No. 05-1268

In The

Supreme Court of the United States

U.S. Steel Mining Company, LLC, et al.,
Petitioners,

v.

Virgil Helton, West Virginia Tax Commissioner.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Justice Benjamin, in one of the several opinions of the badly fractured court below, expressed the 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." Pet. App. 56a. That call for this Court's intervention was well founded. The petition established, and respondent does not seriously dispute, that there is an entrenched division among the federal courts of appeals and state supreme courts over whether taxes on goods in export transit are subject to the categorical prohibition of *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), or, instead, the policy-based analysis of this Court's subsequent ruling in *Michelin Tire Corp*. v. *Wages, Inc.*, 423 U.S. 276 (1976). Nor is there any disagreement that the difference in the two standards is outcome determinative in a large body of cases such as this one. Pet. 17-21. There is also no genuine dispute that this question is of substantial and recurring importance, affecting both the constitutional rights of businesses throughout the country and the important interests of states in raising revenue through lawful taxation. See BIO 4-5 (noting that similar taxes are assessed in many other states); *id*. 8-12 (emphasizing the practical importance of such taxes as part of the "States' Fundamental Taxing Power"). Finally, there is no doubt that the issue was fully considered below, and would be vigorously litigated in this Court, as petitioners' principal argument in the lower courts was that the taxes are invalid under *Richfield Oil*, see Pet. App. 9a, while respondent argued strenuously that "*Richfield* Lacks Vitality," see Resp. W. Va. S. Ct. Br. § II(B)(2); see also BIO 13 n.8.

There is no disagreement that the coal here is "in export commerce" within the meaning of *Richfield Oil* at the time of sale, which occurs no earlier than upon the loading of the railcars irrevocably destined for transport abroad, or more typically, when the coal is delivered to the port or loaded into the ship. See Pet. 13. Accordingly, respondent cannot

seriously dispute that if the taxes accrue upon sale, they fall upon a good "in export transit," giving rise to a question upon which the federal courts of appeals and state supreme courts are intractably divided. See Pet. 17-21; *infra* at 7-8.

Respondent nonetheless asks this Court to permit the division of authority to persist on the ground that the taxes in this case assertedly do not give rise to the question presented. BIO 13, 18-19. That assertion is founded upon a novel and erroneous construction of state law regarding the timing of the accrual of the taxes – a construction the state supreme court did not embrace no doubt in part because *respondent* had expressly rejected it, in the earlier administrative proceedings in this case. Because this case indisputably poses the question presented, and because that question is deserving of this Court's review, the petition for certiorari should be granted.

1. The basis for respondent's opposition is his claim that petitioners' tax liability assertedly "arises at the time of extraction, *not* at the time of sale," BIO 5, such that the taxes are due "even if a sale does not occur," *id*. 6. He would distinguish *Richfield Oil* on the ground that, "while the sale of fuel in *Richfield Oil* was the same act that gave rise to the sales tax and brought the fuel into the export stream," in this case "the taxable event – severance of coal – is not coincident with the entry of the coal into the export stream." *Id.* 15.

To conclude that this construction of state law is wrong, one need look no further than the Commissioner's opinion in the administrative proceedings in this very case. There, the Commissioner found that "liability for the taxes in question accrues under the statutory law, at the time of sale, in these cases, which is after the coal has entered the continuous stream of export to foreign customers." Pet. App. 79a.

The West Virginia Supreme Court of Appeals plainly accepted the Commissioner's view as stated in his administrative opinion, rather than as presented now in litigation. As Justice Maynard observed without

contradiction, "there is no dispute * * * that the taxes at issue accrue at the time of sale." Pet. App. 47a. Indeed, the court specifically acknowledged the "statements by the Tax Commissioner and the circuit court's findings to the effect that the West Virginia coal severance taxes 'accrue' at the time of the coal's sale." Pet. App. 7a n.3. Rather than hold that these statements were incorrect, the court concluded that "[w]e do not believe that this language is *dispositive* in relation to the *legal issue* before this court – the actual constitutionality of the severance taxes in their operation and effect." *Ibid.* (emphases added). The conclusion that the taxes accrue upon sale was not "dispositive" of the legal question, the court explained, because in its view, what mattered instead was that the tax was imposed upon "the privilege and occasion of producing coal for sale or commercial use" and that the "sale of the coal is merely the event that establishes the basis for calculating the tonnage or value of the coal for purposes of ascertaining the amount of tax due." *Ibid.*

These observations are not at all inconsistent with the court's acceptance of the Commissioner's administrative opinion that the taxes accrue upon sale, as illustrated by this Court's decision in *Richfield Oil*. In that case, as in this one, the state did not describe its levy as a tax on exports, or even as a tax on sales. Instead, the tax was "levied on retailers 'For the privilege of selling tangible personal property at retail.'" 329 U.S. at 83. In turn, as in this case, the California Supreme Court concluded that the sale of the taxed goods was simply the event that established the amount of the tax owed for the "privilege" of conducting business in the state. *Id.* at 83-84 ("The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales."). This Court acknowledged that it was bound by the state supreme court's findings on those two questions. *Id.* at 84. But the Court nonetheless recognized that neither finding addressed the constitutionally critical question of when the tax *accrued*.

"That issue turns not on the characterization which the state has given the tax, but on its operation and effect." *Ibid.* The Court held that although the tax before it was upon the "privilege" of conducting a retail business, the sale was nonetheless the "incident which gave rise to the accrual of the tax." *Ibid.* So, too, in this case, the West Virginia Supreme Court of Appeals' observations that the challenged taxes fall upon the "privilege" of severing coal and are calculated on the basis of the amount or price of coal sold in no way contradict the Commissioner's and circuit court's prior conclusion that liability for the taxes accrues upon sale, and not earlier. See Pet. 13-14 & nn.6-8.

Indeed, in light of the statutory language, implementing regulations, and previously consistent interpretations of the Tax Commissioner discussed next, the Supreme Court of Appeals could not fairly doubt that the disputed taxes accrued upon sale. It is undoubtedly for that reason the court relegated its only mention of the issue to a footnote and focused its analysis in the text on the proper constitutional test for taxation of goods in export transit. See Pet. App. 8a-10a.

2. Respondent nonetheless now insists that the lower courts and the Commissioner's initial ruling were all wrong because the taxes accrue upon severance, not sale, and are due even if the coal is never sold. That position cannot be reconciled with the relevant statutes, which do not tax all coal severed in the state, but rather, as relevant here, tax only coal that is severed "for sale," based on the price or tonnage actually sold. See, *e.g.*, W. Va. Code 11-13A-3(a) (tax imposed for severing coal "for sale"); *id.* 11-13A-3(b) (tax calculated at "five percent of the gross value of the natural resource * * * as shown by the gross income derived from the sale or furnishing thereof"); *id.* § 11-12B-3(a) (tax for severing coal "for sale * * * equal to fifty cents per ton of coal produced by the taxpayer for sale").

Respondent's litigating position is moreover flatly contrary to the Commissioner's own legislative regulations

and prior administrative rulings. The regulations provide, for instance, that if coal is mined, but not immediately sold, the tax is due when the coal is actually sold, not when it is severed. See W. Va. Code R. 110-13A-2a.2; Pet. 12. The regulations further provide that if the tax rate changes between the time of severance and the time of sale, the coal is taxed at the "rate in effect during the period in which the gross income is recognized and reported and *not at the rate in effect at the time the natural resources were severed*." W. Va. Code R. 110-13A-2a.3 (emphasis added). And because the tax accrues on sale, rather than severance, the Commissioner has repeatedly ruled that if the coal is mined, but then never sold or used by the taxpayer, no tax is due. See W. Va. Tax Dec. 85-110B, 1996 WL 473674, at *1, *5 (holding no tax due under substantially identical predecessor statute when company "attempted to sell the coal to numerous customers, but was unsuccessful" due to quality of coal, explaining that "[s]ince there was no sale of the coal this tonnage *cannot be taxed*" (emphasis added)); W. Va. Tax Dec. 86-1-B, 1986 WL 21126, at *3 (same).

To support his brazen reversal of position, respondent makes three arguments, none of which withstands scrutiny. First, respondent relies on the fact that the stated purpose of the relevant provisions is to tax the "privilege of severing coal" (BIO 5). But, as discussed *supra*, this Court rejected that very argument in *Richfield Oil*, observing that a tax upon the privilege of doing business may still be measured by, and accrue upon, sale.

Second, respondent notes that some of the smaller taxes are calculated on the basis of the *tonnage* of coal sold, rather than on the *price* of the coal sold. BIO 6. But that fact makes no legal difference; the relevant point is that – as the Commissioner himself has advised taxpayers – those taxes accrue upon *sale*, even if the measure is tonnage rather than price. See West Virginia State Tax Dep't, *Commonly Asked Questions About the Special Tax on Coal*, Pub. TSD-382 (Mar. 1999) (advising that "[l]iability for payment of this tax

accrues when the coal is sold by the producer"); see also W. Va. Tax Dec. 85-110B, 1996 WL 473674, at *5 (Commissioner ruling that no tax due when coal not sold or used).

Third, respondent cites West Virginia Code 11-13A-2(c)(6)(C), which states that "[i]n the absence of a sale, gross value shall be the fair market value for natural resources of similar grade and quality." See BIO 6. Taking this isolated subsection out of context, respondent asserts that it establishes that petitioners are taxed for severed but unsold coal in accordance with the fair market value of that coal. *Ibid*. That assertion is entirely misleading and demonstrably false.

Subsection (c)(6)(C) is part of the general statutory definition of "[g]ross value," a term used to compute a number of different taxes on natural resource extraction and processing.[1] For example, the mining of coal may be subject to taxation for several different reasons, including, as in this case, because the coal is mined "for sale" or because, in other instances, the coal is mined for "commercial use" rather than sale, as when a company mines coal for its own use or as an in-kind royalty payment. See, *e.g.*, W. Va. Code 11-13A-3 (taxing mining of coal for "sale" or "profit" or "commercial use"). In either case, the coal is subject to certain taxes based upon its value, but how that value is calculated varies. When the coal is subject to taxation because it was mined "for sale," the statute provides that "[f]or natural resources severed or processed (or both severed and processed) *and sold* during a reporting period, *gross value is the gross proceeds* received or receivable by the taxpayer." Subsection (c)(6)(A) (emphasis added). That is the provision that governs this case.

When, however, coal is taxed because it was mined for "commercial use" other than sale, the tax obviously cannot be

[1] The term notably has no bearing on the application of the tonnage taxes.

based on the "sale" price of the coal. Section 11-13A-2(c)(6)(C) is addressed to that circumstance, providing that "[i]n the absence of a sale" – *i.e.*, when the tax is due because the coal is mined for the companies' own "commercial use" rather than for "sale" – the tax shall be calculated in accordance with the fair market value of the coal.[2] The implementing regulations thus provide that "[f]or natural resources severed * * * *and sold* during a reporting period, gross value is *the amount received* or receivable by the taxpayer," W. Va. Code R. 110-13A-2a.1 (emphasis added), while the "value of the natural resource product * * * *consumed by the taxpayer* shall be determined" in accordance with its fair market value, *id.* § 110-13A-2a.6.1 (emphasis added).

3. Given that the challenged taxes accrue upon sale, rather than severance, the question presented arises on the facts of this case. It is undisputed that the sale of petitioners' coal typically occurs when the coal is transferred from railcars into waiting cargo ships, but never any sooner than upon loading of the railcars. Pet. 13. It is also undisputed that during this period, the coal is a "good in export transit" within the meaning of *Richfield Oil*. The only remaining question – whether the Constitution permits a tax upon goods in export transit – is precisely the question presented by the petition, decided by the lower court, and dividing numerous federal circuits and state supreme courts.

Respondent does not seriously contend otherwise. His argument that the conflict over "the continued vitality of *Richfield Oil* * * * is irrelevant to this case" rests entirely on his erroneous assertion that the taxes accrue upon severance. BIO 19. That assertion is, for example, the only ground upon which he attempts to distinguish the Fifth Circuit's holding in

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[2] Even then, nothing in the provision states that the tax is due upon *severance*, rather than upon *use*. Moreover, as discussed *supra* at 5, the Commissioner's administrative decisions are to the contrary.

Louisiana Land and Exploration Co. v. *Pilot Petroleum Corp.*, 900 F.2d 816 (1990), and the Texas Supreme Court's holding in *Virginia Indonesia Co.* v. *Harris County Appraisal District*, 910 S.W.2d 905 (1995), both of which struck down taxes upon goods in export transit as categorically prohibited under *Richfield Oil*. See Pet. 17-19; BIO 20-23. Similarly, respondent's only attempt to reconcile those cases with *Auto Cargo, Inc.* v. *Miami Dade County*, 237 F.3d 1289, 1292 (CA11 2001) – which upheld a "vehicle export fee" on used cars passing through the port of Miami on the ground that "*Michelin* overruled" the categorical prohibition on taxes on goods in export transit – is to assert that the facts of *Auto Cargo* "are wholly different than the particular facts of *Richfield Oil*." BIO 24. Just why the Constitution permits an "export fee" on vehicles in export transit, but not a tax on fuel in export transit, respondent does not even attempt to explain.

4. Respondent also argues that the conflict in the lower courts should be left unresolved because the "Supreme Court of Appeals of West Virginia did not treat this Court's opinion in *Richfield Oil* as overruled." BIO 13. That is not correct. The state supreme court clearly expressed its view that *Richfield Oil* had been superseded by *Michelin Tire Corp*. At every stage in the case, respondent had argued, and the lower tribunals had accepted, that *Richfield Oil* had been superseded. See Pet. App. 69a, 80a-81a. Respondent made the same argument to the Supreme Court of Appeals. Resp. W. Va. S. Ct. Br. § II(B)(2) ("*Richfield* Lacks Vitality"). After acknowledging petitioners' reliance on *Richfield Oil* and describing its holding, the court did not conclude that the decision was "limited" or "irrelevan[t] to Petitioners' challenge," BIO 13, but instead explained that in "1976 the focus of the Import-Export Clause analysis took a sharp turn in *Michelin Tire Corp.*" Pet. App. 9a. The Court then proceeded to resolve the case by applying the policy-based

analysis of *Michelin Tire Corp*. *Id*. 9a-13a.[3] Justice Maynard specifically noted "the majority opinion's wholesale rejection of *Richfield Oil* in favor of the *Michelin Tire/Washington Stevedoring* line of cases." Pet. App. 47a. Justice Benjamin likewise recognized that the majority presumed "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 * * * ." Pet. App. 58a. Only Justice Albright disagreed with that assessment, in a separate concurrence joined by no other member of the majority. See Pet. App. 44a-45a (Albright, C.J., concurring).

5. Finally, petitioners obviously do not maintain that "*Richfield Oil* [provides] a categorical prohibition on a state's imposition of any tax on goods *to be* exported." Contra BIO 14 (emphasis added). Petitioners argue only that the State may not impose a tax upon goods while they *are* in export transit, which is precisely what this Court held in *Richfield Oil*.[4] That restriction derives directly from the plain language

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[3] The court did return briefly to *Richfield Oil* in rejecting petitioners' objection that taxing the coal based on its value after loading – which included the value added by the loading process – independently violates the Import-Export Clause because it essentially taxes part of the export process itself. See Pet. App. 14a-15a. This portion of the opinion, however, is entirely separate from the court's resolution of petitioners' argument that the taxes are invalid because they accrue upon sale, when the coal is "in export transit."

[4] Accordingly, respondent's reliance (BIO 10, 14) on *Canton Railroad Company* v. *Rogan*, 340 U.S. 511 (1951), is misplaced, for respondent does not contest in this Court that by the time of sale – which occurs no earlier than the loading of the coal onto railcars and most often upon the transfer of the coal to ships at port – the coal is in export transit. Likewise, *Washington Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), has no application here (contra BIO 16-18), as that case concerned only the constitutionality of taxing an activity

of the Constitution itself, for there could hardly be a more clear example of "Imposts or Duties on Imports or Exports," U.S. Const. art. I, § 10, cl. 2, than a tax imposed directly on goods that are in export transit.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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(stevedoring) related to exports, rather than a tax on the sale of export goods themselves while they are in export transit.