mistook a rejected argument for governing law, *and* misstated what other courts had done with *Michelin*. Despite all of that, it probably reached the correct result, given a set of facts that have almost nothing in common with those here. *Auto Cargo* is a curio, not a reason to grant certiorari.

Across forty years of precedent, these are the three "split" cases Petitioner identifies as warranting certiorari. Two of them are distinguishable on their most central fact—whether the tax in question fell directly on goods in import or export transit—and thus applied *Michelin* without posing any conflict with the Virginia court here. A third should have been decided on a different ground so obvious that the case has gone largely uncited over the past 17 years. It seems unlikely that any court facing a future Import-Export Clause issue will consult any of these three opinions, conclude that it hopelessly conflicts with the Virginia Supreme Court's opinion here, and suffer confusion about which to follow.

III. The issue presented here is not important enough to warrant review.

The Import-Export Clause issue here poses no real threat to state sovereignty or local coffers. *Contra* Pet. 25–27.

The Petition suggests that not being permitted to directly tax goods in import or export transit jeopardizes state sovereignty. Pet. 25. The theory is that not being able to exact a precise variety of taxation (a variety that this Court has *never* upheld) "may prevent" state and local governments "from collecting much-needed revenue." Pet. 25. But Petitioner never *asserts* that either its own sovereignty or its coffers are in any sort of jeopardy. In fact, to Petitioner here and in general, the financial effect of the decision below is negligible. And even if it were not, many alternative paths stand open to taxing businesses like Dulles Duty Free.

A. The financial import of this issue is small.

The Petition outlines the scope of the duty free industry and the fact that Dulles Duty Free sold between $13 million and $20 million per year in export goods during the tax years in question. App. 3a.; Pet. 26–27. It omits that the annual amount of tax at issue in this case is less than $42,000. Nov. 3 Order on Remand (outlining annual tax amounts attributable to exports as between $25,600 and $41,600). Five years' worth of Dulles Duty Free's export-based BPOL taxes add up to less than \$174,000. *Id.*[2]

By comparison, during the tax year 2013 alone, the Loudoun County BPOL tax collected \$28.4 million.[3] Combined with other local taxes, the County raked in \$1.05 billion.[4] What the County has lost in this case is less than 1/600 of its BPOL revenue, and less than 1/25,000 of its annual revenue. The tax money here is a tiny drop in a vast bucket to the County.

Nor does the Petition identify a single other business in Loudoun County positioned like Dulles Duty Free (which sells its goods at an international terminal under a precise system of federal regulations that ensures export, and delivers them in the jetway). The County's BPOL tax is undisputedly constitutional in well above 99% of its applications.

More broadly, Petitioner identifies no other locality or State where this issue controls a meaningful revenue stream. Even its amicus, the largest municipal lawyers' organization in the United States, fails to identify any such place. Instead, it vaguely suggests that "the decision below creates a potential loss in tax revenue." IMLA Br. 3. Its best

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[2] IMLA states this number as "over \$270,000," apparently by a math error. IMLA Br. 11. The Nov. 3 Order specifies the amount of tax in question as \$35,912.73 for 2009, \$25,650.42 for 2010, \$28,955.51 for 2011, \$40,932.05 for 2012, and \$41,537.53 for 2013.

[3] Loudoun County, Va. Budget, at R-12. Available at: https://www.loudoun.gov/DocumentCenter/View/104238.

[4] *Id.* at R-5.

example appears to be Clayton County, Georgia—home to the busiest airport in the world by passenger traffic. IMLA Br. 13. Consistent with the ruling in this case, Clayton County does not levy its business license tax on gross receipts from duty free export sales. Consistent with the financial impact in this case, public records show that Clayton County receives a *tiny* fraction of its revenue from its business license tax analogous to the one here.[5] Only 3.5% of Clayton County's revenue flows from *all* licenses *combined*—fourteen items in all, including marriage licenses, building permits, and pistol licenses, as well as its business license tax. In short, even the places with the largest airports are not losing meaningful revenue.

Petitioner and its amici fail to identify any severe financial impact from the decision below. This makes sense, given that the Virginia court simply applied seventy-year-old precedent and struck down a tax of a sort this Court has "never upheld." *IBM*, 517 U.S. at 862. If the *Richfield Oil* rule created severe financial impacts, they happened decades ago.

B. There are numerous constitutional ways to tax export businesses.

Meanwhile, Dulles Duty Free pays more than $100,000 per year in undisputed state and local taxes. S. Ct. of Va. JA32 (listing "local sales and use tax, business tangible personal property tax, consumer

[5] Clayton County, Ga. Budget, at 47. Available at: https://www.claytoncountyga.gov/pdfs/finance/ Budget%20Book%20 2017%20Final.pdf.

utility tax, and electric consumption tax."). Recently the County has sought payment of a six-figure real estate tax. The ruling below provides exporters no broad exemption from tax.

Moreover, Virginia law gives Petitioner and every other locality a choice about how to impose its BPOL tax. The tax can be based on either gross receipts or on "Virginia taxable income." Va. Code § 58.1-3702 ("the governing body of every county, city and town that levies such license tax may impose the tax on the gross receipts or the Virginia taxable income of the business"). Whichever basis the County chooses must apply to all local retail businesses. Va. Code § 58.1-3705. If the County chose to tax on "Virginia taxable income," its tax basis would consider deductions, exemptions, exclusions, and subtractions. *See* Va. Code § 58.1-402. Such a tax would be distant enough from the value of the export goods that it likely would not be a direct tax on goods moving in export transit. Accordingly, it would fall under the *Michelin* test and presumably survive it.

So the County had (and still has) two paths available. It has decided to use gross receipts. That choice is constitutional in more than 99% of its applications. But it cannot be applied to Duty Free's sales in export transit. Having made its choice, the County cannot now plausibly maintain that a longstanding constitutional rule harms its tax sovereignty. The County could increase its BPOL tax revenue from Dulles Duty Free right away if it changed to a "Virginia taxable income" model for all its retail businesses. Preferring not to do this is not losing control over tax decisions.

Further, there are numerous other ways that even the exact type of tax here—a business license tax—can constitutionally be measured. Some locales charge a retail license tax based on head count—the number of employees who work there. Clayton County, Georgia, for instance, has taxed Duty Free based on its 67 employees there. Hollywood, Florida, does the same. Other locales tax businesses based on "point of sale"—the number of cash registers. Imperial County, California does this. Still other places charge a simple flat annual fee for a business license, including the cities of Nogales and Douglas, Arizona. None of these tax measures fall directly on goods moving in export transit, and all are undisputedly proper under the Import-Export Clause.

C. Duty Free is a unique business model—even most *airport* retail goods are not exports being taxed in transit.

To begin with, the claim that the opinion below breaks new ground is far-fetched on its face. The Virginia Supreme Court applied an on-point, seventy-year-old precedent from this Court. The Virginia court refused to uphold a type of tax this Court has also "never upheld." *IBM*, 517 U.S. at 862. The outcome here is that Petitioner cannot collect a *fraction* of *one* of its taxes from the *one* business that can prove its goods are exports and that they are in transit at the moment the sale is finalized.

Petitioner and its amici vastly overstate the economic impact of this holding (and current doctrine in general).

The tax professors suggest that Duty Free "contorts" its operations to avoid local taxation, or that other businesses may do so "in order to secure exemption." Tax Prof. Br. 17. Similarly, IMLA theorizes that maybe duty free is no different than any airport restaurant or souvenir shop, and so now all should be free of the gross receipts tax here. IMLA Br. 15–17. These ideas are wrong, for several reasons.

First, most goods sold in Dulles Airport are neither "exports" *nor* are they "in transit" at the time of the sale. Purchasers buy these goods and walk away with them in the terminal. The purchasers may be incoming or outgoing, domestic or international, or planning to consume their purchases in or around the airport. There is no "certainty of the foreign destination," as in *Richfield Oil.* 329 U.S. at 83. *See also Swan & Finch Co. v. United States*, 190 U.S. 143, 145 (1903) (holding that "[a]nother country or state as the intended destination of the goods is essential to the idea of exportation.").

Second, duty free retailers are a unique business model. The shops exist inside security in airports, where only passengers may go, and beyond the point of no return at other border crossings. Duty free retailers share custody of many of their goods with the U.S. Customs and Border Protection Service, and keep them in bonded warehouses. Many of the goods never even *enter* the United States as a legal matter—they come in solely for export.

Federal law demands that duty free businesses ensure export, and federal statutes and regulations explain how to do so in some detail. Far different than any other airport store, Duty Free hands over the goods and finalizes the sale only *after* the gate agent checks the traveler onto an international flight. *See* 19 U.S.C. § 1555(b)(3)(F)(i)(II) (requiring duty-free merchandise to be delivered "to the purchaser . . . at the exit point of a specific departing flight"). If the traveler does not appear or does not board the plane, there is no sale and Duty Free keeps the goods. Similarly, those with further layovers inside this country cannot purchase duty free goods except at the "last point leaving the United States." S.Ct. of Va. JA161.

The Virginia court thus was satisfied that Duty Free can be certain of export and that its transactions occur as part of the export process. These operations are not contortions to avoid local tax—they are federally mandated for a unique type of retail business.

Duty Free is not aware of any other industry that uses a similar system for selling export goods. Even within its own industry, Duty Free holds an exclusive franchise to be the sole duty-free retailer at the Washington, D.C. area airports.[6]

Nor does it make sense that others would copy duty free solely to avoid county business license taxes. *Contra* Tax. Profs. Br. 17. Meeting departing travelers at their gate and completing sales transactions as planes board poses a tremendous

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[6] Charlotte Turner, "Duty Free Americas wins bid to operate duty free concessions at Washington airports," TR Business (Aug. 14, 2014), *available at:* https://www.trbusiness.com/regional-news/the-americas/duty-free-americas-wins-bid-to-operate-duty-free-concessions-at-washington-airports/64708.

logistical challenge, far beyond the economics of avoiding 17 cents in tax per hundred dollars in sales. Trial testimony from this case addresses the numerous Customs-licensed cartmen who meet the travelers at the gate and the travails of handling delayed or cancelled flights (Duty Free stays partly open every night until it can make its last deliveries). S.Ct. of Va. JA163–64, JA260. It would be grossly uneconomic for other airport shops to copy duty free.

Moreover, if other businesses were going to copy duty free, they would have done this long ago—*Richfield Oil* has existed for seventy years. In 1995, Texas struck down a tax under *Richfield Oil* in *Virginia Indonesia Company*. 910 S.W.2d at 912. Yet there is no sign of mass business restructuring (certainly nothing *new*) under either of these decisions.

Duty free is a unique business, created and regulated closely by federal law. Moreover, Duty Free is the sole duty free retailer at Dulles Airport. Efforts to show that the holding below here will ripple through all retail (even all *airport* retail) are unfounded.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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