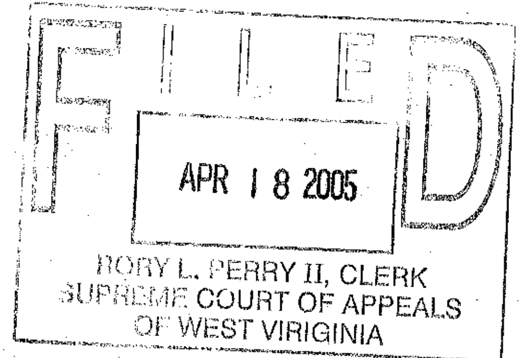
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32528



U.S. STEEL MINING COMPANY,
CONSOLIDATED COAL COMPANY,
LAUREL RUN MINING COMPANY,
McELROY COAL COMPANY,
ARCH COAL, INC.,
MID-VOL LEASING, INC.,
COASTAL COAL-WEST VIRGINIA LLC,
ELK RUN COAL COMPANY, INC.,
PAYNTER BRANCH MINING, INC.,
KINGSTON RESOURCES, INC.,
PIONEER FUEL CORPORATION,

Appellants,

v.

THE HON. VIRGIL T. HELTON,

West Virginia State Tax Commissioner, as successor to
THE HON. REBECCA MELTON CRAIG,

Appellee.

BRIEF AS *AMICUS CURIAE* OF THE COUNTY COMMISSIONERS' ASSOCIATION OF WEST VIRGINIA

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The County Commissioners' Association of West Virginia ("the Association") respectfully submits this brief as an *amicus curiae*. In accordance with W.Va. R. App. P. 19, this brief is accompanied by a motion for leave of Court to file it, and it is submitted within the time allowed the party whose position this brief supports, namely the Appellee Tax Commissioner.

I. Description and Interest of the *Amicus Curiae*

The Association is comprised of the commissioners of every county government in West Virginia. Its mission is to "promot[e] the interest and general welfare of local county government...; to represent county government before the West Virginia Legislature, administrative agencies, and the federal government; to educate the public about the value and need for county programs and services; and to facilitate the exchange of problems, ideas and solutions among county officials." *See* "Welcome to the County Commissioners' Association of West Virginia," http://www.polsci.wvu.edu/wv/welcome.html (as of April 15, 2005).

As the Court doubtless knows, county commissioners possess, among other powers, broad executive authority to conduct the affairs of county government. In their executive capacity, they have many important duties, including such tasks as budgetary oversight and management of local responses to emergencies or natural disasters. These weighty duties are assigned county commissioners so as to permit them to react to local needs with a speed and specificity that would be both more expensive and more difficult for the centralized state government to achieve.

This action threatens the commissioners' ability to play their assigned role. Of particular concern to the counties and their respective commissioners in the instant action is the revenue that the counties receive from one of the coal severance taxes imposed by state law. *See*

W.Va. Code § 11-13A-6. These tax receipts are integral – and in some instances even vital – to the day-to-day operation of many county governments.

Because of the nature of and general rationale for severance taxes, the legislative scheme grants counties with active, producing mines a greater share of the proceeds. Three-fourths of the proceeds are allotted to the counties in which coal is produced, and then among them according to relative production. The remaining one-fourth is distributed to all counties in proportion to their populations.[1] In 2004, eighteen counties[2] received over two hundred thousand, four[3] over one million, and one – Boone County – in excess of three million dollars from § 11-13A-6's tax. In recent years, the counties have collectively shared approximately fourteen to fifteen million dollars of severance tax funding annually.

These funds sustain many useful and essential functions of local government, which functions are chosen according to local needs as perceived by the Association's commissioner members. They are used for law enforcement, "911" and other emergency communications, fire departments, medical services, and ambulatory care. They provide funds for debt service, to secure bond offerings, and to finance water and sewage treatment projects.

To offer an example, Boone County uses its $3 million-plus in revenue for 911 emergency systems, water and sewer projects, capital outlay projects, law enforcement vehicles, health and mental health services, regional jail costs, and other necessary and worthwhile purposes. Indeed, in Boone County, severance taxes furnish over forty percent of the general (*i.e.* excluding salaries) county budget. Loss of this revenue would require elimination of or

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[1] This description of the division of proceeds takes into account only the portion of § 11-13A-6's tax that is distributed to the counties. A smaller but still significant amount is also distributed to the state's municipalities.

[2] Boone, Clay, Fayette, Grant, Kanawha, Lincoln, Logan, Marion, Marshall, McDowell, Mingo, Monongalia, Nicholas, Preston, Raleigh, Wayne, Webster, and Wyoming.

[3] Boone, Kanawha, Logan, and Marshall.

drastic cuts to these programs and projects, and could render it difficult to even conduct the core functions assigned the county government by constitution and statute.

But even counties that receive much less in absolute terms than Boone are often vitally dependent on what they do receive. Grant County also depends heavily on coal severance taxes. The approximately $375,000 it has received over the past two years has been earmarked solely for emergency medical services, rural health, and a fire department. Loss of this vital funding could therefore threaten not just the finances of the county, but the welfare of its citizens.

In sum, many counties across the state would face dire financial crises should this Court reverse the Circuit Court's ruling that the severance tax survives Appellants' Import-Export Clause challenge. Because the counties receive disbursements quarterly, this crisis would arrive quickly, thereby prohibiting gradual cuts and adjustments over the course of months or years. *See* W.Va. Code § 11-13A-6(e).

II. Points and Authorities Relied Upon

Cases

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 9-10

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978) 6-9

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 5-9

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 7-9

United States v. International Business Machines Corp., 517 U.S. 843 (1996) 7

Constitutional and Statutory Provisions

U.S. Const. art. I, § 8 9

U.S. Const. art. I, § 10 .... *passim*

W.Va. Code § 11-13A-2(c)(6) 4

W.Va. Code § 11-13A-6 2-3

Administrative Rules

110 C.S.R. 13A, § 2.7 10

Rules of Court

W.Va. R. App. P. 19 1

III. Introduction and Summary of Argument

The Association, being an *amicus* rather than a party, recognizes that the Appellee Tax Commissioner has both the responsibility and special expertise to respond fully to Appellants' arguments, and the Association's purpose is not to unduly belabor what the Tax Commissioner argued below and will argue here. Accordingly, the Association will endeavor to be brief in describing its views on the merits of the appeal.[4]

To summarize those views bluntly, this case has nothing whatever to do with imports or exports, let alone imposts or duties on them. The challenged tax is for taking coal out of the ground and thereby converting it, once and forever, into personal property. The event creating liability for the tax is that permanent severance, and the amount of the tax is based on the coal's value when severed, no matter where it is sold – indeed, no matter whether it is ever sold at all. *See* W.Va. Code § 11-13A-2(c)(6). Appellants seek to exempt themselves from this nondiscriminatory, already-extant tax liability through their own *subsequent* choice of where to market the severed coal. Nothing in logic or reason commends such an exemption, and nothing in the law requires it.

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[4] Although it perhaps could go without saying, the Association notes that its views, although intended and expected to be congruent with the Tax Commissioner's, are nevertheless its own. Hence, should the Court perceive any incongruence upon which the Association's position would prejudice the Tax Commissioner's, the Association respectfully requests that the Court defer to the Tax Commissioner on that issue.

IV. Argument

Appellants' challenge to West Virginia's severance taxes rests solely on the Import-Export Clause of U.S. Const. art. I, § 10 ("the Clause").[5] The text and purposes of the Clause should therefore be the first inquiry. Most fundamentally, it warrants special emphasis that the Clause does not prohibit state "taxes" – but rather only the far more specific "Imposts" or "Duties" – on imports or exports. This limitation is an important one, and one that Appellants understandably avoid emphasizing

Because of the Clause's limitation, it will and should be quite rare that a nondiscriminatory state tax of general applicability will violate the Clause. Why? Because discrimination and specific applicability are the hallmarks of "duties" and "imposts," which are by definition exactions from imported or exported goods *as such*, *i.e.* on account of their status as imports or exports.

As the United States Supreme Court has explained, imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country[.]" *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287 (1976). They are thus of a distinctly different character than ordinary nondiscriminatory state taxes, which defray the burdens of local government evenhandedly:

> [T]here is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that

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[5] The Clause provides:

> 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 Control of the Congress.

> permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.

Michelin, 423 U.S. at 287.

As the briefs of Appellants and the Commissioner surely reveal, the *Michelin* case, quoted above, is of considerable consequence to resolution of this case. Indeed, in the Association's view, it is controlling. The *Michelin* Court upheld a nondiscriminatory state property tax on business inventory notwithstanding that some of the goods taxed were imported. In doing so, the Court focused on whether the tax was an "impost" or "duty," and concluded that it could not be unless it taxed the goods *as imports.*

> Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution. For such an exaction, *unlike discriminatory state taxation against imported goods as imports*, was not regarded as an impediment that severely hampered commerce or constituted a form of tribute by seaboard States to the disadvantage of the other States.
>
> It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition *such a tax does not fall on imports as such because of their place of origin.* It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation.

Michelin, 423 U.S. at 286 (emphasis added). The Court further observed that "[w]hat [permissible forms of state taxation] share, it should be emphasized, is the characteristic that they cannot be selectively imposed and increased so as substantially to impair or prohibit importation." *Id.* at 287-288. Although *Michelin* involved imported goods, its reasoning applies to exports as well. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978) ("*Washington Stevedoring*").

Hence, because West Virginia's coal severance taxes are not and cannot be "selectively imposed and increased so as substantially to impair or prohibit [exportation,]" *Michelin*, 423 U.S. at 287-288, they do not offend the Clause.[6]

Appellants attempt to avoid straightforward application of *Michelin* through reliance on *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). This reliance is misplaced for several reasons.

First, the facts of *Richfield* are nothing like those here. It involved the propriety of a state sales tax on a sale that occurred *on a ship, in port, ready to put to sea.* A tax at the source and arising from the very creation of the goods is obviously very differently based and situated. As dissenting Justice Hugo Black remarked in *Richfield* itself, without contradiction from the majority: "No one, I suppose, would think of saying that ... a property or severance tax would be unconstitutional as a tax on exports. The reason would be that the taxable event clearly arose before and not after the exportation began." *Richfield*, 329 U.S. 69, 87 (1946) (Black, J. dissenting). No one would think of so saying, that is, until Appellants brought this case.

[6] The *Michelin* Court hypothesized a type of nondiscriminatory tax that might nonetheless possibly run afoul of the Clause, *i.e.* a property tax on goods that are "merely in transit" through a state to or from port. 423 U.S. at 289-290. The Court observed that such a tax might implicate one of the key purposes of the Clause, which was to prevent seaboard states from taking advantage of their "peculiar geographic situation" to obtain an unfair advantage over inland states as regards imports and exports. *Id.*; *see United States v. International Business Machines Corp.*, 517 U.S. 843, 862 (1996) (discussing, in *dicta*, possibility that such a nondiscriminatory tax could violate the Clause).

West Virginia's severance taxes clearly do not fall within, or even implicate, this potential exception to the principle that nondiscriminatory state taxes are not "imposts" or "duties." There are at least three reasons why this is so. First, the State does not tax the goods "in transit"; the taxable event is the severance and preparation of coal for market, and not its subsequent movement as a severed and marketable commodity. Second, even if the taxes fell upon the goods to some extent while they were "in transit," it could not be said that they so fell because the goods were *merely* in transit across the State. West Virginia's interest in and nexus to the severed coal is exponentially stronger than that of being a "mere" conduit of the coal to market. Finally, West Virginia is both the source of the goods and an inland, landlocked state; consequently, its severance taxes cannot and do not work to take unfair advantage of a state more poorly positioned geographically. Hence, they do not pose any of the evils at which the Clause was aimed.

Second, *Richfield* is an example of an obsolete method of analysis. *Michelin* discarded and superseded that method. The Supreme Court itself has so recognized, stating, in these unmistakably clear terms:

> In *Michelin* the Court upheld the application of a general ad valorem property tax to imported tires and tubes. The Court surveyed the history and purposes of the Import-Export Clause to determine, *for the first time*, which taxes fell within the absolute ban on "Imposts or Duties." Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. 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[.] 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.
>
> *Michelin initiated a different approach* to Import-Export Clause cases. It ignored the simple question whether the tires or tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an "Impost or Duty." Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause[.]

Washington Stevedoring, 435 U.S. at 751-752 (emphasis added; collected citations omitted). Notably, one of the "[p]revious cases" cited by the Court as "assuming" broad applicability of the Clause to all taxes affecting imported and exported goods was *Richfield.*

Thus, *Washington Stevedoring* confirms that the *Michelin* Court retired its wooden and artificial former tests in favor of a substantive approach aimed at furthering the real purposes of the Clause. But the Court did not merely disavow a body of case law of which *Richfield* was a part; in fact, it singled out the case for specific criticism. Responding to the taxpayer's reliance on it, the *Washington Stevedoring* Court noted that *Richfield* could not provide "persuasive support" for the taxpayer's position because *Richfield* failed to "recognize[] that the term 'Impost or Duty' is not self-defining and does not necessarily encompass all

taxes[,]" and that reliance on it "*ignores the central holding* of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes." *Washington Stevedoring*, 435 U.S. at 759 (emphasis added); *see also id.* at 760 (Court rejects attempt to have it "resurrect[]" pre-Michelin law so as to determine "when goods lose their status as imports and exports. *This is precisely the inquiry the Court abandoned* in *Michelin*[.]") (emphasis added).

Moreover, the Court then flatly directed that the *Michelin* test be used in export cases: "[A]ny tax relating to exports can be tested for its conformance with the first and third policies [stated in *Michelin*]. If the constitutional interests are not disturbed, the tax should not be considered an 'Impost or Duty' any more than should a tax related to imports." *Washington Stevedoring*, 435 U.S. at 758.[7] By prescribing a test for "*any* tax relating to exports," the Court necessarily displaced other and former yardsticks. In sum, *Richfield* would not govern here even if it were factually on point.

Finally, and even if applicability of the Clause turned artificially and rigidly on the superseded "original package" or "export stream" tests, the taxes at issue would be constitutional. Coal in the ground is *literally* a physical part of our State and the particular county in which it has lain undisturbed for so very long. All of its value originates here, and it cannot become a transportable, marketable commodity until it is physically severed from the earth. Hence, coal severance is a quintessentially local, pre-market activity. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981) (noting, on Commerce Clause challenge to a

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[7] Although it is sufficient for purposes of this case that the severance tax is not a "duty" or "impost," it bears mention that the type of tax that it actually *is* – an excise on a privilege – was recognized by the Framers as a distinct type of governmental exaction. *Washington Stevedoring*, 435 U.S. at 759 (noting that Art. I, § 8 gives Congress general power to "lay and collect Taxes, Duties, Imposts, and Excises" which in turn shows that "the Framers apparently did not include 'Excises,' such as an exaction on the privilege of doing business, within the scope of 'Imposts' or 'Duties'").

coal severance tax, that severance is a "'local' activity preceding entry of the goods into interstate commerce").

This conclusion is further confirmed by the manner in which West Virginia law calculates fair market value at the point of severance. Although the evidence of such value often (though not always) looks to the actual price received in the market for the coal, the value taxed carefully *excludes* costs included in the price that are associated with transportation of the coal to the point of sale. 110 C.S.R. 13A, § 2.7. This exclusion is not only logical in its own right – inasmuch as the point of the statute is to fairly and consistently assess a tax on the value of severed minerals at the time of severance – but it also has the *direct* effect of assuring that neither the domestic nor foreign shipment of the newly severed coal generates or bears *any* of the tax.

V. Conclusion

Eons ago, nature endowed what would ultimately become the State of West Virginia, and the counties that comprise it, with fabulous mineral wealth. But this bounty came with a catch; it can be tapped only once, and when it is depleted, it will be gone forever.

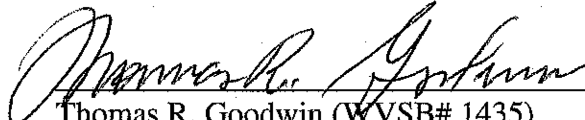
To partially offset the gradual-but-irreversible diminishment that coal mining therefore causes to our communities' resources and property tax base, the Legislature has seen fit to impose the severance taxes at issue in this case. Although these taxes produce considerable revenue for the time being, they are very modest in the larger picture, in comparison with the tremendous wealth permanently lost through severance and carrying away of the State's endowment of coal.

In this suit, Appellants seek to avoid these taxes, alleging an absolute *entitlement* to sever and carry off these irreplaceable resources unhindered and unburdened. Why do they

deem themselves so entitled? The answer is not an intuitive one. They do so simply because they choose to take West Virginia's natural wealth not only out of the State, but out of the United States as well. That cannot be the law, and that is not the law. No state would have joined a federal compact that so pointlessly subjugated their welfare to the private interests of foreign traders. And no state did.

In sum, West Virginia's evenhanded, nondiscriminatory severance taxes are blind to the taxpayer's subsequent marketing intentions – whether the coal winds up at Mount Storm or Moscow, the tax is the same. These taxes are not, therefore, "imposts" or "duties" on exports, and their collection does not create or threaten any of the evils that motivated the Framers to include the Import-Export Clause in the fundamental law of the United States. Accordingly, the Association, as *amicus curiae*, urges the Court to affirm the judgment of the Circuit Court of Kanawha County.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, certify that I served the foregoing "Motion for Leave to File Brief as *Amicus Curiae* on Behalf of the County Commissioners' Association of West Virginia" and "Brief as *Amicus Curiae* of the County Commissioners' Association of West Virginia" this 18th day of April, 2005, by depositing true and correct copies thereof in the United States Mail, postage prepaid, addressed as follows:

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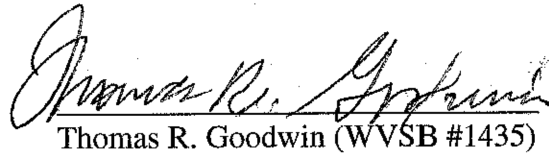

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