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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Although Respondent strains to reconcile conflicting decisions about the proper interpretation of the Import-Export Clause, ultimately it cannot (and does not really try to) dispute that lower courts are divided—especially over the status and role of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

Respondent therefore opposes the Petition by proclaiming that Import-Export Clause jurisprudence "is not broken and does not need to be fixed." Respondent's Brief in Opposition ("Opp.") 1, 7. It seems that under Respondent's view of the world, *Richfield Oil* remains as vital today as the day it was decided.

Respondent, however, appears to be alone in believing Import-Export Clause jurisprudence is settled and clear, and should be left alone by this Court.

The leading legal treatise on state taxation reports that "State courts have generally treated *Richfield* with considerable skepticism," and has concluded "the weight of reason and authority support the view . . . that *Richfield* is no longer good law." Walter Hellerstein & John A. Swain, *State Taxation* ¶ 5.05[2][a] (3d ed. 2017).

Nineteen tax law scholars filed an amicus brief in support of the Petition, observing: "Courts in eight States as well as one federal court of appeals no longer adhere to *Richfield Oil*. . . . Courts in five other States

as well as another federal court of appeals have said that *Richfield Oil* remains binding until this Court expressly overrules it."[1] They believe "[t]his split generates uncertainty for market actors" and "interferes with the ability of state and local governments to craft durable tax regimes."[2]

The International Municipal Lawyers Association also filed an amicus brief in support of the Petition, explaining: "[t]he 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."[3]

Judges too have invited this Court to clarify Import-Export Clause jurisprudence. *E.g. United States Steel Mining Co., LLC v. Helton*, 631 S.E.2d 559, 580 (W. Va. 2005) (Benjamin, J., dissenting in part) (encouraging this Court "to bring a new clarity to this area of constitutional law in the near future"). In fact, in this case the Supreme Court of Virginia recognized "courts have struggled to determine which test to apply when it comes to assessing the constitutionality of

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[1] Brief of Tax Law Professors as *Amici Curiae* in Support of Petitioner ("Tax Law Professors' Br.") 3; *see also id.* at 10-12 & nn.6, 7 (citing cases).

[2] *Id.* at 3.

[3] Brief of International Municipal Lawyers Association as *Amici Curiae* in Support of Petitioner ("IMLA Br.") 1-2.

taxes that fall on export goods in transit,"[4] and observed: "[i]t may be that the Supreme Court will provide additional guidance concerning the applicability of the Import-Export Clause to non-discriminatory taxes" like the one at issue, which this Court has "carefully carved out for future disposition." App. 16a, 19a, 22a.

I. Respondent Concedes Lower Courts Are Divided, and Its Efforts to Minimize That Split Are Unavailing

Respondent contends there is no split of authority "worthy of this Court's attention." Opp. 13. Leaving aside the concession that there is a "split" of authority, Respondent's portrayal of the case law is unavailing.

Respondent suggests *Department of Revenue v. Alaska Pulp America, Inc.*, 674 P.2d 268 (Alaska 1983), should be disregarded because it concerned "dividends and commissions flowing between Alaska business entities." Opp. 15. That misses the forest for a tree. The taxpayers in *Alaska Pulp* were domestic international sales corporations ("DISCs") eligible for special federal tax treatment precisely because they derived at least 95 percent of their revenue from *export* sales. *See* 26 U.S.C. § 992(a)(1)(A) (1976). Respondent ignores the Supreme Court of Alaska's clear view that "[w]hen a tax is challenged under the import-export clause, the court must . . . determine whether the tax

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[4] The trial court in this case observed: "It is challenging to try to reconcile the Import Export Clause jurisprudence." App. 33a.

offends any of the three purposes of that clause, as delineated in *Michelin*." 674 P.2d at 279 (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976)). Employing that approach, the Supreme Court of Alaska held the assessment on gross receipts covering *exports* does not conflict with the Clause. *Id*. at 280.

Respondent similarly tries to distinguish *Helton*, where the Supreme Court of Appeals of West Virginia upheld a tax on coal mined in West Virginia and exported abroad. After noting *Michelin* marked a "sharp turn" in the focus of Import-Export Clause analysis, 631 S.E.2d at 562, the court relied on *Michelin* to uphold the tax *without deciding* whether the goods were "in transit," as *Richfield Oil's* stream of export test would require. *See* Petition 18. Respondent inaccurately suggests *Helton* turned on whether the coal at issue was "in transit." Opp. 15-16. And, contrary to Respondent's characterization, the two *Helton* dissenters understood the court's decision was inconsistent with *Richfield Oil*, protesting that "the majority opinion's wholesale rejection of *Richfield Oil* in favor of the *Michelin Tire/Washington Stevedoring* line of cases is improper." 631 S.E.2d at 569 (Maynard, J., dissenting); *id.* at 581 (Benjamin, J., dissenting in part).

Unable to deny the conflict between *Auto Cargo, Inc. v. Miami Dade County*, 237 F.3d 1289 (11th Cir. 2001), and the decision below here, Respondent resorts to dismissing *Auto Cargo* as a "head-scratcher." Opp. 17. But Respondent's merits critique of *Auto Cargo* does not change the fact there is a conflict.

Nor does Respondent's discussion of these three decisions[5] change the fact they heeded *Michelin*'s lesson that the Import-Export Clause should be interpreted in light of the Framers' "objectives" in enacting it. *Michelin*, 423 U.S. at 293; *see also Department of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 758 (1978) ("[T]he *Michelin* approach should apply to taxation involving exports as well as imports."). The Supreme Court of Virginia, in contrast, mechanically adhered to its reading of *Richfield Oil*, without regard for whether Loudoun's BPOL tax may be sustained in light of the Clause's purposes in our constitutional scheme—and without analyzing whether the tax is an "impost" or "duty" within the meaning of the Clause. *See* Petition 28-29.

II. *Stare Decisis* Provides No Basis For Denying the Petition

Respondent boldly claims that "[s]tare decisis looms large here." Opp. 13. It does not.

As an initial matter, *stare decisis* is not itself an argument against granting the Petition. Even when

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[5] Respondent ignores other cases cited in the Petition evidencing disagreement relevant to the Questions Presented: *Western Oil & Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984); and *David Hazan, Inc. v. Tax Appeals Tribunal*, 556 N.E.2d 1113 (N.Y. 1990), *affirming David Hazan, Inc. v. Tax Appeals Tribunal*, 543 N.Y.S.2d 545, 547 (N.Y. App. Div. 1989) (Mikoll, J., dissenting).

the law is settled, the Court grants petitions for review under appropriate circumstances.

Moreover, this Court has previously granted review with the express purpose of clarifying the impact of *Michelin*. *See Limbach v. Hooven & Allison Co.* (*Hooven II*), 466 U.S. 353 (1984).

Stare decisis principles also apply particularly weakly here, given the doctrine's premise that "it is usually 'more important that the applicable rule be settled than that it be settled right,'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)), contrasted with the widespread doubt about *Richfield Oil*'s viability. While *Richfield Oil* has not been overturned by this Court, it can hardly be called "settled law." Many judges already treat *Richfield Oil* with "considerable skepticism," and legal scholars have concluded "the weight of reason and authority support the view . . . that *Richfield* is no longer good law." Hellerstein & Swain, *supra*, ¶ 5.05[2][a][6]; *see*, *e.g.*, *P.J. Lumber Co.,*

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[6] Despite its being cited several times in the Petition, Respondent ignores the Hellerstein & Swain treatise, instead citing Professor Tribe's commentary about the Clause, written nearly two decades ago. Opp. 11 (citing Laurence H. Tribe, *American Constitutional Law* § 6-26 (3d ed. 2000)). Yet even Professor's Tribe's descriptions of this Court's cases failed to provide clarity to the Supreme Court of Texas in *Virginia Indonesia Co. v. Harris County Appraisal District*, 910 S.W.2d 905 (Tex. 1995), where the majority cited an earlier edition of Professor Tribe's treatise, while the dissenting Justices rejected the majority's approach,

Inc. v. City of Prichard, No. 2160627, 2017 WL 4214170, at *3 (Ala. Civ. App. Sept. 22, 2017) (*Richfield Oil* is "no longer valid"). This perspective is surely informed by the view that this Court has previously "cast doubt on *Richfield Oil*'s continuing validity." Tax Law Professors' Br. 2 (citing *Washington Stevedoring*, 435 U.S. at 757 n.23 and *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 77 (1993)); *see also* Hellerstein & Swain, *supra*, ¶ 5.05[2][a] (noting that in *Itel* the Court "itself cast doubt on the continuing validity of *Richfield*."); Brannon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce § 12.07 (2d ed. 2013 & 2017 Cum. Supp.) (in *Itel* the Court "[h]int[ed] that this prohibition [on the 'direct' taxation of imports and exports 'in transit'], which had been applied in the *Richfield Oil* case, had been 'altered' (repudiated?) by the approach adopted in *Michelin*.").

Richfield Oil is the kind of "doctrinal dinosaur . . . for which [the Court] sometimes depart[s] from *stare decisis*." *Kimble*, 135 S. Ct. at 2411. Over time, the Court has displaced its jurisprudential underpinnings. *See* Petition 4-12; Tax Law Professors' Br. 4 ("[I]f *stare decisis* was not enough to save *Richfield Oil*'s dormant Commerce Clause cousin or the analogous 'original package' rule for imports, it cannot carry the day

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contending that "adherence to an in-transit rule is at odds with the Supreme Court's modern jurisprudence." *Id*. at 916.

here.").[7] *Stare decisis* is no impediment to overruling a case where "[t]ime and subsequent cases have washed away [its] logic." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).[8] This is especially true with constitutional cases where "adherence to precedent is not rigidly required." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

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[7] According to Respondent, "[t]he holding below flows from at least a hundred years of Import-Export jurisprudence." Opp. 6. But that is part of the problem with Respondent's arguments. In *Michelin*, this Court "initiated a different approach to Import-Export Clause cases," *Washington Stevedoring*, 435 U.S. at 752, "abandon[ing] a century of precedent." Hellerstein & Swain, *supra*, ¶ 5.02[2]; *see also* Petition 4-8 (discussing precedent displaced by *Michelin*). *Richfield Oil* thus stands for the "most longstanding principle of Import-Export Clause jurisprudence" (Opp. 6) only because happenstance has left it the "legal last-man-standing" in *Michelin*'s path. *Kimble*, 135 S. Ct. at 2411.

[8] Under Respondent's view, Import-Export Clause jurisprudence is governed by a cleavage: one rule "[w]hen a case presents facts like those in *Richfield Oil*," and "another [*Michelin*] for all other taxes." Opp. 6. As a descriptive matter decisional law does not adhere to this dichotomy. As a normative justification, Respondent sees virtue in *Richfield Oil*'s supposed "bright-line rule" (Opp. i, 8), but in reality its "test has proven to be devilishly difficult for lower courts to administer." Tax Law Professors' Br. 13. This difficulty is evident from statements by numerous courts trying to apply it (and the conflicting results they have reached), including the two courts below in this case—which reached opposite conclusions while agreeing about the confused state of Import-Export Clause jurisprudence. The tax law professor *amici* are correct: "this Court should relegate *Richfield Oil* to the dustbin." *Id*. at 3.

III. The Questions Presented Are Important

Respondent opposes the Petition on the ground the issues are not "important *enough*" to warrant review. Opp. 20 (emphasis added). Respondent is mistaken.

If there is disagreement or uncertainty about the meaning of a constitutional provision, this Court has the ultimate responsibility to settle those issues. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Sup. Ct. R. 10. This is no less true of the Import-Export Clause than other constitutional provisions.

Respondent nevertheless claims the Petition should be denied because there is not enough money at stake. Opp. 2, 20-22. This assertion—made without supporting legal authority—is belied by the parties' actual conduct. Respondent initiated legal proceedings to contest its tax bill, and then pressed on with litigation when it lost before the trial court. Meanwhile, Petitioner has dedicated its resources to seeking review by this Court after an adverse decision by the Supreme Court of Virginia.

Respondent is also wrong in suggesting that only duty-free commerce is at stake. While the goods at issue here were clearly "in transit" when conveyed to customers upon departure from the United States, Loudoun's BPOL tax was assessed on an annual basis and calculated based on the prior year's gross sales. The tax "does not target imports or exports; it applies across the board to all sales" (App. 4a), and "is not on a particular transaction, but only uses sales as the measure of business activity upon which to base its

tax." Craig D. Bell & Emily J.S. Winbigler, *Taxation*, 52 U. Rich. L. Rev. 79, 106 (2017).

If *Richfield Oil* requires striking down a tax with these characteristics—as Respondent contends, and the Supreme Court of Virginia held—then it is difficult to see how a state or local government may lawfully impose *any* tax for which the calculation depends in part on sales of actually-exported goods (goods which were necessarily "in transit" at the point of export). The tax law professor *amici* recognize the Petition presents issues with implications well-beyond the duty free context. *See* Tax Law Professors' Br. 1, 14-15.[9]

But even under the implausible assumption that the legal issues here impact only duty-free commerce, nearly 100 communities in the United States host duty free stores, with estimated aggregate annual sales of $4 billion. *See* Petition 26-27. Respondent does not deny its counsel has asserted the decision below "will affect the entire U.S. duty-free industry." *See* Petition 27.

Respondent also ignores the federalism concerns implicated here. *See* Petition 32-33; Tax Law Professors' Br. 18 ("*Richfield Oil* needlessly constrains the fiscal autonomy of state and local government" without "vindicat[ing] the clause's core objectives"); *id.*

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[9] Respondent's claim that "duty free retailers are a unique business model" is irrelevant. Opp. 24-27. There is no special branch of Import-Export Clause law for duty free retailers. Nor are courts' holdings about the Clause confined to that industry.

at 1 ("The Court's resolution of this case will determine whether state and local governments can apply their sales and personal property taxes to exports in a balanced and nondiscriminatory fashion."); IMLA Br. 10 (the decision below "improperly interferes with states and local governments' taxation power as well as their sovereignty").[10]

And Respondent ignores the plea for this Court's guidance from local government attorneys responsible

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[10] In an effort to stave off this Court's review, Respondent says "[t]here are numerous constitutional ways to tax export businesses." Opp. 22. But Respondents' speculative musings about alternatives "distant enough from the value of the export goods that [they] *likely* would not be a direct tax on goods moving in export transit" (Opp. 23) (emphasis added) only highlight the need for this Court's guidance. This claim also appears to contradict Respondent's core merits argument: "taxes that fall directly on the value of goods moving in export transit violate the Import-Export Clause." Opp. 3. After all, the BPOL tax the Supreme Court of Virginia invalidated on the basis of *Richfield Oil* "does not target imports or exports; it applies across the board to all sales." App. 4a. As Respondent's counsel put it, "the BPOL tax is not on a particular transaction, but only uses sales as the measure of business activity upon which to base its tax." Bell & Winbigler, *Taxation*, 52 U. Rich. L. Rev. at 106. Yet under the logic of the decision below almost any tax for which the calculation depends in part on sales of actually-exported goods would violate the Import-Export Clause. Moreover, Respondent fails to address the point that state and local governments face significant administrative burdens if constitutionally proscribed from calculating non-discriminatory taxes based on gross receipts. *See* Petition 33; *see also* IMLA Br. 12-14.

for providing advice about the Import-Export Clause. *See* IMLA Br. 2-3.

IV. This Case Is an Ideal Vehicle For Resolving the Questions Presented

This Court has repeatedly deferred "the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit," preferring to wait "until a case with pertinent facts is presented." *Washington Stevedoring*, 435 U.S. at 757 n.23.

The Petition presents the opportunity to answer this question, and resolve disagreement among lower courts about the role (if any) *Richfield Oil* should play in Import-Export Clause jurisprudence. *See* Tax Law Professors' Br. 9 (*Richfield Oil* "remains on the books only because the Court has not yet heard a case in which its status was directly at stake. The petition here presents such a case.").

Respondent does not dispute the decision below turned entirely on the Questions Presented.[11]

Respondent also does not dispute there are relatively few appropriate vehicles for this Court to review and resolve these questions—itself making the point that "[d]uring the forty years since *Michelin* and *Washington Stevedoring*, this Court has hardly had

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[11] The decision below did not turn in any respect on the fact that Respondent is a duty free retailer. The regulations governing duty-free commerce cited by Respondent (Opp. 3-4) are irrelevant to the Petition.

occasion to revisit the issue." Opp. 12.[12] The Court therefore should seize the opportunity, and grant the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[12] According to Respondent's counsel, the Supreme Court of Virginia's decision "represents perhaps the most significant Import-Export Clause decision issued in the last 20 years." *See* Petition 27 n.16.