No. 17-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution's Import-Export Clause prohibits states from "lay[ing] any Imposts or Duties on Imports or Exports." U.S. Const. art. I, § 10, cl. 2. This Court's "modern Import-Export test was first announced in" *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), in which the Court adopted an Import-Export Clause analysis focused on the "main concerns" leading to adoption of the Clause. *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993). Notwithstanding *Michelin*, the Supreme Court of Virginia in the decision below, along with other state courts of last resort and two federal courts of appeals, continue to employ the formalistic test of *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946), to ascertain whether a tax affecting exports violates the Import-Export Clause. These decisions relying on *Richfield Oil* conflict with *Michelin* and subsequent decisions by this Court, as well as with decisions by other state and federal courts. This Court has repeatedly deferred addressing *Richfield Oil*'s continuing vitality, awaiting a case presenting that issue.

The Questions Presented are:

1. Should the validity under the Import-Export Clause of a non-discriminatory local business license tax calculated on the basis of gross receipts be evaluated using this Court's approach in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), or in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946)?

2. Does a local business license tax calculated based on a gross receipts, which does not specifically target imports or exports, violate the Import-Export Clause if some of the gross receipts include export sales?

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The opinion of the Supreme Court of Virginia is reported at 803 S.E.2d 54 and reproduced in the Appendix to this Petition at App. 1a. The opinion of the Circuit Court of Loudoun County is unreported, but reproduced in the Appendix at App. 23a.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on August 24, 2017. On October 17, 2017, The Chief Justice extended the time to file a petition for certiorari to December 22, 2017 (No. 17A408). This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Constitution's Import-Export Clause provides, in relevant part:

> 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 text of that provision, and relevant Virginia statutes and Loudoun County ordinances, are reproduced at App. 47a-49a.

INTRODUCTION

In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), this Court "initiated a different approach to Import-Export Clause cases," *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978), "abandon[ing] a century of precedent." Walter Hellerstein & John A. Swain, *State Taxation* ¶ 5.02[2] (3d ed. 2017). But more than four decades after *Michelin* this Court has yet to expressly decide how the "modern Import-Export test" first announced in *Michelin* applies when a State directly taxes imports or exports in transit. In *Washington Stevedoring*, decided two years after *Michelin*, the Court specifically declined to reach that issue, "prefer[ring] to defer decision until a case with pertinent facts is presented." *Washington Stevedoring*, 435 U.S. at 757 n.23.

This Petition presents the opportunity to answer this long-open question. And an answer from this Court is much-needed. Since *Michelin* and *Washington Stevedoring* were decided, federal courts of appeals and state courts of last resort have disagreed about how to analyze Import-Export challenges to taxes on imports or exports in transit. The decision below by the Supreme Court of Virginia held that a state tax assessed directly on export goods in transit violates the Import-Export Clause because it fails the "stream of export" test described by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). Two federal courts of appeals and other state courts of last resort follow that approach. But those decisions are in conflict with decisions by one federal

court of appeals and other state courts of last resort, which have concluded that *Michelin* and its progeny have supplanted *Richfield Oil*.

The Court should grant this Petition to answer important, unsettled questions about the Import-Export Clause, and resolve the conflicts among the Supreme Court of Virginia, other state courts of last resort and federal courts of appeals.

STATEMENT OF THE CASE

A. Legal Background

The Import-Export Clause provides that "[n]o 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 . . . ." U.S. Const. art. I, § 10, cl. 2.

As this Court has explained, the Clause addressed "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787 . . . the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin*, 423 U.S. at 283. States lacking ports conducive to foreign trade were at the mercy of the states that had them, and could tax goods moving through those ports on their way to or from less commercially fortunate states. James Madison thus compared New Jersey to "a Cask tapped at both ends" by New York and Philadelphia; whereas North Carolina's position between Virginia and South

Carolina made it "a patient bleeding at both Arms." 3 *The Records of the Federal Convention of 1787*, at 542 (Max Farrand ed., 1911).

The Import-Export Clause was the "principal remedy proposed by the Philadelphia Convention" for this "commercial strife." Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 Miss. L.J. 521, 521 (1998). The political and economic problems to which the Clause was addressed were so serious that "[t]he Import-Export Clause . . . attracted more attention at Philadelphia than the Commerce Clause." *Id.* at 523.

Early judicial interpretations of the Clause assumed that *any* tax, if it touched "Imports or Exports," constituted a forbidden "Impost or Dut[y]" under the Clause. Accordingly, these early cases focused on the meaning of the terms "import" and "export," relying largely on formalistic tax and Commerce Clause jurisprudence prevailing at the time to elucidate those terms.

The most famous of these doctrines was the "original package doctrine," first developed by Chief Justice Marshall in his opinion for the Court in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Marshall confronted the "conflict" between the Import-Export Clause's prohibition on state taxation of imports and the states' "acknowledged power to tax persons and property within their territory"—which imported goods obviously were, once they had been imported. *Id.* at 441. Which principle gave way to the other would depend on whether the taxed good retained its status

as an "import" at the time the tax was assessed. To determine whether an imported good was, at any given moment, still an "Import" within the meaning of the Clause, Chief Justice Marshall proposed that:

> when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

Brown, 25 U.S. (12 Wheat.) at 441-42. In *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), the Court held that *Brown*'s original package doctrine applied to nondiscriminatory *ad valorem* taxes—in other words, to taxes that, though facially neutral as to imports and exports, fall on imports or exports simply by virtue of their being "included as part of the whole property of [a state's] citizens which is subjected equally to an *ad valorem* tax." 80 U.S. (13 Wall.) at 34. The *Low* Court explained that under the bright-line rule of *Brown*:

> the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a

> tax upon them, in any shape, is within the constitutional prohibition.

Id. at 34. A state's nondiscriminatory *ad valorem* tax could constitutionally be applied to a merchant's imported goods only if the merchant had "broken up" those goods from their "original cases."

In *Coe v. Town of Errol*, 116 U.S. 517 (1886), the Court dealt with a state tax on *exports*. The Court recognized that no definite rule had yet been adopted identifying "the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state." *Id.* at 527. To fill this gap, the Court adopted a test akin to an inverse-original-package-doctrine to determine when goods *stopped* being a part of a given state's "mass of property," *Low*, 80 U.S. (13 Wall.) at 34, and became "Exports" immune from state taxation under the Import-Export Clause:

> [S]uch goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey.

Coe, 116 U.S. at 527. This became known as the "stream of export" test: when a good began its "journey" into the export stream, the Import-Export Clause's immunity attached.

Difficult questions remained about when, exactly, a good intended for export began that journey. In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), the Court confronted a tax on oil intended for export by ship, assessed when the oil had been pumped into the cargo ship's tanks but before the ship had left "California waters" for its foreign destination. *Id.* at 83. The Court reviewed the few precedents that could help answer the "question whether at the time the tax accrued the oil was an export," *id.* at 78, and concluded the transfer of the oil from tanks located on the dock into tanks on the cargo ship "marked the commencement of the movement of the oil abroad." *Id.* at 83. The Court held that a good has immunity under the Import-Export Clause upon beginning some physical movement "so long as the certainty of the foreign destination is plain." *Id.*

Justice Black dissented, arguing that "[t]he motivation of this tax and its economic consequences plainly are not those which the writers of the Constitution condemned." *Id.* at 89 (Black, J., dissenting). Observing that "the Constitution does not define in words what is an impost or tax on exports and what is not," *id.*, Justice Black argued for an interpretation of the Import-Export Clause that would be true to the original purpose of the Clause, not formalistic tests detached from evidence about the way the Framers wrote and thought. *Id.* at 88-90 ("Constitutional interpretations which make serious inroads into the power of both the States and the Federal Government to tax sales made by local businesses should not turn on fine legal concepts of

when title passed or delivery occurred in relation to the beginning of exportation. . . . No persuasive evidence has been produced to indicate that those who wrote the Constitution thought in such terms or that they would have handicapped the state and federal taxing power in such a way.").

The original package doctrine for imports, and the "stream of export" doctrine for exports governed Import-Export Clause jurisprudence for much of the nineteenth and twentieth centuries, with mounting criticism from judges and scholars.

In *Michelin*, 423 U.S. 276, this Court upended its Import-Export Clause jurisprudence, "abandon[ing] a century of precedent." Walter Hellerstein & John A. Swain, *State Taxation* ¶ 5.02[2] (3d ed. 2017). The Michelin Tire Corporation had challenged a Georgia *ad valorem* property tax on its "inventory of imported tires and tubes," which (with a few exceptions) had not been removed from their original packages. 423 U.S. at 279. Under *Low v. Austin*, that basic fact pattern was a clear violation of the Import-Export Clause: even though the Georgia tax did not facially discriminate against imports, it could not validly be applied to any imported goods that remained in their original packages.

The Court rejected that analysis and overruled *Low v. Austin*. Instead of a formalistic reliance on the original package doctrine—and an exclusive focus on whether a good retained its status as an "Import" within the meaning of the Clause—the Court explained that the Clause should be interpreted in light of its

original understanding and objectives, with attention to "the specific abuses which led the Framers to include the Import-Export Clause in the Constitution." *Id.* at 282-83.

The *Michelin* Court explained that in adopting the Import-Export Clause, "[t]he Framers of the Constitution . . . sought to alleviate three main concerns." *Id.* at 285. First, state taxation should not interfere with the Federal Government's ability to "speak with one voice when regulating commercial relations with foreign governments"; second, because "import revenues were to be the major source of revenue of the Federal Government," states should not be able to divert that revenue to themselves at the Federal Government's expense; and third, in order to maintain "harmony among the States . . . seaboard States, with their crucial ports of entry," would have to be prevented 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.

Because Georgia's nondiscriminatory *ad valorem* property tax did not conflict with any of those three policies (even though it fell on property that included some imports, and even though some of those imports still resided in their "original packages"), the Court held the tax was not a prohibited "Impost or Duty" within the meaning of the Import-Export Clause. *Id.* at 302.

Two years later, in *Department of Revenue of Washington v. Association of Washington Stevedoring*

Cos., 435 U.S. 734 (1978), this Court confronted a challenge to the State of Washington's attempt to apply its "business and occupation tax" to stevedoring—"the business of loading and unloading cargo from ships." *Id.* at 736-37. The stevedoring activities subject to the tax involved both imports *and* exports, each in the midst of their import or export "journey." The Court reviewed its then-recent *Michelin* decision, explaining:

> Before *Michelin*, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original package doctrine of *Brown v. Maryland*, 12 Wheat. 419 (1827). So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. With respect to exports, the dispositive question was whether the goods had entered the "export stream," the final continuous journey out of the country. As soon as the journey began, tax immunity attached.

Id. at 752 (citations omitted). The Court explained that because Washington's application of its tax to stevedoring activities did not violate any of the three policies animating the Import-Export Clause, it did not

constitute "an 'Impost or Duty' subject to the absolute ban of the Clause." *Id.* at 755.[1]

The *Washington Stevedoring* Court stopped short, however, of holding that the *Michelin* framework had fully supplanted the "export stream" test that the Court had previously applied to export goods already in transit on their export "journey." The Court noted that in *Michelin*, it had not had to "face the question whether a tax relating to goods in transit would be an 'Impost or Duty' even if it offended none of the policies behind the Clause." *Id.* But the *Washington Stevedoring* Court again reserved the question, noting that although the tax at issue fell on an "activity [that] occur[ed] while imports and exports are in transit . . . . the tax [did] not fall on the goods themselves"—only on the "business of loading and unloading ships, or, in other words, the business of transporting cargo within the State of Washington." *Id.* The Court used this distinction to limit its holding to a tax that involves imports or exports only indirectly, and "[did] not reach the question of the applicability of the *Michelin*

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[1] *See also* Hellerstein & Swain, *supra*, ¶ 5.01 ("*Michelin* and *Washington Stevedoring* marked a fundamental redirection of the inquiry under the Import-Export Clause away from the question whether a particular good is an 'import' or an 'export' and toward the question whether a particular levy is an 'impost' or 'duty.' Since virtually all of the earlier precedents interpreting the clause were preoccupied exclusively with the former question, they must be viewed with considerable caution today.").

approach when a State *directly* taxes imports or exports in transit." *Id.* at 757 n.23 (emphasis added).[2]

Since *Washington Stevedoring* the Court has substantively addressed the Import-Export Clause on only a few occasions. *See*, *e.g.*, *Limbach v. Hooven & Allison Co.* (*Hooven II*), 466 U.S. 353, 359 (1984) ("Although *Hooven I* [*Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)] was not expressly overruled in *Michelin*, it must be regarded as retaining no vitality since the *Michelin* decision."); *R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130 (1986) (applying *Michelin* to an *ad valorem* property tax affecting imported goods, finding no violation of the Import-Export Clause); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76-77 (1993) (applying *Michelin* to a tax affecting cargo containers used in international trade, finding no violation of the Import-Export Clause); *see also* Brannon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce § 12.07 (2d ed. 2013 and 2017 Cum. Supp.) ("Since *Washington Stevedoring*, the Supreme Court has passed on only one case [*Itel*] alleging that a state tax violated the Import-Export Clause because it was levied on exports.").

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[2] Despite that reservation, the *Washington Stevedoring* Court determined "the *Michelin* approach should apply to taxation involving exports as well as imports." *Id.* at 758.

B. Factual Background and Proceedings Below

Respondent Dulles Duty Free, LLC ("DDF") operates "duty free" stores at Dulles International Airport, which is located in Loudoun County, Virginia. Those stores' sales are predominantly to travelers departing the United States ("international sales"), but some sales are "domestic"—*i.e.*, to passengers remaining in the United States. App. 3a.

Petitioner Loudoun County imposes a 0.17% Business, Professional and Occupational License ("BPOL") tax measured by the gross receipts of retail stores located in the County.[3] Loudoun accordingly calculated the BPOL tax on DDF using gross receipts, including the portion of its total sales attributable to international travelers who purchase an item at its Dulles Airport duty free stores, and then carry that item out of the country on an international flight.

DDF filed an application in the Loudoun County Circuit Court seeking correction of its BPOL taxes for the tax years 2009-2013, arguing the County's collection of those taxes related to "international sales" violated the Import-Export Clause under *Richfield Oil*.[4]

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[3] Loudoun County Ordinance § 840.14(o); App. 49a. The County imposes a flat $30 annual fee if gross receipts are $200,000 or less. Loudoun County Ordinance § 840.13(c); App. 4a.

[4] DDF filed its application pursuant to Va. Code Ann. § 58.1-3984(A), which authorizes an application in the Virginia courts "to correct erroneous assessment of local levies." App. 27a.

Following a two-day hearing, the Circuit Court rejected DDF's Import-Export challenge. App. 23a. Applying *Michelin* and *Washington Stevedoring*, the Circuit Court concluded that the BPOL tax "is not an impost or duty, and does not transgress any of the policy dictates behind the Import Export Clause." App.46a.

The Circuit Court entered its Final Order on May 6, 2016. DDF timely noticed an appeal on June 3, 2016, and petitioned the Supreme Court of Virginia on June 22, 2016. On December 14, 2016, the Virginia Supreme Court granted DDF's petition for appeal.

The Supreme Court of Virginia reversed. Although it acknowledged the contrary holdings of other courts, App. 18a-19a, and observed that "[i]t is fair to say that courts have struggled to determine which test to apply when it comes to assessing the constitutionality of taxes that fall on export goods in transit," App. 16a, the court held that *this* Court "has not overruled *Richfield Oil* and, while it has significantly revised its Import-Export Clause jurisprudence, the Court has carefully carved out for future disposition the issue whether the *Michelin* test would apply to a non-discriminatory tax that falls on export goods in transit." App. 19a. "Consequently," the Supreme Court of Virginia "conclude[d] that *Richfield Oil* supplies the rule of decision." *Id.* It also determined that the BPOL tax, though it "is imposed on the direct receipts of a business . . . is in its 'operation and effect' a direct tax on the export goods in transit." App. 21a (quoting *Richfield Oil*, 329 U.S. at 84); *see also* App. 20a ("There is no dispute that the merchandise Duty Free sells to

international travelers constitutes export goods in transit."). The court therefore held that, as applied to DDF's "export goods," the BPOL "constitutes an impermissible impost upon an export in violation of the Import-Export Clause" and reversed the judgment of the Circuit Court. App. 22a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly deferred "the question of 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. This Petition squarely presents the opportunity to answer this long-open question, and to resolve disagreement among federal courts of appeals and state courts of last resort about the role (if any) *Richfield Oil* should play in analyzing whether a non-discriminatory business license tax measured on the basis of gross receipts violates the Import-Export Clause.

I. Federal Courts of Appeals and State Courts of Last Resort Have Reached Conflicting Decisions About the Proper Interpretation of the Import-Export Clause

A. One Federal Court of Appeals and Two State Courts of Last Resort Have Determined That Import-Export Challenges to Assessments Affecting Exports Should Be Evaluated Using This Court's *Michelin* Test, in Conflict With the Decision Below

One federal court of appeals and two state courts of last resort hold that the logic of *Michelin* and its progeny have supplanted *Richfield Oil*, and that the *Michelin* framework applies to all state taxation on export goods in transit.

In *Auto Cargo, Inc. v. Miami Dade County*, 237 F.3d 1289 (11th Cir. 2001), the **Eleventh Circuit** applied the *Michelin* framework to uphold a nondiscriminatory tax imposed by Dade County, Florida on "used, self-propelled vehicles" (*i.e.*, used cars) in export transit through the Port of Miami. *Id.* at 1290. A county ordinance required auto exporters to pay a $7.50 "vehicle export fee" on each car "for which export authorization was sought" at the Port. *Id.* at 1291. The "vehicle export fee" was assessed as each car passed through the Port of Miami en route to its foreign destination: *after* the car had entered the "export stream." The Eleventh Circuit explicitly rejected Auto Cargo's argument that *Michelin* and its progeny could be confined to their facts, which (argued

Auto Cargo) had not involved goods already in the "export stream": the court explained that "the framework established in *Michelin* for assessing the constitutionality of an exaction under the Import-Export Clause is clearly a general one and not restricted simply to the facts under consideration in that case." *Id.* at 1293. Instead, the Eleventh Circuit emphasized: "*Michelin* overruled cases that stressed the nature of the goods as imports or exports and instead focused on the nature of the exaction at issue," and "establishes the only applicable standard for determining whether an exaction is discriminatory under the Import-Export Clause." *Id.* at 1292, 1294.

In *Department of Revenue v. Alaska Pulp America, Inc.*, 674 P.2d 268 (Alaska 1983), the **Supreme Court of Alaska**, upheld a business license tax on the gross receipts of two domestic international sales corporations ("DISCs"), federally authorized corporate entities that act as "sales agent[s] for the products of [their] parent corporation" and receive "federal income tax incentives" on behalf of their domestic parent corporations by "selling American products abroad." *Id.* at 277. In evaluating an Import-Export Clause challenge to the business license tax on the DISCs' gross receipts, the Supreme Court of Alaska explained: "When a tax is challenged under the import-export clause, the court must . . . determine whether the tax offends any of the three purposes of that clause, as delineated in *Michelin*." *Id.* at 279. And, employing that approach, the Supreme Court of Alaska held that the assessment on gross receipts covering exports does not conflict with the Clause and "merely requires the

taxpayers to pay their just share for the privilege of conducting business in Alaska." *Id*. at 280.

In *United States Steel Mining Co., LLC v. Helton*, 631 S.E.2d 559 (W. Va. 2005), *cert. denied*, 547 U.S. 1179 (2006), the **Supreme Court of Appeals of West Virginia**, upheld a tax on coal mined in West Virginia and exported abroad. Noting that *Michelin* marked a "sharp turn" in the focus of Import-Export Clause analysis, *id*. at 567, 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 id.* at 567 (the taxes "do not offend the policies that the Supreme Court has said underlie the Import-Export Clause"); *id.* at 567-68 (the taxes "are not imposed on goods that are *undisputedly* in export transit," because the "initial loading of coal at coal preparation facilities into rail cars [] is not *clearly* a part of the export transit process") (emphases added). But two members of the Court dissented. Justice Maynard contended that "the majority opinion's wholesale rejection of *Richfield Oil* in favor of the *Michelin Tire/Washington Stevedoring* line of cases is improper . . . ." *Id*. at 569. In his view, "*Richfield Oil* remains good law and it directly control[led]" the case. *Id*. Justice Benjamin wrote separately, dissenting in part, arguing that the majority inappropriately "presume[d] that *Richfield Oil*'s 'stream-of-export' rule has been overruled or disregarded by the United States Supreme Court in favor of *Michelin*'s policy rule." *Id*. at 581. Justice Benjamin, however, found the disagreement among members of the court "understandable" given the absence of "non-divergent

case law," explaining "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." *Id.* at 580.[5]

B. Since *Michelin*, Two Federal Courts of Appeals and Two State Courts of Last Resort Have Relied on *Richfield Oil* Rather Than *Michelin* in Deciding an Import-Export Clause Challenge to Assessments Affecting Exports, in Accord With the Decision Below

Two federal courts of appeals and two state high courts have continued to apply *Richfield Oil* since *Michelin* was decided, in accord with the decision below.

In *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), Pilot Petroleum Corporation challenged a Louisiana tax

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[5] In *David Hazan, Inc. v. Tax Appeals Tribunal*, 556 N.E.2d 1113 (N.Y. 1990), the New York Court of Appeals affirmed a decision by New York's Tax Appeals Tribunal upholding a state tax under *Michelin* and *Washington Stevedoring*. One Court of Appeals judge dissented, adopting the reasoning of two dissenting judges in the intermediate appellate court, who would have applied *Richfield Oil* to invalidate the state tax at issue. *See David Hazan, Inc. v. Tax Appeals Tribunal*, 543 N.Y.S.2d 545, 547 (N.Y. App. Div. 1989) (Mikoll, J., dissenting) ("We disagree with the Tribunal that *Washington* or *Michelin*, relied on by the Tribunal, have abrogated the concept of 'export stream.'") (citations omitted).

assessed on oil exports that the state assessed after the oil had been loaded "into the tanks of a foreign-flagged tanker." *Id.* at 821. The **Fifth Circuit**, while observing "[t]he broad prohibition against any and all taxation upon imports and exports has been discarded" in *Michelin*, nevertheless determined that *Michelin* did not reach "in-transit" exports which were "[s]till [w]ithin the [c]lause." *Id.* at 820. And, looking to *Richfield Oil*, the Court invalidated the tax because the oil had already been loaded into the cargo ship's tanks in preparation for export. *Id.*

Judge Jolly dissented, however, explaining that even though "the Supreme Court has not explicitly addressed the [Import-Export] Clause's application to direct taxes on goods 'in transit' . . . . [t]he Court's recent decisions . . . make clear that even a tax operating directly on goods 'in transit' is not prohibited if it is non-discriminatory and does not frustrate the policies underlying the Clause." *Id.* at 822 (Jolly, J., dissenting). Without disputing that the tax at issue would fail *Richfield Oil*'s "export stream" test, Judge Jolly argued that *Michelin* provided the only appropriate framework for assessing the tax's constitutionality under the Clause, and that under *Michelin*, the tax was valid. *Id.* at 822-23.

The **Ninth Circuit** employed a similar approach in *Connell Rice & Sugar Co., Inc. v. Yolo County*, 569 F.2d 514, 518 (9th Cir. 1978). There, the Court of Appeals evaluated an Import-Export Clause challenge

to an *ad valorem* tax on rice, citing *Richfield Oil* as "helpful authorit[y]" and applying the "export stream" test, without any citation to or discussion of *Michelin*.[6]

In *Virginia Indonesia Co. v. Harris County Appraisal District*, 910 S.W.2d 905 (Tex. 1995), the **Supreme Court of Texas** likewise adhered to a pre-*Michelin* "stream of export doctrine" in striking down an *ad valorem* property tax. The Virginia Indonesia Company ("VICO") procured goods throughout the United States on behalf of an Indonesian joint venture. VICO would gather the goods intended for export at an export packer's facility in Harris County, Texas. In 1991, the County assessed an *ad valorem* tax on VICO's property while it sat at the export packer's facility awaiting export. Noting "[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," *id.* at 910, the Texas Supreme Court eschewed the *Michelin* test in favor of "the long-standing rule that a tax on goods in the export stream of commerce violates the import-export clause." *Id.* at 911-12. And, as in *Pilot Petroleum*, the court's reliance on pre-*Michelin* analysis elicited a dissent: Justices Hecht and Owen rejected the majority's approach, contending that "adherence to an in-transit rule is at odds with the

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[6] In a subsequent case the Ninth Circuit employed the *Michelin* test to find a violation of the Import-Export Clause in a case where the court did not mention *Richfield Oil*. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984).

Supreme Court's modern jurisprudence." *Id.* at 916. "The reasoning of *Michelin* and its progeny demonstrate that the tax here does not offend the policies of the Import-Export Clause," they explained. *Id.*[7]

II. This Case is an Ideal Vehicle for Resolving the Questions Presented

This case is an ideal vehicle to resolve the questions presented.

First, the decision and judgment below turned entirely on the Supreme Court of Virginia's interpretation and application of the Import-Export Clause and not on any other grounds, including state-law grounds, that would interfere with this Court's disposition of the question presented. Further, the material facts underlying this dispute are uncontested. App. 24a.

Second, the Supreme Court of Virginia acknowledged *Michelin* but expressly concluded, in a detailed opinion, that *Richfield Oil* controls. App. 7a. ("Resolution of the constitutional propriety of the BPOL tax to Duty Free's in-transit export sales hinges

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[7] The Supreme Court of Washington has also held that *Richfield Oil* continues to govern state taxation of export goods in transit after *Michelin*. *See Coast Pac. Trading, Inc. v. State*, 719 P.2d 541, 544 (Wash. 1986) ("The parties thus correctly point out that *Michelin* and *Stevedoring* have not overruled decisions that struck down taxes levied directly on goods that had reached the export stream . . . . includ[ing] *Richfield Oil* . . . .").

on the applicability, and ongoing validity, of the decision in *Richfield Oil*"); App. 16a, 19a (*Richfield Oil* "supplies the rule of decision").

Third, although uncertainty and disagreement about the questions presented have been brewing for some time, there are relatively few appropriate vehicles for this Court to review and resolve these questions.[8] The Court should seize the opportunity presented by this case to address these important questions.[9]

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In *Helton*, Justice Benjamin, writing in dissent, encouraged this Court "to bring a new clarity to this area of constitutional law in the near future." *Helton*, 631 S.E.2d at 580.

Here, mindful of disagreement among the lower courts, and the need for further guidance, the unanimous Supreme Court of Virginia also has gently suggested this Court's review is welcome. Recognizing

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[8] *See infra* note 16 (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.").

[9] The Court has previously granted review of a case to clarify the impact of *Michelin* on an aspect of Import-Export Clause jurisprudence. *See Hooven II*, 466 U.S. at 359 ("Although *Hooven I* [*Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)] was not expressly overruled in *Michelin*, it must be regarded as retaining no validity since the *Michelin* decision. The conclusion of the Supreme Court of Ohio that *Hooven I* retains current validity in this respect is therefore in error.").

"that courts have struggled to determine which test to apply when it comes to assessing the constitutionality of taxes that fall on export goods in transit," App. 16a,[10] the court concluded its assessment of this question of federal law by observing: "It 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. App. 22a.[11]

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[10] The Circuit Court in this case similarly observed: "It is challenging to try to reconcile the Import Export Clause jurisprudence." App. 33a.

[11] Commentators are understandably uncertain about the status of *Richfield Oil* after *Michelin* and *Washington Stevedoring*. For example, a leading treatise on state taxation observes: "State courts have generally treated *Richfield* with considerable skepticism," while noting that in *Itel* the Court "itself cast doubt on the continuing validity of *Richfield*." Hellerstein & Swain, *supra*, ¶ 5.05[2][a]. That treatise's authors have concluded: "[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." *Id.* But even that assessment is hedged in light of post-*Michelin* decisions by lower courts which embrace *Richfield Oil*, and "are a reminder that it would be premature to give *Richfield* its last rites." *Id.* Another commentator who has written about the Clause is similarly uncertain, observing: 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*." Denning, *supra*, § 12.07; *see Itel Containers*, 507 U.S. at 77 (assuming but not resolving whether the rule followed in *Richfield Oil* has "been altered by the approach we adopted in *Michelin*").

This Court should dispel the uncertainty and conclusively answer the questions presented by this Petition.[12]

III. The Questions Presented are Important

The questions presented in this Petition are important.

The Import-Export Clause operates as a constraint on the power of states (and local governments) to raise revenue. But taxation authority is "central to state sovereignty." *Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994); *see also* The Federalist No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (under the plan of the Constitutional Convention "with the sole exception of duties on imports and exports" states would retain the authority to raise their own revenues "in the most absolute and unqualified sense").

In order to exercise their full authority to raise revenue, state and local governments require a clear and accurate understanding of the meaning and scope of the Import-Export Clause. Uncertainty about what is permitted and what is proscribed by the Import-Export Clause hampers state and local governments, and may prevent them from collecting much-needed revenue. That uncertainty can also lead to costly and

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[12] *Cf. United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 846 (1996) (we "agreed to hear this case to decide whether we should overrule *Thames & Mersey* [237 U.S. 19 (1915)]," given "subsequent decisions interpreting the Import-Export Clause" including "specifically, *Michelin Tire Corp.*").

time-consuming litigation about the scope of the Import-Export Clause and its application to particular government assessments.

In addition to the general importance of clarity about the Import-Export Clause, its specific application to duty free operations, as in this case, has significant economic consequences. There are nearly 100 communities in the United States that host duty free stores. Most of these communities are *not* at international airports: while more than three dozen communities have international airports with duty free stores, even more are located along the border with Canada or Mexico (and one, in Anacortes, Washington, at the ferry terminal to Canada).[13] The authority of state and local governments to impose taxes that affect "exports" from these duty free locations (which is currently unclear) is an issue of financial importance to these communities. Respondent's export sales for 2009-2013 at just the few of its locations in Loudoun County exceeded $85 million. App. 3a. The duty free stores spread across the United States[14] are estimated

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[13] *See Stores, United States*, Duty Free Ams., https://www.dutyfreeamericas.com/locations/ (last visited Dec. 18, 2017) (further analysis on file with counsel).

[14] Respondent's parent, Duty Free Americas, Inc., itself has locations in 19 states as well as the District of Columbia. *See* Pretrial Memorandum of Dulles Duty Free, LLC, at 3, *Dulles Duty Free LLC v. County of Loudoun*, Civil Action No. 90613 (Va. Cir. Ct. May 6, 2016) (on file with counsel); *Stores, United States*, *supra*.

to have aggregate annual sales of $4 billion.[15] Counsel for Respondent has asserted that the decision below "will affect the entire U.S. duty-free industry."[16]

Moreover, the implications of the decision below by the Supreme Court of Virginia extend far beyond duty free transactions. 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. If a tax imposed annually based on historical gross sales violates the Import-Export Clause's proscription on "imposts and duties"—as the Supreme Court of Virginia concluded, guided by *Richfield Oil*—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).

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[15] Lois Pasternak, *US Duty Free market will expand to $5bn by 2020, says research*, Travel Markets Insider, June 22, 2016, http://travelmarketsinsider.net/us-duty-free-market-will-expand-to-5bn-by-2020-says-research/ ("The US market was worth $3.9 billion in 2015 and will expand by $1.1 billion at a Compound Annual Growth Rate (CAGR) of 5% to reach $5 billion by 2020.").

[16] *See* Carrie Salls, *Duty free stores at Dulles Airport win at Va. SC; Decision significant for Import-Export Clause*, Legal NewsLine, Sept. 6, 2017, https://legalnewsline.com/stories/511204498-duty-free-stores-at-dulles-airport-win-at-va-sc-decision-significant-for-import-export-clause. Counsel for Respondent has also said the decision "represents perhaps the most significant Import-Export Clause decision issued in the last 20 years." *Id.*

IV. Loudoun's BPOL Tax is Constitutional, and the Decision of the Supreme Court of Virginia was Incorrect

The Petition should also be granted because Loudoun's BPOL tax is constitutional, and the decision of the Supreme Court of Virginia was incorrect.

As a threshold matter, that decision depends entirely on the view that *Richfield Oil* remains in full force. But that notion is dubious. Although there is clear and persistent disagreement among the lower courts, "the weight of reason and authority support the view . . . that *Richfield* is no longer good law." *See* Hellerstein & Swain, *supra*, ¶ 5.05[2][a].

The Supreme Court of Virginia's conclusion that the BPOL violates the Import-Export Clause is also suspect for other reasons.

The Import-Export Clause, by its own terms, concerns only "Imposts" and "Duties." U.S. Const. art. I, § 10, cl. 2. These terms are distinct from—and narrower than—the term "taxes," used elsewhere in the Constitution. *See United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 857-58 (1996) ("impost and duty are narrower terms than tax," and "the absolute ban is only of 'Imposts or Duties' and not of all taxes"); *Washington Stevedoring*, 435 U.S. at 751 (Clause "bans only 'Imposts or Duties on Imports or Exports'"). Yet the Supreme Court of Virginia failed to analyze substantively whether Loudoun's BPOL tax is a

"duty"[17]—instead relying entirely on its view that "[w]e are hard pressed to see a difference of constitutional magnitude between the BPOL tax and the tax at issue in *Richfield Oil*." App. 21a. That failure is especially noteworthy given this Court's rejection of reliance on *Richfield Oil* by the taxpayer in *Washington Stevedoring*, observing that *Richfield Oil* was not "persuasive support" because it did not "recognize[] that the term 'Impost or Duty' is not self-defining and does not necessarily encompass all taxes." *Washington Stevedoring*, 435 U.S. at 759; *id.* ("[T]he central holding of *Michelin* [is] that the absolute ban is only on 'Imposts and Duties' and not of all taxes.").

The decision below also failed to heed one of the principal lessons of *Michelin*: the Import-Export Clause should be interpreted in light of the Framers' "objectives" in enacting it. *Michelin*, 423 U.S. at 293. While the Supreme Court of Virginia recognized this Court "has significantly revised its Import-Export Clause jurisprudence" since *Richfield Oil*, App. 19a, it nevertheless mechanically adhered to its reading of *Richfield*, without regard for whether Loudoun's BPOL may be sustained in light of the Import-Export

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[17] This case concerns only *exports*. The term "imposts" arguably relates to imports only. *See Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 637 (1997) (Thomas, J., dissenting) ("[A]s 18th-century usage of the word indicates, an impost was a tax levied on *goods* at the time of *importation*."); *see also* Robert G. Natelson, *What The Constitution Means By "Duties, Imposts, And Excises"—And "Taxes" (Direct Or Otherwise)*, 66 Case W. Res. L. Rev. 297, 322-23 (2015).

Clause's purposes in our constitutional scheme. But this Court has already evaluated a post-*Michelin* Import-Export challenge to a tax affecting *exports* in light of the "policies behind the Clause." *R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 153 (1986) ("The nondiscriminatory ad valorem property tax at issue here seems indistinguishable from the tax in *Michelin* in terms of these policies."); *see also Wash. Stevedoring*, 435 U.S. at 758 ("the *Michelin* approach should apply to taxation involving exports as well as imports"). Refusal to consider the purposes of the Clause was particularly egregious given the ambiguity of the terms "impost" and "duty" used in the Clause. *Cf. Michelin*, 423 U.S. at 293-94 ("The terminology employed in the Clause 'Imposts or Duties' is 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."). Nothing about Loudoun's BPOL tax offends or undermines the purposes underlying enactment of the Import-Export Clause.[18] *See Michelin*, 423 U.S. at 290 ("[T]he Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.").

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[18] The Supreme Court of Virginia did not opine that the BPOL tax would be invalid under the *Michelin* approach. In its brief before the Supreme Court of Virginia, DDF did not challenge the Circuit Court's conclusion that the BPOL tax is valid under the *Michelin* approach. Br. of Appellant Dulles Duty Free, LLC at 4, 14-26, No. 160939 (Va. Jan. 17, 2017).

The judgment below is also difficult to reconcile with this Court's view that "a nondiscriminatory gross receipts tax . . . may be sustained if fairly apportioned to the business done within the taxing state." *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515 (1951); *see also R.J. Reynolds Tobacco*, 479 U.S. at 134 (upholding nondiscriminatory *ad valorem* tax where taxpayer "receives identical city and county police, fire, and other public services" at export and non-export facilities). Here, "[t]he [BPOL] tax does not target imports or exports; it applies across the board to all sales." App. 4a.[19] And Respondent "does not dispute that it owns inventory and other personal property in Loudoun County. There is also no question that it employs a large number of personnel in the County to run its retail operations. [It] uses County roads, and benefits from the protection of County fire and rescue, law enforcement, the court system, and other County services." App. 3a. Even before *Michelin* this Court determined that the Import-Export Clause was not meant "to relieve property eventually to be exported from its share of the cost of local services." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70 (1974) (quoting *Joy Oil Co. v. State Tax Comm'n*, 337 U.S.

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[19] The Supreme Court of Virginia recognized that Loudoun's BPOL tax is "nondiscriminatory." *See* App. 22a.

286, 288 (1949)).[20] And *Michelin* itself expressed the same idea. *See Michelin*, 423 U.S. at 287 ("Unlike imposts and duties, which are essentially taxes on the commercial privilege of bring goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth.").

Federalism considerations also cast doubt on the judgment below. Because taxation authority is "central to state sovereignty," as when construing a statute which impacts exercise of "the States' traditional powers," interpretation of the Import-Export Clause should not extend "beyond its evident scope." *Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994); *see also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *see also Michelin*, 423 U.S. at 293 ("[S]ince prohibition of nondiscriminatory ad valorem property taxation would not further the objective of the Import-Export Clause

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[20] The uncertainty and disagreement among the lower courts is due in part to the fact that this Court has not expressly addressed the application of the *Michelin* approach to a state tax "directly on goods in import or export transit." *See Int'l Bus. Mach. Corp.*, 517 U.S. at 862; *see also Washington Stevedoring*, 435 U.S. at 757 n.23.

only the clearest constitutional mandate should lead us to condemn such taxation.").

The judgment of the Supreme Court of Virginia is also likely to impose a substantial burden on state and local governments. The decision below has far-reaching implications. *See supra* at 27. Under its 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. State and local governments will also face significant administrative burdens if they are constitutionally proscribed from calculating non-discriminatory taxes based on gross receipts.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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