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Brief of Tax Law Professors as *Amici Curiae* in Support of Petitioner in *Loudoun County, Virginia v. Dulles Duty Free, LLC*

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No. 17-904

IN THE
Supreme Court of the United States

LOUDOUN COUNTY, VIRGINIA,
Petitioner,

v.

DULLES DUTY FREE, LLC,
Respondent.

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

BRIEF OF TAX LAW PROFESSORS *AS AMICI CURIAE* IN SUPPORT OF PETITIONER

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January 25, 2018

QUESTION PRESENTED

Whether the validity under the Import-Export Clause of a nondiscriminatory state or local tax based on the value of sales or personal property that applies to goods in the stream of export should be evaluated under this Court's approach in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), or in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of tax law at universities across the United States. As scholars and teachers, they have considered the doctrinal roots and practical consequences of judicial limits on state and local taxation. *Amici* join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in the Appendix to this brief.

SUMMARY OF ARGUMENT

For more than seven decades, state and local governments as well as market actors have labored under an export tax regime that is inconsistent, inefficient, and inequitable. This case presents the Court with a chance to restore rationality to the tax treatment of the export sector. The economic implications are vast: annual exports of goods from the United States exceed $1.4 trillion.[2] 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.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due and that the parties have consented to the filing of this brief.

[2] *See* U.S. Census Bureau, U.S. International Trade in Goods and Services (FT900), Exhibit 5 (Jan. 5, 2018), *available at* https://www.census.gov/foreign-trade/Press-Release/current_press_release/index.html.

Near the middle of the last century, this Court held that the Import-Export Clause prohibits a State from levying a sales tax on goods that have begun a "continuous route or journey" to a foreign destination. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 79 (1946).[3] The Court borrowed this "continuous route or journey" test—also known as the "stream of export" test—from an earlier dormant Commerce Clause decision that addressed the taxation of goods in interstate rather than international trade. *See Coe v. Town of Errol*, 116 U.S. 517, 527 (1886). The *Richfield Oil* test for exports was the jurisprudential analogue to the "original package" test for imports, which held that imported goods retained immunity from state personal property taxes until they left the importer's control or were broken up from their original cases. *See Low v. Austin*, 80 U.S. (13 Wall.) 29, 32-34 (1871).

In the years since *Richfield Oil*, this Court has ceased to rely on *Coe*'s "continuous route or journey" test for dormant Commerce Clause purposes. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Court also has discarded the "original package" doctrine as applied to imports. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976). And the Court has cast doubt on *Richfield Oil*'s continued validity in two cases. *See Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 757 n.23 (1978); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60,

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[3] While *Richfield Oil* involved a tax on gross receipts (sales), lower courts have extended its holding to taxes that are based on the value of personal property. *See*, *e.g.*, *Virginia Indonesia Co. v. Harris Cnty. Appraisal Dist.*, 910 S.W.2d 905, 907-15 (Tex. 1995).

77 (1993). Still, this Court has yet to overrule *Richfield Oil* explicitly.

Courts in eight States as well as one federal court of appeals no longer adhere to *Richfield Oil*. Their decision to depart from *Richfield Oil* follows logically from this Court's opinion in *Michelin Tire*, which rejected the premises upon which *Richfield Oil* rested. 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. This split generates uncertainty for market actors as they struggle to develop long-term business plans, and it interferes with the ability of state and local governments to craft durable tax regimes.

Such uncertainty on its own is sufficient to justify this Court's intervention. And, if and when it steps in, this Court should relegate *Richfield Oil* to the dustbin. *Richfield Oil*'s holding is at odds with the text and purpose of the Import-Export Clause; it has proven to be difficult for lower courts to apply; and it encourages exporters to alter their business practices in inefficient ways so as to ensure exemption for their goods. The businesses that cannot or choose not to put themselves through contortions in order to qualify for exemption then bear a disproportionate tax burden. Perhaps these consequences would be tolerable if *Richfield Oil* vindicated important constitutional values. But, to the contrary, *Richfield Oil*'s holding —that the Import-Export Clause prohibits the application of a nondiscriminatory tax to exports that have begun a "continuous route or journey" out of the country—needlessly infringes upon the fiscal autonomy of States without advancing the Import-Export Clause's core objectives.

In the end, all that *Richfield Oil*'s holding has going for it is *stare decisis*. But if *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 here. Reliance interests weigh on both sides, and the Court has given fair warning to regulated parties that it will reconsider *Richfield Oil* in the appropriate case. That case has now arrived, and this Court should seize the opportunity to overrule *Richfield Oil* once and for all.

ARGUMENT

I. *RICHFIELD OIL* IS A DOCTRINAL ANACHRONISM

Richfield Oil's essential holding—that state and local governments cannot impose nondiscriminatory sales taxes on goods that have begun a "continuous route or journey" to a foreign destination—is based on a dubious interpretation of the Constitution's Import-Export Clause. *Cf.* U.S. Const. art. I, § 10, cl. 2 ("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 it's [*sic*] inspection Laws . . . .").[4] The "continuous route or journey" test for exports is the analogue to the "original package" rule for imports, which this Court adopted in the nineteenth century

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[4] The Import-Export Clause is distinct from the Export Clause, which applies to Congress rather than to the States. *See* U.S. Const. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."); *United States v. IBM Corp.*, 517 U.S. 843, 857 (1996) ("The Export Clause prohibits Congress from laying any 'Tax or Duty' on exports, while the Import-Export Clause prevents the States from laying any 'Imposts or Duties' on imports or exports.").

and ultimately discarded in the twentieth. *Richfield Oil*'s holding deserves the same fate.

The "original package" doctrine dates back to Chief Justice Marshall's opinion for the Court in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Under *Brown*, a good qualifies as an "import"—and so is immune from an "impost" or "duty" levied by a State—as long as the good "remain[s] the property of the importer, in his warehouse, in the original form or package in which it was imported." *Id.* at 442. Significantly, *Brown* did not hold that *every* tax on imported goods in their original packages violated the Import-Export Clause. Under *Brown*, a tax on imported goods in their original packages ran afoul of the constitutional prohibition only if the tax also qualified as an "impost" or "duty." *See Michelin Tire*, 423 U.S. at 295-98 (explaining *Brown*).

Four-and-a-half decades after *Brown* was decided, this Court in *Low v. Austin* extended the "original package" rule far beyond its original scope and held that the Import-Export Clause barred States from imposing any tax on imported goods while those goods remained in their original packages. *See Low*, 80 U.S. (13 Wall.) at 34. Under *Low*, even a personal property tax that treated imported goods in their original packages the same as other personal property in the State would violate the Import-Export Clause. *See id.* at 35. While the *Low* Court's extension of *Brown* was "uniformly" criticized as a misreading of Chief Justice Marshall's opinion, *Michelin Tire*, 423 U.S. at 282-83 (collecting sources), the Court continued to apply *Low*'s "original package" rule to strike down nondiscriminatory state and local taxes into the middle of the twentieth century. *See*, *e.g.*,

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 654, 679 (1945) ("*Hooven I*").

The "continuous route or journey" test for exports is of more recent vintage. The rule is sometimes attributed to this Court's 1886 decision in *Coe v. Town of Errol*, which held that goods remained subject to state taxation "in the usual way" until they had "been shipped, or entered with a common carrier for transportation, to another state," or had "been started upon such transportation in a continuous route or journey." 116 U.S. at 527. *See*, *e.g.*, *Virginia Indonesia*, 910 S.W.2d at 908. *Coe*, however, concerned the scope of the dormant Commerce Clause's restrictions on state taxation of interstate trade, not the Import-Export Clause's restrictions on state taxation of foreign trade. *See Coe*, 116 U.S. at 526. It was not until after World War II, in *Richfield Oil*, that this Court first invoked *Coe*'s "continuous route or journey" language to strike down a nondiscriminatory state tax on the grounds that it operated as a duty on exports in violation of the Import-Export Clause. *See Richfield Oil*, 329 U.S. at 79, 86.

In the years since *Richfield Oil*, this Court has departed from *Coe*'s "continuous route or journey" test in its dormant Commerce Clause jurisprudence. Now, a state tax generally will survive a dormant Commerce Clause challenge as long as the tax (1) "is applied to an activity with a substantial nexus with the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. And, at around the same time as it moved beyond *Coe*'s "continuous route or journey" formulation for dormant Commerce Clause purposes, the Court expressly overruled its "original package" doctrine for Import-

Export Clause purposes. *See Michelin Tire*, 423 U.S. at 301. Now, a tax that applies to imports will be struck down on Import-Export Clause grounds only if it (1) undermines the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments," (2) diverts import revenue from the federal government to the States, or (3) disturbs "harmony among the States" by allowing "seaboard States, with their crucial ports of entry," to use their position to the disadvantage of "other States not situated as favorably geographically." *Id.* at 285-86; *accord Washington Stevedoring*, 435 U.S. at 753-55; *Itel Containers*, 507 U.S. at 76.

Michelin Tire was a case about imports, while this case is about exports. But the holding of *Michelin Tire* did not hinge on what it means to be an "import"; it turned on what it means to be an "impost" or "duty." As the Court in *Michelin Tire* explained:

> [T]he [Import-Export] Clause is not written in terms of a broad prohibition of every "tax." The prohibition is only against States laying "Imposts or Duties" . . . . By contrast, Congress is empowered to "lay and collect *Taxes*, Duties, Imposts, and Excises[,]" which plainly lends support to a reading of the Import-Export Clause as not prohibiting every exaction or "tax" which falls in some measure on imported goods. . . . The characteristic common to both "imposts" and "duties" was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce and tax States situated less favorably geographically.

423 U.S. at 290-93 (emphasis added).

Prior to *Michelin Tire*, cases such as *Richfield Oil* "had assumed that all taxes on imports and exports . . . were banned by the Clause." *Washington Stevedoring*, 435 U.S. at 751-52 (recounting history). By contrast, *Michelin Tire* "initiated a different approach to Import-Export Clause cases" according to which the Court focused instead on "analyz[ing] the nature of the tax to determine whether it was an 'Impost or Duty.'" *Id.* at 752. Thus, even if goods obtain the status of "exports" once they begin a "continuous route or journey" to a foreign destination, the reasoning of *Michelin Tire* would suggest that such goods still can be subject to nondiscriminatory state and local taxes as long as those taxes are not imposts or duties—that is, as long as they are not directed at imports or exports as such.

But, while the logical implication of *Michelin Tire* is that a nondiscriminatory state tax that applies to exports is not a constitutionally prohibited impost or duty, this Court has never explicitly overruled *Richfield Oil*'s holding that a nondiscriminatory tax runs afoul of the Import-Export Clause if it applies to goods that have begun a "continuous route or journey" out of the country. Justice Powell pressed the Court to take that step shortly after *Michelin Tire*, but a majority of the Justices chose "to defer decision until a case with pertinent facts is presented." *Washington Stevedoring*, 435 U.S. at 757 n.23; *see id.* at 761-64 (Powell, J., concurring in part and concurring in the result). More recently, the State of Tennessee urged this Court to recognize that *Richfield Oil* had been "abandoned," Br. of Resp. 41-42, *Itel Containers*, No. 91-321 (U.S. filed June 25, 1992), 1992 WL 511845, but again the Court concluded that the question was not squarely before it. *See Itel*

Containers, 507 U.S. at 77 ("Even assuming that [the *Richfield Oil*] rule has not been altered by the approach we adopted in *Michelin*, it is inapplicable here.").

All of this puts *Richfield Oil* in precedential purgatory. The idea that every tax on exports is an impost or duty—the idea underlying *Richfield Oil*'s holding—makes the word "tax" in other clauses of the Constitution mere surplusage. *See* U.S. Const. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises"); art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").[5] And the notion that a nondiscriminatory tax on exports is an impost or duty within the meaning of the Import-Export Clause stands in irreconcilable tension with this Court's conclusion in *Michelin Tire* that a tax is not an impost or duty unless it implicates the Import-Export Clause's core objectives. Whether one focuses on the Import-Export Clause's text or its purpose, *Richfield Oil* has little to recommend itself. It 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.

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[5] Thus, overruling *Richfield Oil*'s restriction on nondiscriminatory state and local taxes would be entirely consistent with this Court's holding in *IBM*, which prohibits Congress from imposing a federal *tax* on exports. *See IBM*, 517 U.S. at 857 ("In both *Michelin* and *Washington Stevedoring*, we left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause.").

II. FAILURE TO ADDRESS *RICHFIELD OIL*'S STATUS CREATES UNCERTAINTY FOR MARKET ACTORS AND FOR STATE AND LOCAL GOVERNMENTS

This Court's failure to address *Richfield Oil*'s ongoing validity puts lower courts in a bind. On the one hand, the Court has instructed lower courts to take heed of *Michelin Tire*'s obvious implications. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359, 361 (1984) ("*Hooven II*") ("While we acknowledge that *Hooven I* was not expressly overruled in *Michelin*, the latter case strongly implies that the foundation of the former had been seriously undermined. . . . The conclusion of the Supreme Court of Ohio that *Hooven I* retains current validity in this respect is therefore in error."). On the other hand, this Court has said that, if one of its precedents "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Caught between the force of *Michelin Tire* and the rule of *Rodriguez de Quijas*, lower courts have gone in both directions.

The Eleventh Circuit and the courts of at least eight States—including three state supreme courts—appear to have concluded that *Michelin Tire* supplants *Richfield Oil*.[6] The Fifth Circuit and the

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[6] *See Auto Cargo, Inc. v. Miami Dade Cnty.*, 237 F.3d 1289, 1292 (11th Cir. 2001) (*Michelin Tire* overruled the stream-of-export doctrine); *State, Dep't of Revenue v. Alaska Pulp Am., Inc.*, 674 P.2d 268, 279 (Alaska 1983) (*Michelin Tire* test applies to gross receipts tax on exported goods); *Itel Containers Int'l*

courts of at least five States—including three state supreme courts—have recognized *Richfield Oil* as good law.[7] Courts of appeals in one State—

Corp. v. Cardwell, 814 S.W.2d 29, 37-38 (Tenn. 1991) (applying *Michelin Tire* rather than *Richfield Oil*), *aff'd on other grounds sub nom. Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559, 562-64 (W. Va. 2005) (same); *P.J. Lumber Co. v. City of Prichard*, No. 2160627, 2017 Ala. Civ. App. LEXIS 185, at *7 (Civ. App. Sept. 22, 2017) (*Richfield Oil* is "no longer valid"); *Arizona Dep't of Revenue v. Robinson's Hardware*, 721 P.2d 137, 139 (Ariz. Ct. App. 1986) ("[T]he rule enunciated in *Richfield* is no longer the proper standard by which to measure the validity of state taxation on foreign commerce under the Import-Export Clause."); *Bradford Exch. A.G. v. Illinois Dep't of Revenue*, 508 N.E.2d 316, 321 (Ill. App. Ct. 1987) (applying *Michelin Tire* and noting that "[t]he taxpayer's reliance on *Richfield Oil* . . . ignores the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes"); *Holt Hauling & Warehousing Sys., Inc. v. Director, Div. of Taxation*, 9 N.J. Tax 446, 449-52 (1987) (applying *Michelin Tire* rather than *Richfield Oil*); *David Hazan, Inc. v. Tax Appeals Tribunal*, 543 N.Y.S.2d 545 (App. Div. 1989), *aff'd without opinion*, 556 N.E.2d 1113 (N.Y. 1990); *see also David Hazan*, 543 N.Y.S.2d at 547 (Mikoll, J., dissenting) (noting that Tax Tribunal decision affirmed by Appellate Division had concluded that *Michelin Tire* and *Washington Stevedoring* "abrogated the concept of 'export stream'").

[7] *See Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir. 1990) (applying *Richfield Oil*); *Virginia Indonesia*, 910 S.W.2d at 912-14 (following *Louisiana Land* and *Richfield Oil*); *Dulles Duty Free, LLC v. County of Loudoun*, 803 S.E.2d 54, 60 (Va. 2017) (decision below) ("[t]he bright line *Richfield Oil* test, rather than the policy based *Michelin* test, supplies the rule of decision"); *Coast Pac. Trading, Inc. v. State, Dep't of Revenue*, 719 P.2d 541, 544 (Wash. 1986) ("*Michelin* and *Stevedoring* have not overruled decisions that struck down taxes levied directly on goods that had reached the export stream. These decisions include *Richfield Oil* . . . ."); *Ammex, Inc. v. Department of Treasury*, 603 N.W.2d 308, 313 (Mich. Ct. App. 1999) ("[W]e must conclude that *Richfield Oil*

California—appear to be split on the question. *Compare McDonnell Douglas Corp. v. State Bd. of Equalization*, 10 Cal. App. 4th 1413, 1421 n.4, 1424 (1992) (applying *Richfield Oil* and noting that the Import-Export Clause's exemption "still applies to goods in the export stream"), *with City of Los Angeles v. Marine Wholesale/Warehouse Co.*, 15 Cal. App. 4th 1834, 1838, 1843-46 (1993) (upholding gross receipts tax on warehouse "engaged solely in sales of goods . . . to cruise ships and airlines that were engaged solely in sailing to foreign ports and flying to foreign locations"). *Cf. National Film Labs. v. California State Bd. of Equalization*, No. D049006, 2007 Cal. App. Unpub. LEXIS 8088, at *23-24 (Oct. 4, 2007) (noting apparent split). The split divides the States that rank highest in terms of total merchandise exports, with Texas and Washington (number one and number three) on the opposite side of New York and Illinois (number four and number five), and the second largest exporter—California—itself conflicted.[8]

Uncertainty over *Richfield Oil*'s status has negative effects on market actors as well as state and local governments. Businesses engaged in the export of goods enter into long-term contracts without being able to anticipate their tax liabilities. State and local governments design their own tax systems without knowing whether elements will be struck down on

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has precedential value."); *Lipshutz Bros., Inc. v. Tax Review Bd.*, 4 Phila. 374, 386, 1980 WL 194215 (C.P. Pa. 1980) (stream-of-export doctrine "remains fully effective"), *aff'd*, 439 A.2d 862 (Pa. Commw. Ct. 1981).

[8] For figures on total merchandise exports by State, see U.S. Dep't of Commerce, Int'l Trade Admin., *2016 NAICS Total All Merchandise Exports to World*, *available at* http://tse.export.gov/tse/MapDisplay.aspx (last visited Jan. 23, 2018).

Import-Export Clause grounds. For that reason, litigants on both sides of the issue have asked the Court to clarify whether *Richfield Oil* remains valid. *Compare* Pet. for Cert., *Harris Cnty. Appraisal Dist. v. Virginia Indonesia Co.*, No. 95-1528 (U.S. filed Mar. 20, 1996), 1996 WL 33439089 (asking Court to overrule *Richfield Oil*), *cert. denied*, 518 U.S. 1004 (1996), *with* Pet. for Cert., *U.S. Steel Mining Co. v. Helton*, No. 05-1268 (U.S. filed Mar. 31, 2006), 2006 WL 869888 (asking Court to reaffirm *Richfield Oil*), *cert. denied*, 547 U.S. 1179 (2006). The status quo is one in which no one wins.

III. *RICHFIELD OIL* SHOULD BE OVERRULED

By granting this petition and resolving the split over *Richfield Oil*'s status, this Court can reduce uncertainty for all involved—whichever way it comes down on the merits. That said, overruling *Richfield Oil* is clearly the better course. *Richfield Oil*'s "continuous route or journey" test has proven difficult to apply in practice, and, when applied, it produces inefficient and inequitable results. Moreover, the *Richfield Oil* doctrine has led to unnecessary infringement upon state and local fiscal autonomy. And, because there are strong reliance interests on both sides, *stare decisis* does not provide a persuasive reason to retain *Richfield Oil*.

A. *Richfield Oil* Does Not Supply Lower Courts with an Administrable Test

The *Richfield Oil* test has proven to be devilishly difficult for lower courts to administer. This is especially ironic given that the only justification this Court has ever offered for the *Richfield Oil* rule is its clarity. As the Court observed in *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974):

> It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. . . . [E]ven if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question.

But, rather than "avoid[ing] all ambiguity," *Richfield Oil*'s "continuous route or journey" test has created decades of headaches for litigants and lower courts. The test is easy enough to apply when a U.S. manufacturer sends goods to a customer abroad via common carrier, but distribution channels for exporters are rarely so straightforward. Consider the following scenarios, all drawn from litigated Import-Export Clause cases:

- A hardware store in the border city of Nogales, Arizona, sells merchandise to Mexican factories. The merchandise is delivered to warehouses maintained by Mexican manufacturers on the U.S. side of the border. At the time the goods are sold by the hardware store, have they begun their "continuous route or journey" to their foreign destination, such that the State of Arizona would be barred from imposing a tax on the store's sales? *See Robinson's Hardware*, 721 P.2d at 137-38.
- A manufacturer in Long Beach, California, sells aircraft parts to a Mexican airline. A U.S. common carrier transports the parts via truck to the

U.S.-Mexico border, where they remain for 48 hours to complete customs processing. The parts are then loaded onto the trucks of a Mexican common carrier and delivered to Mexico City. Do the aircraft parts begin their "continuous route or journey" to a foreign destination when they are delivered to the U.S. trucker, or does the 48-hour pause and the transfer from one common carrier to another break up the trip? *See McDonnell Douglas*, 10 Cal. App. 4th at 1416-17.

- A U.S. corporation, acting as agent for an Indonesian joint venture, buys oil and gas exploration equipment from various vendors across the United States. The equipment is delivered to an independent export packer in Houston, Texas, where it is inspected prior to export to Indonesia. Some damaged or defective goods may remain with the packer for up to six months. At the time the goods arrive at the export packer, have they already begun a "continuous route or journey" to their ultimate Indonesian destination? *See Virginia Indonesia*, 910 S.W.2d at 906-07, 912-15 (holding that goods are immune from personal property tax). *But see Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288-89 (1949) (15-month delay interrupts continuity of export process).

These fact patterns illustrate the array of difficult line-drawing questions with which courts applying *Richfield Oil* must wrestle. To be sure, any legal doctrine requires line-drawing, but the line-drawing challenge here is particularly acute. Typically, this Court either (a) issues a "rule" that tells lower courts precisely how to respond to specific triggering facts,

or (b) lays out a "standard" that directs lower courts to apply background principles and policies on a case-by-case basis. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58-59 (1992). The problem with *Richfield Oil* is that it is neither a bright-line rule nor a standard based on principles and policies. Unlike a successful bright-line rule, *Richfield Oil* leaves lower courts to confront countless cases of ambiguity. And, unlike a successful standard, *Richfield Oil* identifies no background principle or policy to which a lower court can appeal in an ambiguous case.

The *Richfield Oil* test thus fails doubly in its attempt to "avoid all ambiguity" regarding the Import-Export Clause's scope. *Cf. Kosydar*, 417 U.S. at 71. First, it has not brought clarity to the tax treatment of exports because States and market actors are not sure whether *Richfield Oil* even applies. And, second, even if the Court does reaffirm *Richfield Oil*, lower courts will be left with little guidance as to how to apply *Richfield Oil*'s holding in the multitude of cases that will fall close to the line. A general rule that nondiscriminatory sales and personal property taxes are not "imposts" or "duties" for purposes of the Import-Export Clause would avoid the administrative and compliance challenges that *Richfield Oil* has engendered.

B. *Richfield Oil* Is Inefficient, Inequitable, and Unnecessarily Intrusive upon State Fiscal Autonomy

Aside from administrability concerns, *Richfield Oil* fails to allocate tax burdens in an efficient and equitable manner. It motivates market actors to distort their behavior in order to claim exemption. It shifts

tax burdens from some businesses to others in entirely arbitrary ways. And it gratuitously intrudes upon the fiscal autonomy of state and local governments.

As for efficiency: Wherever lower courts applying *Richfield Oil* ultimately draw the line between exports and non-exports, market actors will be encouraged to alter their operations so that their sales fall on the export side of the line. For example, if a court holds that delivery to a common carrier for transport to Mexico marks the start of a "continuous route or journey" abroad but that delivery to the Mexican manufacturer's U.S. warehouse does not, exporters will have an incentive to deliver to the common carrier even if delivery to the warehouse would be more efficient from a non-tax perspective. Indeed, the facts of the present case illustrate the extent to which businesses may distort their distribution channels in order to secure exemption. Instead of delivering a handbag or watch to the purchaser at the point of sale, respondent gives the purchaser a ticket, and a "duty free runner" then "delivers the item to the buyer at the jetway immediately prior to boarding and the customer hands the ticket to the runner." *Dulles Duty Free*, 803 S.E.2d at 55 (decision below). Such contortions may be necessitated by *Richfield Oil*'s "continuous route or journey" test, but, if so, that is one strike against retaining *Richfield Oil*.

As for equity: *Richfield Oil* allows some businesses to escape the application of sales and personal property taxes, and, by doing so, shifts more of the tax burden to other businesses and individuals. *See Richfield Oil*, 329 U.S. at 87 (Black, J., dissenting) (foreseeing that *Richfield Oil* will "creat[e] an island of constitutional tax immunity for a substantial pro-

portion of the profitable business of the nation" and thus "throw[] an unfair part of the tax burden on others"). This burden-shifting has little relationship to the benefits that various businesses derive from state and local government services. Businesses that export goods to foreign countries rely on local police and fire departments, roads, garbage clean-up, and other state and municipal services no less than counterparts that manufacture goods for in-state use or that ship their goods domestically rather than internationally. There is no apparent reason why exporters should pay any less for those services than other taxpayers in the same jurisdiction. *See id.* at 89 ("[T]he history and the evolution of the constitutional prohibition against taxation of exports manifest that there was no intention to subsidize either export businesses or foreign purchasers by any such broad immunity from state and federal taxation.").

All the while, *Richfield Oil* needlessly constrains the fiscal autonomy of state and local governments. Of course, the Import-Export Clause contemplates such intrusions when necessary to vindicate the clause's core objectives: (1) to allow the federal government to "speak with one voice when regulating commercial relations" with foreign nations; (2) to ensure that "import revenues," which were once the federal government's "major source of revenue," are not "diverted to the States"; and (3) to preserve "harmony among the States" by preventing "seaboard States, with their crucial ports of entry," from extracting rents from "other States not situated as favorably geographically." *Michelin Tire*, 423 U.S. at 285-86. But *Richfield Oil* addresses none of these concerns.

Applying a nondiscriminatory state or local tax to goods in the stream of export does not interfere with the federal government's conduct of international economic affairs. When foreign governments object to U.S. state and local tax treatment of exports, they generally object on the grounds that exports are treated *too* favorably. *See*, *e.g.*, World Trade Org., *Report of the Appellate Body: United States—Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R (Sept. 4, 2017) (European Union challenge to Washington State tax incentives for aircraft industry), *available at* https://www.wto.org/english/tratop_e/dispu_e/487abr_e.pdf. It is the exemption of exports—not the nondiscriminatory taxation of exports—that creates foreign policy complications. Moreover, state and local taxation of goods in the stream of export does not interfere with federal revenue-raising. The federal government historically has relied on import revenue but never on export revenue—and, indeed, the federal government is itself prohibited from taxing exports. *See* U.S. Const. art. I, § 9, cl. 5. Finally, a nondiscriminatory state or local tax based on the value of personal property or sales does not raise the risk of "interstate rivalry and friction." *Washington Stevedoring*, 435 U.S. at 754. As this Court has said, "[t]he third Import-Export Clause policy . . . is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State." *Id.* at 754-55.

C. Reliance Interests Do Not Weigh in Favor of Retaining *Richfield Oil*

Overruling a precedent—even a poorly reasoned precedent that produces inconsistent, inefficient, and

inequitable results—is never a small matter. "[R]eliance on a judicial opinion is a significant reason to adhere to it." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007). Here, however, reliance interests cannot justify *Richfield Oil*'s retention—for three reasons.

First, reliance interests weigh on both sides in this case. Concededly, some businesses may have made long-term investments on the assumption that *Richfield Oil* ensured exemption from certain state and local taxes. At the same time, lawmakers and tax authorities in jurisdictions whose courts no longer follow *Richfield Oil* have constructed their own tax systems on the assumption that this Court would carry *Michelin Tire* through to its logical conclusion. *Cf. Hooven II*, 466 U.S. at 359, 361 ("error" for state court to continue to rely on a precedent that was "seriously undermined"—but "not expressly overruled"—by *Michelin Tire*). So, too, businesses in those jurisdictions that have *not* designed their distribution channels in order to claim exemption under *Richfield Oil* will be placed at a disadvantage if new competitors can swoop in and secure immunity from state and local taxes. The revival of *Richfield Oil* in the twenty-first century would upset reliance interests at least as much as a decision to lay *Richfield Oil* to rest.

Second, this Court has given fair warning to all who would listen that *Richfield Oil* stands on its last legs. As far back as 1978, the Court indicated that it would reconsider *Richfield Oil* when "a case with pertinent facts is presented." *Washington Stevedoring*, 435 U.S. at 757 n.23. And, again in 1993, the Court issued a reminder that *Richfield Oil*'s validity was in doubt. *See Itel Containers*, 507 U.S. at 77

(“*Even assuming* that [the *Richfield Oil*] rule has not been altered by the approach we adopted in *Michelin* . . . .”) (emphasis added). Any business that made a long-term investment in the past several decades on the assumption that *Richfield Oil* would survive must have known that it was engaged in a gamble. If the Court grants this petition and overrules *Richfield Oil*, no one can claim that she or he was blindsided.

Third, this Court did not consider the reliance argument to be a sufficient justification for retaining the “original package” doctrine for imports. *See Michelin Tire*, 423 U.S. at 282-83. Nor did this Court think that reliance interests weighed decisively in favor of adhering to the formalistic dormant Commerce Clause doctrine from which *Richfield Oil* borrowed. *See Complete Auto*, 430 U.S. at 279. Reliance interests here are no stronger—indeed, much weaker—than in *Michelin Tire* or *Complete Auto*. Both of those decisions marked significant deviations from prior precedent. *See Washington Stevedoring*, 435 U.S. at 752 (“*Michelin* initiated a different approach to Import-Export Clause cases.”); *U.S. Steel Mining*, 631 S.E.2d at 562 (“the focus of Import-Export Clause analysis took a sharp turn in *Michelin Tire*”); *IBM*, 517 U.S. at 851 (noting “[o]ur rejection in *Complete Auto* of much of our early dormant Commerce Clause jurisprudence”). By contrast, overruling *Richfield Oil* would amount to follow-through on an intention telegraphed well in advance. Reliance interests thus supply no reason for this Court to retain a doctrine that distorts economic decisionmaking, allocates tax burdens unfairly, and undermines the fiscal autonomy of state and local governments.

CONCLUSION

The petition for a writ of certiorari should be granted.

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