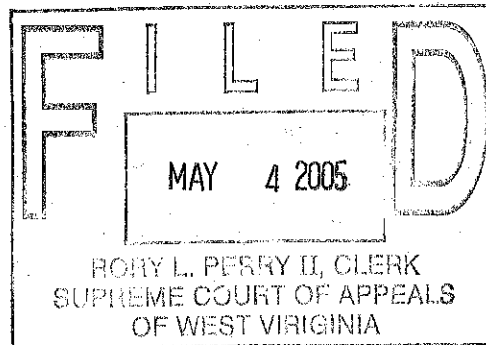


No. 32528

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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,



Petitioners Below, Appellants,

v.

THE HONORABLE VIRGIL HELTON,
West Virginia State Tax Commissioner,

Respondent Below, Appellee.

REPLY BRIEF OF U.S. STEEL MINING COMPANY, ET AL.

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND SUMMARY.....	1
ARGUMENT	4
I. <i>Richfield Oil's</i> Holding that the Import-Export Clause Prohibits State Taxation of Goods in the Export Stream is Still Good Law.....	4
A. The U.S. Supreme Court has Confirmed that <i>Michelin</i> Does Not Extend To State Taxation of Goods in the Export Stream, and that <i>Richfield Oil</i> is Still Good Law.....	5
B. <i>Richfield Oil</i> Retains Precedential Value Because it has Not Been Overruled.....	10
II. The Subject Taxes are Imposed when the Coal is in the Export Stream and thus Within the Zone of Immunity as Recognized in <i>Richfield Oil</i>	12
A. The Terms of the Statute Impose the Taxes Upon the Loading of Coal for Shipment, which is the Act that Commits the Coal to the Export Stream.....	12
1. This Court's Decision in <i>Kanawha Eagle</i> Recognized that the Loading of Coal is a Taxable Event Under the Statute.. ..	13
2. <i>Commonwealth Edison</i> is Distinguishable Both in Terms of the Tax and the Constitutional Provision that were Involved in that Case.....	17
3. West Virginia's Unconstitutional Taxation of the Loading of Coal is the Result of the Legislature's Deliberate Expansion of Taxable Activity under the Statute.....	21
B. In Addition to Being Unconstitutional as Taxes on the Loading of Coal under the Literal Terms of the Statute, the Taxes are Unconstitutional because they Accrue, in Operation and Effect, on the Sale of Coal in the Export Stream.....	24

1.	The Tax Commissioner is Bound by His Administrative Findings that Liability for the Taxes Accrues at the Time of Sale, After the Coal is in the Export Stream.....	24
2.	If this Court Considers the Tax Commissioner's Arguments Regarding the Accrual of the Taxes, it Should Reject Them on the Merits.....	26
a.	The Sale of Coal, Rather than Severance, Gives Rise to Liability for the Taxes	26
b.	The Tax Commissioner's Arguments Regarding the Calculation of the Tax Base do not Support the Conclusion that Liability Accrues Upon Severance. Indeed, the Calculation of the Tax Base Confirms that the Taxes Accrue Upon the Sale of Coal	27
c.	The Tax Commissioner's Reliance on Cases and Statutes Involving Other States' Taxes is Misplaced	33
III.	The Taxes in Question are Unconstitutional as Applied to Exported Coal Even Under <i>Michelin</i>	35
A.	The Taxes Undermine the Federal Government's Ability to Speak with One Voice in Matters of Foreign Commerce.....	35
B.	The Taxes Have the Potential to Undermine Harmony Among the States.....	38
	CONCLUSION	41
	ADDENDUM	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page

COURT CASES

<i>A.G. Spalding & Bros. v. Edwards</i> , 262 U.S. 66 (1923)	2, 11, 14, 15, 16
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	11
<i>Ammex, Inc. v. Department of Treasury</i> , 603 N.W.2d 308 (Mich. App. 1999).....	8
<i>Arkansas Electric Co-op Corp. v. Arkansas Public Service Commission</i> , 461 U.S. 375 (1983)	18
<i>Brown v. Helvering</i> , 291 U.S. 193 (1934)	26
<i>Coe v. Errol</i> , 116 U.S. 517 (1886)	11, 12, 16
<i>Canton R. Co. v. Rogan</i> , 340 U.S. 511 (1951).....	6, 14
<i>Central Greyhound Lines, Inc. v. Mealey</i> , 334 U.S. 653 (1948)	19, 20
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	17, 18, 19, 20, 33, 34, 38
<i>Container Corp. of America v. Franchise Tax Board</i> , 463 U.S. 159 (1983)	35
<i>Department of Rev. of Wash. v. Association of Wash. Stevedoring Cos.</i> , 435 U.S. 734 (1978).....	5, 6, 7, 13, 14, 38
<i>Empresa Siderurgica S.A. v. County of Merced</i> , 337 U.S. 154 (1949).....	9, 16
<i>Gilbert Imported Hardwoods v. Dailey</i> , 167 W. Va. 587, 280 S.E.2d 260 (1981)	21, 22
<i>Hatter v. United States</i> , 64 F.3d 647 (Fed. Cir. 1995).....	11
<i>Homestake Mining Co. v. Johnson</i> , 374 N.W.2d 357 (S. D. 1985)	33, 34
<i>Joy Oil Co. v. State Tax Commissioner of Michigan</i> , 337 U.S. 286 (1949).....	9
<i>Kanawha Eagle, LLC v. Tax Commissioner</i> , 609 S.E.2d 877 (W. Va. 2004)	1, 13, 17, 28
<i>Kosydar v. National Cash Register Co.</i> , 417 U.S. 62 (1974)	9, 15, 16, 17
<i>Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.</i> , 900 F.2d 816 (5th Cir.), cert. denied, 498 U.S. 897 (1990).....	35, 36, 37, 40
<i>Michelin Tire Corp. v. Wages</i> , 423 U.S. 276 (1976)	passim
<i>Oklahoma Tax Commission v. Jefferson Lines, Inc.</i> , 514 U.S. 175 (1995)	19
<i>Richfield Oil Corp. v. State Bd. of Equalization</i> , 329 U.S. 69 (1946)	passim
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> , 490 U.S. 477 (1989)	11

<i>Rojo Oil Co., Inc. v. McNamara</i> , 547 So.2d 1096 (La. App. 1 Cir. 1989).....	34
<i>Saudi Refining, Inc. v. Director of Revenue</i> , 715 A.2d 89 (Del. Super. Ct. 1998)	37
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997).....	11
<i>United States v. Hatter</i> , 532 U.S. 557 (2001)	11
<i>United States v. Hughes Properties, Inc.</i> , 476 U.S. 593 (1986)	26
<i>United States v. International Bus. Mach. Corp.</i> , 517 U.S. 843 (1996)	<i>passim</i>
<i>Virginia Indonesia Co. v. Harris County Appraisal Dist.</i> , 910 S.W.2d 905 (Tex. 1995), <i>cert. denied</i> , 518 U.S. 1004 (1996).....	11, 12, 35, 36, 37, 40

ADMINISTRATIVE CASES

Adm. Dec. 86-1-B (W. Va. St. Tax Dept.), available at 1986 WL 221126.....	31, 32
<i>In re U.S. Steel Mining Co., LLC and Consolidation Coal Company, et al.</i> (Final Decision of the Office of Hearings and Appeals, March 31, 2003), <i>aff'd</i> , <i>U.S. Steel Mining, LLC, et al. v. Craig</i> , Civ. Action No. 03-AA-74 (Cir. Ct. Kanawha Co., May 27, 2004)	14, 24, 25
W. Va. Tax. Dec. 85-110 B (W. Va. Off. Hrg. App.), available at 1996 WL 473674	31, 32

UNITED STATES CONSTITUTION

Commerce Clause	
U.S. Const. art. I, § 8, cl. 3.....	<i>passim</i>
Export Clause	
U.S. Const. art. I, § 9, cl. 5.....	9, 15
Import-Export Clause	
U.S. Const. art. I, § 10, cl. 2.....	<i>passim</i>

STATUTES

1980 W.Va. Acts, c.123, effective April 1, 1980.....	22
Mont. Code Ann. § 15-35-102(4) (1979).....	18
N.M. Stat. Ann. § 7-26-4	34
N.M. Stat. Ann § 7-26-6	34
W. Va. Code §11-13-2a (1971).....	21
W. Va. Code § 11-13A-2(b)(14).....	22
W. Va. Code § 11-13A-2(c)(6)	28

W. Va. Code § 11-13A-2(c)(6)(C).....	29
W. Va. Code § 11-13A-2(c)(6)(G)	23, 24
W. Va. Code § 11-13A-2(c)(6)(H)	23
W. Va. Code § 11-13A-2(c)(11).....	22, 23
W. Va. Code § 11-13A-4(a).....	22
W. Va. Code § 11-13A-4(a)(1).....	12, 13, 18, 22, 28
W. Va. Code § 11-13A-4(c).....	23
W. Va. Code § 11-13A-4(e).....	23
W. Va. Code § 22-3-32(a).....	27

REGULATIONS

W. Va. Code St. R. 110 § 13A-2a.6.....	29
W. Va. Code St. R. 110 § 13A-4.1.1 (1992).....	22

MISCELLANEOUS

Leslie W. Abramson, <i>State Taxation of Exports: The Stream of Constitutionality</i> , 54 N.C. L. Rev. 59, 73 (1975)	9
Boris I. Bittker & Brannon P. Denning, <i>The Import-Export Clause</i> , 68 Miss. L. J. 521 (1998)	10
Walter Hellerstein, <i>Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports</i> , 1976 Sup. Ct. Rev. 99 (1976)	10
Walter Hellerstein, <i>State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?</i> , 75 Mich. L. Rev. 1426 (1977).....	20
Laurence H. Tribe, <i>American Constitutional Law</i> § 6-26 (3d. ed. 2000)	7, 8, 20, 21
<i>Cause of Derailment Still Under Investigation</i> , Topeka Capital Journal, March 30, 2004, available at 2004 WLNR 11243854	31
West Virginia St. Tax Dept. Pub. TSD-210 (Jan. 2005).....	29, 30, 31
West Virginia St. Tax Dept. Pub. TSD-382 (Mar. 1999)	26, 27, 30

INTRODUCTION AND SUMMARY

Appellants U.S. Steel Mining Company, et al. hereby file their reply to the West Virginia Tax Commissioner's brief ("Comm. Br."), addressing, where applicable, the briefs filed by *amici curiae* in support of the Tax Commissioner.

The Tax Commissioner contends that the policy-based analysis of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) supersedes the "stream of export" rule exemplified by *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946), which flatly prohibits State taxes on goods in the export stream. But even the Tax Commissioner concedes that "the 'stream of export' doctrine set forth in *Richfield Oil* may have life left in it." Comm. Br. at 21. While that concession alone is sufficient for this Court to hold that *Richfield Oil* still has precedential value, this Court need not rely on that concession in order to do so. The Supreme Court's discussion of *Richfield Oil* in *United States v. International Bus. Mach. Corp.*, 517 U.S. 843 (1996) ("*IBM*"), which the Tax Commissioner mischaracterizes, leaves no doubt that the Supreme Court continues to recognize *Richfield Oil*'s precedential value. Even if the authority of *Richfield Oil* were clouded, that case remains good law because it has never been overruled. As the Supreme Court has emphasized, in numerous decisions which the Tax Commissioner ignores, courts must follow Supreme Court precedents unless and until they are overruled by the High Court.

Applying the analysis required under *Richfield Oil*, the Tax Commissioner's arguments that the subject taxes do not fall on coal in the export stream lack merit. The Tax Commissioner makes only a single, passing reference to this Court's decision in *Kanawha Eagle, LLC v. Tax Commissioner*, 609 S.E.2d 877 (W. Va. 2004), and fails to mention its holding that "[t]he initial loading of fully processed clean coal at the preparation plant for shipment is one of the specified activities viewed as a taxable event" under the statute. *Id.*, Syl. Pt. 4. *Kanawha Eagle* thus not only refutes the Tax Commissioner's claim that the taxes are imposed merely on the severance of

coal from the earth, it thereby confirms that the taxes impermissibly fall on coal in the export stream because the loading of coal for shipment is the very act that commits the coal to exportation.

There is no merit to the Tax Commissioner's tortured reasoning that there is a split-second gap between the completion of loading and the commencement of exportation because loading purportedly ends the precise instant that "the coal reaches the end of the conveyor belt and gravity takes over for the final drop into the railcar or barge." Comm. Br. at 28. But even if it were the case that loading suddenly stops the exact moment a given lump of coal leaves the conveyor belt and begins "falling through space" into the railcar (*id.* at 29), it would have no relevance from a constitutional standpoint. The Supreme Court has confirmed that while the Import-Export Clause clearly is violated when a tax is imposed after goods have been loaded for export, it is no less violated when the act that incurs the tax is also the very act that "committed the goods to the carrier" for export. *Richfield Oil*, 329 U.S. at 81 (quoting *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923)). Thus, even under the Tax Commissioner's restrictive definition of loading, loading is still the act that commits the coal to exportation, and the state's taxation of that act is therefore unconstitutional as applied to exported coal.

The taxes are unconstitutional as applied to exported coal for a second, independent reason — because they accrue, in operation and effect, on the *sale* of coal, when the coal is in the export stream. The Tax Commissioner's administrative findings to this effect were adopted by the circuit court, and the Tax Commissioner may not disavow them simply because he recognizes, belatedly, that they require invalidation of the subject taxes. Contrary to the Tax Commissioner's claim, these findings reflect neither "careless drafting" nor "reasoning" that the

Tax Commissioner can change on a whim. These findings are just that — findings — made on the basis of an extensive record, and they are binding on the Tax Commissioner.

Even if this Court was to consider the Tax Commissioner's arguments regarding the accrual of the taxes, they are without merit. Tellingly, the Tax Commissioner ignores his department's own regulations and publications which confirm that, contrary to the Commissioner's litigation argument, the sale is not merely the basis for *measuring* or *calculating* the amount of taxes, but rather is the very event that triggers *liability*.

The Tax Commissioner's heavy reliance on the computation of the tax base is misplaced. Although the statute provides that in the absence of a sale, gross value shall be the fair market value for natural resources of the same grade or quality, the Commissioner's own regulations and publications expressly provide that this alternate valuation method applies only when coal is commercially used (or sold to related parties) and, correspondingly, that it does not apply to severed coal that is not so disposed of. The lack of any means to calculate a tax base in the absence of the sale or commercial use of the coal is consistent with the Commissioner's express acknowledgement, in a document published outside the self-interested context of this case, that tax liability accrues not upon severance, but upon the sale or commercial use of the coal, as the case may be.

The Tax Commissioner's other value-based argument, which emphasizes the allowance of a deduction for freight charges from the loading facility to the port, also undercuts his position. For as the Tax Commissioner concedes, the taxable value of the coal still "includes whatever value is involved in loading the coal for shipment" (Comm. Br. at 30), which is the point at which the coal is committed to the export stream.

Finally, the taxes are unconstitutional even under *Michelin*. The Tax Commissioner does not dispute any aspect of the economic analysis of Appellants' expert witness, which established that the taxes adversely affect the level of U.S. coal exports to a significant degree. Nor does the Tax Commissioner take issue with the persuasive analysis of the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit, which, in two pre-*IBM* decisions, held that nondiscriminatory State taxes that fall on goods in the export stream impair the federal government's ability to speak with one voice in matters of foreign commerce — the first policy identified in *Michelin* — when they impact U.S. exports in this fashion. The taxes also implicate *Michelin's* "State Harmony" prong, which recognizes that the Import-Export Clause prohibits State taxes that interfere with the free flow of goods between States. Contrary to the Tax Commissioner's assertions, the taxes do not merely affect certain individual businesses in other States; rather, they adversely affect commerce itself, and thereby implicate *Michelin's* State Harmony prong.

ARGUMENT

I. ***Richfield Oil's* Holding that the Import-Export Clause Prohibits State Taxation of Goods in the Export Stream is Still Good Law.**

The threshold question facing this Court is whether *Richfield Oil*, in which the Supreme Court held that the Import-Export Clause prohibits State taxation of goods in the export stream, is still good law. Although the Tax Commissioner and two *amici* urge this Court to find that *Richfield Oil's* analysis has been superseded by *Michelin*, it is noteworthy that even the Tax Commissioner refuses to proclaim *Richfield Oil's* demise, as he concedes that that "the 'stream of export' doctrine set forth in *Richfield Oil* may have life left in it." Comm. Br. at 21. In fact, there is no reason to equivocate, as the Supreme Court's most recent discussion of its Import-Export case law affirmatively confirms the continuing vitality of *Richfield Oil* and the stream of

export doctrine. But even if it were the case that *Richfield Oil's* precedential value were cast in some doubt by *Michelin*, the fact remains that *Richfield Oil* has never been overruled. That in and of itself requires this Court to invalidate the subject taxes as applied to exported coal under *Richfield Oil* should the Court find, as the Tax Commissioner did in his administrative decision and as Appellants have demonstrated, that the taxes in question are imposed on coal in the export stream.

A. The U.S. Supreme Court has Confirmed that *Michelin* Does Not Extend to State Taxation of Goods in the Export Stream, and that *Richfield Oil* is Still Good Law.

In 1996, some 20 years after *Michelin*, the Supreme Court in *IBM* refuted the notion that the stream of export doctrine under the Import-Export Clause is in doubt. Indeed, the Tax Commissioner, in a circuit court brief filed just two months ago in another Import-Export Clause case involving the subject taxes, acknowledged that *IBM* "cited *Richfield* for the proposition that a tax on goods while they are in the steam of export commerce violates the Import-Export Clause." Tax Commissioner's Reply Brief, *Elk Run Coal Company, Inc., et al. v. Craig, State Tax Commissioner of West Virginia*, Civ. Action No. 04-AA-78 (Cir. Ct. Kanawha Co.), at 6 (citing *IBM*) (excerpt annexed hereto at A3).

In an abrupt about-face, the Tax Commissioner now asserts that *IBM's* "reference to *Richfield* involved nothing more than indicating how the Court's analysis under the Export Clause differed from its analysis under the Import-Export Clause." Comm. Br. at 25. The Tax Commissioner is mistaken. Although the *IBM* Court did note certain textual differences between the two clauses, the Tax Commissioner ignores the fact that in a completely different section of its opinion, the *IBM* Court focused specifically on its Import-Export Clause precedents and unequivocally stated that *Michelin* and *Department of Rev. of Wash. v. Association of Wash.*

Stevedoring Cos., 435 U.S. 734 (1978) (“*Washington Stevedoring*”) “do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on . . . exports in transit.” *IBM*, 517 U.S. at 861.

The Tax Commissioner observes that *Washington Stevedoring* distinguished *Richfield Oil*, but contrary to his assertion, the Court did not do so in a manner that “implicitly questioned [*Richfield Oil’s*] continued validity.” Comm. Br. at 24. Rather, as discussed below, *Washington Stevedoring* distinguished *Richfield Oil* on its facts, and expressly indicated that because of those factual differences, *Richfield Oil’s* precedential value was unaffected by the *Washington Stevedoring* decision.

As Appellants noted in their opening brief, although *Washington Stevedoring* applied the *Michelin* approach to the State of Washington’s taxation of stevedoring services in connection with exports, the Court emphasized that its decision “d[id] not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit.” *Washington Stevedoring*, 435 U.S. at 757. Instead, the Court merely concluded that “the *Michelin* policy analysis should not be discarded . . . where the taxation falls upon a service distinct from the goods and their value.” *Id.*

Significantly, *Washington Stevedoring* cited *Richfield Oil* as an example where the tax did fall on the goods and their value. *Id.* at 756 n.21. In recognizing this distinction, *Washington Stevedoring* relied upon an earlier decision involving taxation of handling services, *Canton R. Co. v. Rogan*, 340 U.S. 511, 513-14 (1951), which had similarly distinguished *Richfield Oil* as a case that involved taxation of goods rather than services. *Washington Stevedoring*, 435 U.S. at 756. In 1996, the *IBM* Court drew the very same distinction regarding *Richfield Oil* that the Court drew in *Washington Stevedoring* and *Canton*, and thus confirmed in unequivocal terms

that neither *Michelin* nor *Washington Stevedoring* extends to State taxation of goods in export transit. The *IBM* Court stated:

We also declined to endorse the Government's theory in *Washington Stevedoring*. After reciting that the Court in *Canton R. Co.* had distinguished . . . *Richfield Oil* [and other decisions], we pointed out that in those cases "the State [or Federal Government] had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves." *Washington Stevedoring*, 435 U.S., at 756, n.21. We expressly declined to "reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit," because, although the goods in that case were in transit, the tax fell on "a service distinct from the goods and their value." Thus, contrary to the Government's contention, this Court's *Import-Export Clause* cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit.

IBM, 517 U.S. at 862 (emphasis added) (citations omitted).

The Tax Commissioner claims that *IBM* merely noted that "neither *Michelin* nor *Washington Stevedoring* addressed a situation like that before the Court in *IBM*," namely, a tax on goods in export transit. Comm. Br. at 25. *IBM* did much more than that. As confirmed above, *IBM* also specifically recognized that neither *Michelin* nor *Washington Stevedoring* addressed a situation like that presented in *Richfield Oil*. Thus, as Professor Tribe has noted, *IBM* "reject[ed] an argument that a generally applicable, nondiscriminatory state tax on goods in transit would be permissible under the *Import-Export Clause*." Laurence H. Tribe, *American Constitutional Law*, § 6-26, at 1163 n.24 (3d ed. 2000) (hereinafter "Tribe") (citing *IBM*, 517 U.S. at 861). As such, the circuit court's reason in this case for disregarding *IBM*, which is echoed by *amicus* Affiliated Construction Trade Foundation — that *IBM* addressed only the application of *Michelin* and *Washington Stevedoring* to the Export Clause — is demonstrably wrong. As noted in Appellants' opening brief ("App. Br.") at 28, *IBM* found that *Michelin* and *Washington Stevedoring* did not validate nondiscriminatory taxation of goods in export transit under the Export Clause because they do not do so even under the *Import-Export Clause*. See

517 U.S. at 861-62; *see also*, *Tribe*, § 6-26, at 1163 n.24, *supra*. Even if *IBM's* extensive discussion of the Court's Import-Export Clause precedents were to be viewed as *dicta*, neither the Tax Commissioner nor any of the *amici* has even attempted to explain why that would justify ignoring the Court's discussion. Appellants, on the other hand, have established that Supreme Court *dicta* cannot be disregarded. *See* App. Br. at 29.¹

The Tax Commissioner and each of the *amici* also ignore the Supreme Court's favorable treatment of *Richfield Oil* in a different section of the *IBM* opinion, which further confirms that the Court views *Richfield Oil* as retaining its vitality post-*Michelin*. The Court supported its holding that shifts in its dormant Commerce Clause jurisprudence do not apply to the Export Clause by analogy to the fact that *Richfield Oil* "distinguish[ed] accommodations made under the Commerce Clause from the express textual prohibition of the Import-Export Clause." *IBM*, 517 U.S. at 852 (citing *Richfield Oil*, 329 U.S. at 75-76). As Appellants noted in their opening brief (at 26-27), the significance of the Court's reliance on *Richfield Oil* for this proposition lies in the fact that if *Michelin*, rather than *Richfield Oil*, represented the standard for evaluating State taxation of goods in the export stream, then it would, contrary to *IBM's* reasoning, render the "accommodations made under the Commerce Clause" *controlling* as to the constitutionality of State taxation of goods in the export stream. For as the Tax Commissioner agrees (*see* Comm. Br. at 41), *Michelin* incorporates Commerce Clause analysis. In other words, if the Tax

¹ *Amicus* County Commissioners' Association erroneously suggests that *IBM* indicated that only State taxes on goods merely in transit through a state would run afoul of the Import-Export Clause, and then only under *Michelin's* balancing analysis. *IBM* has not been read so narrowly. *See, e.g., Ammex, Inc. v. Department of Treasury*, 603 N.W.2d 308, 313 (Mich. App. 1999) (concluding, based on *IBM*, that "*Richfield Oil* has precedential value"), *cert. denied*, 534 U.S. 827 (2001); *Tribe*, § 6-26, at 1164 n.26 (*IBM* "rejected the application of a balancing test once a tax is characterized as falling on exports") (citing 517 U.S. at 862) (italics omitted); *id.* at 1165 ("despite the significant change in the treatment of taxes on imports brought about by *Michelin*, the test applied to state taxes on exports is likely to remain the same").

Commissioner were correct that *Michelin* superseded *Richfield Oil*, then the *IBM* Court necessarily committed the analytical blunder of relying on *Richfield Oil* for a proposition that the Court knew was no longer valid. *Id.* Clearly, that is not the case, and the Tax Commissioner's assertion that *Richfield Oil* is "outdated and useless" in light of *Michelin* is just as clearly in error. Tellingly, the Tax Commissioner offers no response to the absurd implications of his argument.

Finally, the Tax Commissioner's reliance on several law review articles is misplaced. The Tax Commissioner characterizes *Richfield Oil* as an "aberration" based on an article by Professor Abramson. Comm. Br. at 21. But Professor Abramson did not express doubt regarding the stream of export doctrine and the immunity from taxation of goods in the export stream. He merely argued that *Richfield Oil* had "impl[ied] that the import-export clause immunity could obtain in the absence of physical movement of the taxed goods [into the export stream] if the certainty of export were positively established by some other means," and that in subsequent cases, "the Supreme Court began a return to a strict physical movement test for invalidation of state taxes." Leslie W. Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C. L. Rev. 59, 73 (1975) (citing *Empresa Siderurgica S.A. v. County of Merced*, 337 U.S. 154 (1949)).² Interestingly, even as to this limited argument, Professor Abramson pointed out a flaw in his theory. *See id.* at 72-73 (observing that the "certainty of export [in *Richfield Oil*] was demonstrated by some physical movement, which occurred when the oil was pumped into the purchaser's ship").

² Professor Abramson also relied upon *Joy Oil Co. v. State Tax Commissioner of Michigan*, 337 U.S. 286 (1949) and *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974) to support his theory. Those cases, like *Empresa Siderurgica*, applied the stream of export rule.

The Tax Commissioner selectively quotes from two other law review articles that actually contradict his position. The Tax Commissioner notes that in 1976, Professor Hellerstein observed that “*Michelin* has broadened the states’ power to tax imports.” Comm. Br. at 10 (quoting Walter Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 Sup. Ct. Rev. 99, 126 (1976)). The Tax Commissioner fails to note, however, that Professor Hellerstein qualified this statement by recognizing that *Michelin* upheld only “nondiscriminatory ad valorem property taxes upon goods *no longer in transit*.” *Id.* (emphasis added). As Appellants noted in their opening brief, Professor Hellerstein presciently stated that “[a]ssuming that the tax in question is nondiscriminatory, as most taxes are, decision will turn on whether the goods are in ‘import transit’ or in ‘the export stream’ . . .” *Id.* at 132 (footnote omitted).

Professor Bittker’s article also undercuts the Tax Commissioner’s position. Just as Professor Tribe has observed (*see supra* at 7), Professor Bittker recognized that *IBM* “rejected” the argument “that the Supreme Court’s ‘Import-Export Clause jurisprudence now permits a State to impose a nondiscriminatory tax directly on goods import or export transit.’” Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 Miss. L. J. 521, 549 n.93 (1998) (quoting *IBM*, 517 U.S. at 861-62).

B. *Richfield Oil* Retains Precedential Value Because it has Not Been Overruled.

Even if this Court was to agree with the Tax Commissioner that *Michelin* casts some doubt on *Richfield Oil*’s continuing vitality, the Court still must treat *Richfield Oil* as precedential authority because it has never been overruled. Although the Tax Commissioner baldly asserts that “[d]ecisions like that in *Richfield* can become outdated and useless without being explicitly overruled” (Comm. Br. at 24), Supreme Court case law instructs to the contrary.

As Appellants demonstrated in their opening brief (at 32-33), the Supreme Court has confirmed repeatedly in recent years that courts must follow Supreme Court precedents even if they believe that such precedents are inconsistent with later decisions of the Court. *See, e.g., United States v. Hatter*, 532 U.S. 557, 567 (2001) (approving court of appeals' application of Supreme Court precedent that was arguably in doubt, noting that "if 'changes in judicial doctrine' ha[ve] significantly undermined [the case's] holding, this 'Court itself would have overruled the case'" (quoting *Hatter v. United States*, 64 F.3d 647, 650 (Fed. Cir. 1995)); *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20 (1997) (court of appeals "was correct in applying" Supreme Court precedent even though it believed it to be "inconsistent with later decisions of the Court," because "it is this Court's prerogative alone to overrule one of its precedents") (citation and internal quotation marks omitted); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("If a precedent of this Court 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.") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Not surprisingly, neither the Tax Commissioner nor any of the *amici* make any attempt to rebut these well-settled and oft-applied principles, nor do they provide any reason why this Court should deviate from them. Accordingly, even if this Court was to find that *Michelin* undermines the reasoning of *Richfield Oil*, it would be duty-bound to conclude nevertheless that *Richfield Oil* retains precedential value. That is precisely the conclusion that the Texas Supreme Court drew in an Import-Export Clause case in 1995, prior to *IBM's* confirmation that *Richfield Oil* is still good law. Invoking the cardinal rule of *Rodriguez de Quijas*, *supra*, the Texas Supreme Court held that "[i]n light of the fact that the United States Supreme Court has not overruled *Coe v.*

Errol or any of its progeny [including *Richfield Oil*], we apply the long-standing rule that a tax on goods in the export stream of commerce violates the import-export clause.” *Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 912 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996). This Court, too, should apply *Richfield Oil’s* “long-standing rule” and invalidate the subject taxes as applied to exported coal if it finds that the taxes are imposed when the coal is in the export stream. As demonstrated in the following section, such a finding is inescapable.

II. The Subject Taxes are Imposed when the Coal is in the Export Stream and thus Within the Zone of Immunity as Recognized in *Richfield Oil*.

A. The Terms of the Statute Impose the Taxes Upon the Loading of Coal for Shipment, which is the Act that Commits the Coal to the Export Stream.

The Tax Commissioner acknowledges that in *Richfield Oil*, the tax was unconstitutional as applied to exports because “the act of engaging in the sale (which gave rise to the tax) was the exact same act that brought the product into the stream of foreign commerce.” Comm. Br. at 26. The same is true with regard to the West Virginia severance tax statute, whose terms impose the tax on the loading of coal for shipment, which is also the act that brings the coal into the stream of export. *See* W. Va. Code § 11-13A-4(a)(1) (providing that myriad post-severance processing operations, including the loading of coal for shipment, “shall be considered as mining and part of the privilege taxed”).³

³ *Amicus* West Virginia Association of County Officials argues that because the statute defines “severing” or “severed” as the removal of natural resources from the earth, the statute “therefore imposes a separate and distinct severance tax on severance, distinct and separate from the tax imposed on preparation.” Br. at 5. To the contrary, because the statute elsewhere expressly provides that post-severance processing operations, including loading for shipment, “shall be considered as mining and part of the privilege taxed,” (W. Va. Code § 11-13A-4(a)(1)), the statute expressly subjects all aspects of the mining process, including loading, to a single tax.

1. This Court's Decision in *Kanawha Eagle* Recognized that the Loading of Coal is a Taxable Event Under the Statute.

As Appellants noted in their opening brief, based on W. Va. Code § 11-13A-4(a)(1), this Court recently held that “[t]he initial loading of fully processed clean coal at the preparation plant for shipment is one of the specified activities viewed as a taxable event” under the statute. Syl. Pt. 4, *Kanawha Eagle, LLC v. Tax Commissioner*, 609 S.E.2d 877 (W. Va. 2004). The imposition of the tax on the loading of coal for shipment is therefore unconstitutional as applied to exported coal, because, under the same analysis applied in *Richfield Oil*, the loading of processed coal for shipment is the same act that brings the coal into the stream of export.

The Tax Commissioner barely mentions *Kanawha Eagle* in his brief, and on the sole occasion that he does, he does not even mention this Court's holding that the loading of coal for shipment is a taxable event under the terms of the statute. See Comm. Br. at 31 (noting only that *Kanawha Eagle* “involve[d]” severance taxes). Nor does the Tax Commissioner make any attempt to rebut the fact that West Virginia's tax on the loading of coal, which is based on the value of the coal being loaded, is tantamount to a tax on the coal itself, and thus distinguishable from the tax in *Washington Stevedoring*. In the latter case, a privilege tax on the *service* of loading and unloading cargo, which was based on the proceeds from such services, could not “be considered taxation upon the goods themselves” precisely because it did *not* “relate[] to the value of the goods” being loaded, but rather fell upon a “service distinct from the goods and their value.” *Washington Stevedoring*, 435 U.S. at 757 (emphasis added). Instead, the Tax Commissioner employs tortured reasoning in an attempt to argue that the loading of coal does not put the coal into the export stream.

The Tax Commissioner asserts that loading for shipment ends “when the coal reaches the end of the conveyor belt and gravity takes over for the final drop into the railcar or barge.”

Comm. Br. at 28. This conveniently enables the Tax Commissioner to profess that “[f]or a second or two, the coal exists in a netherworld between loading and shipment, falling through space owned neither by the coal producer nor the common carrier until it hits the bottom of the railcar or barge.” *Id.* From this, the Tax Commissioner concludes that the coal is in the export stream not when it is “being loaded,” but when it “is loaded (i.e., when it is in the rail car).” *Id.* (emphasis in original).⁴

The Tax Commissioner’s self-described “microanalysis” of the loading process (Comm. Br. at 29) fails to establish that loading is anything other than the act that places the coal into the export stream.

⁴ Elsewhere in his brief, the Tax Commissioner makes the conflicting argument that exportation only begins “at water’s edge.” Comm. Br. at 27 (quoting *Canton R. Co. v. Rogan*, 340 U.S. 511, 515 (1951)). That clearly is not the case here. As the Supreme Court confirmed in *Kosydar*, 417 U.S. at 67, the determination of when goods enter the export stream is a factual one, and as the Tax Commissioner noted in his administrative decision, the “material facts in this matter are not controverted” and establish that once the coal is processed, Appellants “immediately plac[e] th[e] coal in the export stream to purchasers in foreign countries.” *In re U.S. Steel Mining Co., LLC and Consolidation Coal Company, et al.* (Final Decision of the Office of Hearings and Appeals (March 31, 2003), at 3, 4 (emphasis added). Thus, even the Tax Commissioner does not dispute that coal which is loaded for shipment at the mine is in the export stream. See Comm. Br. at 28.

Moreover, the Tax Commissioner’s selective quotation from *Canton* ignores the fact that the Court differentiated between the broad zone of immunity afforded “goods” or “articles,” and the more limited immunity afforded services such as the handling of goods. 340 U.S. at 514. As Appellants noted in their opening brief, *Canton* thus recognized that while “[a]n article may be an export and immune from a tax long before . . . it reaches the port,” “the range of immunity cannot be so wide” with respect to “the handling of [goods].” App. Br. at 17 n.9 (emphasis added) (quoting 340 U.S. at 514-15). The Tax Commissioner observes that *Canton* distinguished *Richfield Oil* and *Spalding* (Comm. Br. at 27), but that distinction confirms that the Import-Export Clause affords goods greater protection from taxation than it does services. *Canton* distinguished *Richfield Oil* and *Spalding* precisely on the ground that the taxes struck down in those cases were on goods (the taxes were based on the value of the goods), whereas the tax upheld in *Canton*, which was based on revenues derived from handling services, was “not on the goods but on the handling of them at the port.” 340 U.S. at 514 (emphasis in original). The Supreme Court has recognized that distinction to this day. Indeed, when *IBM* rejected the argument that *Washington Stevedoring* had extended the *Michelin* approach to State taxation of goods in the export stream, the Court emphasized that *Washington Stevedoring* had itself distinguished State taxation of goods from State taxation of services on the strength of *Canton*. See *IBM*, 517 U.S. at 862.

To be sure, the Supreme Court has recognized that the stream of export doctrine requires courts to fix a point at which “the export may be said to begin.” *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923). But the Court’s analysis in this regard confirms that hair-splitting such as that attempted by the Tax Commissioner does not render the subject taxes constitutional.⁵

Richfield Oil relied upon and applied the export stream analysis of *Spalding*, which was also endorsed in *IBM*. See 517 U.S. at 849. In *Spalding*, the Court explained that goods are subject to taxation when they are being manufactured, and that “no one would doubt that they [are] exempt after they had been loaded” for export. 262 U.S. at 69. Significantly, however, *Spalding* also confirmed that the Court will conclude that the facts “are closer to the latter than to the former side, and that the export had begun,” when “[t]he very act that . . . incurred the tax . . . committed the goods to the carrier . . .” 262 U.S. at 69 (emphasis added).⁶ Thus, contrary to the Tax Commissioner’s erroneous assumption, the constitutional exemption from taxation does not attach only “after” goods have been loaded. Rather, the exemption attaches to acts that “commit” goods to the carrier for export.

Here, the coal is committed to the rail carrier not by virtue of the fact that the coal has “been loaded,” but by the act of *loading* itself. This case is no different from *Richfield Oil*, where, as the Tax Commissioner acknowledges, “the taxable incident coincided with *the loading* of the oil into the ship’s hold.” Comm. Br. at 29 (emphasis added). Although the Tax

⁵ *Spalding* involved a challenge to a federal tax under the Export Clause of the U.S. Constitution, U.S. Const. art. I, § 9, cl. 5. But as Appellants noted in their opening brief, “[a] long line of cases has recognized . . . that the meaning of ‘export’ is the same under [the Export Clause] as under the Import-Export Clause.” App. Br. at 20 n.10 (quoting *Kosydar*, 417 U.S. at 67 n.5).

⁶ As Appellants noted in their opening brief, although *Spalding* was referring to a vessel, it recognized that the “same principle” applied when goods are placed into the export stream by their commitment to a rail carrier inland. App. Br. at 18 n. 9 (quoting *Spalding*, 262 U.S. at 70).

Commissioner tries to distinguish *Richfield Oil* by arguing that the “logistical realities of pumping oil into a tanker require a seamless physical connection between ship and shore that is not necessary when loading coal” (Comm. Br. at 29), nothing in *Richfield Oil* supports any such distinction. To the contrary, the *Richfield Oil* Court recognized that it is enough that “the expected and accomplished effect of the act was to start [the goods] for th[e] port.” 329 U.S. at 81 (quoting *Spalding*, 262 U.S. at 69).

Justice Black’s dissent in *Richfield Oil*, upon which the Tax Commissioner and *amicus* County Commissioners’ Association rely, is not on point. Justice Black stated that no one would suggest that a severance tax would be unconstitutional as a tax on exports for the reason that “the taxable event clearly arose before and not after the exportation began.” 329 U.S. at 87. Even if the subject taxes are viewed as taxes on the “privilege of mining,” this Court has held that loading is a “taxable event” under the statute, and the loading of coal is what commits the coal to exportation.

Nor does *Kosydar* support the Tax Commissioner’s analysis. The Tax Commissioner claims that *Kosydar*’s “insistence upon an actual movement into the stream of export,” which was recognized as perhaps “an overly wooden or mechanistic application of the *Coe* doctrine” (417 U.S. at 71), “apparently” endorses his “overly formalistic” approach here. Comm. Br. at 29. That is not so. *Kosydar* still examined whether, at the time the tax was imposed, “the movement to foreign shores had []either started []or been committed.” 417 U.S. at 70 (emphasis added) (quoting *Empresa Siderurgica*, 337 U.S. at 157). No Import-Export Clause violation was found because the goods “were sitting in [a] warehouse awaiting shipment,” some for as long as three years. *Id.* at 69, 70. Here, by contrast, it is an undisputed fact that the coal is “loaded while the train passes under the flood load facility,” such that the “coal is literally rolling to the sea” as

it is being loaded: *Petition for Appeal of U.S. Steel Mining Company, LLC, et al.*, Civ. Action No. 03-AA-74 (Cir. Ct. Kanawha Co., May 23, 2003), ¶ 31(b); Tax Commissioner's Response to Petition, ¶ 31 (admitting same). *Kosydar* therefore provides no support for the Tax Commissioner's position, either analytically or factually.

Thus, even assuming *arguendo* the validity of the Tax Commissioner's analytical contortions regarding the duration of the loading process, it is still insufficient to render the taxes constitutional as applied to exported coal. There can be no legitimate dispute that the act of loading — even under the Tax Commissioner's restrictive definition — is the act that “commits” the coal to the rail carrier.⁷ Accordingly, even if one were to assume that *Richfield Oil* is distinguishable in the sense that it involved a sales tax and this case somehow does not, it remains the case that the *principle* that required invalidation of the tax in *Richfield Oil* — that States may not tax the very act that commits goods to the export stream — also requires invalidation of the taxes here.

2. *Commonwealth Edison* is Distinguishable Both in Terms of the Tax and the Constitutional Provision that were Involved in that Case.

As Appellants anticipated, the Tax Commissioner relies heavily on a Commerce Clause case, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), to argue that “a nondiscriminatory severance tax does not burden commerce, whether interstate or foreign.”

⁷ In point of fact, there is no validity to the Tax Commissioner's claim that the “loading” of coal can be said to end prior to the time the coal is in the railcar or barge. The notion that the loading process ends at the precise instant that a given lump of coal leaves the conveyor belt and begins “falling through space” defies reason and common sense. Taking a somewhat different approach, *amicus* West Virginia Education Association erroneously asserts that in *Kanawha Eagle*, this Court defined the taxable activity in truncated fashion, *i.e.*, as only encompassing post-severance operations “*up until delivery* to a third party carrier at the processing plant.” Br. at 2 (emphasis added). This Court suggested no such thing, and instead expressly held that the “loading” of such processed coal is a taxable event. Syl. Pt. 4, *Kanawha Eagle*.

Comm. Br. at 31 (heading). Inasmuch as Appellants' opening brief has already addressed most of the Tax Commissioner's arguments regarding *Commonwealth Edison*, as well as the Tax Commissioner's misplaced reliance on Commerce Clause concepts generally (*see* App. Br. at 20-21), only a brief elaboration is required here.

Although the Tax Commissioner claims that there is a "striking" similarity between the tax involved in *Commonwealth Edison* and the taxes in question here (Comm. Br. at 34), what is striking is the Commissioner's failure to address the fact that the Montana Legislature expressly limited the subject of its tax to coal "severed from the earth" (Mont. Code Ann. § 15-35-102(4) (1979)), whereas the West Virginia Legislature expressly *expanded* the subject of its tax to include post-severance activities through and including the loading of processed coal for shipment. *See* W. Va. Code § 11-13A-4(a)(1). Accordingly, even assuming *arguendo* that the Supreme Court recognized that the Montana tax was levied on a local activity preceding the coal's entry into interstate commerce, it is not controlling with regard to the very different taxes enacted by West Virginia.⁸

Instead of addressing the obvious difference in subject matter between the Montana and West Virginia taxes, the Tax Commissioner attempts to side-step that disparity by erecting a straw man. First, he mischaracterizes Appellants' argument as one that distinguishes

⁸ As Appellants demonstrated in their opening brief (at 21-22), the Court in *Commonwealth Edison* had no cause to, and did not, make any "finding" as to when Montana's tax was actually levied, let alone speak to the timing of its "accrual." To the contrary, the Court emphasized that under the Commerce Clause, it did not matter when the tax was imposed. *See* 453 U.S. at 614-17. The Tax Commissioner's assertion that a decision two years later, *Arkansas Electric Co-op Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), implicitly confirmed that Montana's tax was imposed prior to the coal's entry into interstate commerce, is incorrect. The *Arkansas Electric* Court simply observed that *Commonwealth Edison* abandoned the rule that a tax's constitutionality under the Commerce Clause "depended on *whether* it was imposed" prior to the goods' entry into interstate commerce. 461 U.S. at 391 (emphasis added). *Arkansas Electric* did not purport to speak to the question of whether Montana's tax *in fact* was imposed prior to the coal's entry into interstate commerce.

Commonwealth Edison not based on the difference in the subject of the two States' taxes, but on the basis of a difference in how the taxes are calculated. The Tax Commissioner then refutes the notion that there is any difference in how the taxes are calculated by reference to Montana court cases that recognize that the Montana tax is calculated based on the sales price, just as West Virginia's is. *See Comm. Br. at 35-36.*

Appellants, however, have never contended that the Montana and West Virginia taxes are calculated differently. What Appellants do contend is that under the reading of the West Virginia statutes proffered by the Tax Commissioner, which focuses on the label employed by the Legislature, *i.e.*, taxes imposed on the privilege of mining coal, the taxes still are not levied on the mere severance of coal, but upon the loading of coal for shipment, which marks the completion of mining under the statute and commits the coal to the export stream. The fact that both Montana and West Virginia calculate the taxes based on contract sales price does nothing to change this fact.⁹

The Tax Commissioner notes that the Supreme Court has held that two taxes, both measured by gross proceeds or gross receipts, had "different validity" under the Commerce Clause, depending on the "subject" of the tax. *Comm. Br. at 26* (comparing *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) with *Central Greyhound Lines, Inc. v.*

⁹ At worst, the similarity in how the two States' taxes are calculated would arguably, and then only harmlessly, chip away a bit at Appellants' *separate and independent* argument that West Virginia's taxes fall, in operation and effect, on the sale of coal — and then only if (1) this Court was to agree with the Tax Commissioner's assertion that the *Commonwealth Edison* Court found that Montana's tax was levied at the time of severance, and (2) "levying" of a tax is somehow deemed to be equivalent to the "accrual" of a tax, which *Richfield Oil* held to be the operative test under the Import-Export Clause. But even then, it still remains the case that West Virginia's Tax Department has specifically recognized that liability for the subject taxes accrues when the coal is sold, not when it is severed. *See App. Br. at 13-14; see also, infra at 26-27.* And, of course, it also remains the case that the Tax Commissioner never explains how his focus on the measurement of the tax in order to justify his reliance on *Commonwealth Edison* can be reconciled with his arguments elsewhere, that the measurement of a tax is irrelevant to the determination of what it is imposed on. *See Comm. Br. at 15-20.*

Mealey, 334 U.S. 653 (1948)). While an analogy may be drawn to this case, it is not one that is helpful to the Tax Commissioner. Although West Virginia's taxes are, similar to Montana's tax, measured by sales receipts, and even assuming *arguendo* that Montana's tax was levied on coal prior to its entry into interstate commerce, West Virginia's taxes have "different validity" under the Import-Export Clause than Montana's had under the Commerce Clause — or even arguably would have had under the Import-Export Clause — because they have a different *subject* than Montana's. By the express terms of the statute, the subject of West Virginia's taxes includes the loading of coal for shipment, whereas the subject of Montana's tax was limited to severance of coal from the earth. Accordingly, the Supreme Court's decision in *Commonwealth Edison* upholding a different tax, under a different constitutional provision, has no bearing on the validity of West Virginia's taxes under the Import-Export Clause pursuant to *Richfield Oil*.

Likewise, the Tax Commissioner's arguments regarding the purported special role of severance taxes and the States' concomitant power to levy such taxes under the Commerce Clause (*see e.g.*, Comm. Br. at 12-14, 31) are irrelevant to the analysis in this case. The Tax Commissioner refers to "the Supreme Court's movement toward a unified approach to constitutional issues involving state taxation" (Comm. Br. at 32) (citing Walter Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977)), but as *IBM* confirmed in 1996, bright line immunity from State taxation of goods in export transit remains in place under the Import-Export Clause. The Tax Commissioner tries to muddy the waters by citing to a 1988 law review article referring to a statement by Professor Tribe that the Supreme Court would presumably employ a similar definition to define when goods are "in transit" for both interstate and foreign commerce clause purposes. Comm. Br. at 32. But as Professor Tribe makes clear in his 2000 treatise,

although the Supreme Court “has evidently embraced the ‘in transit’ distinction first enunciated in Commerce Clause cases in determining *whether a tax fell on ‘exports’ in the first place,*” the Court has “rejected the application of a [Commerce Clause] balancing test *once a tax is characterized as falling on exports.*” Tribe, § 6-26, at 1164 n.26 (emphasis in original) (citing *IBM*, 517 U.S. at 862).

3. West Virginia’s Unconstitutional Taxation of the Loading of Coal is the Result of the Legislature’s Deliberate Expansion of Taxable Activity under the Statute.

It should not go unmentioned that the constitutional infirmity arising from the terms of the West Virginia statute results from deliberate legislative action taken some 25 years ago, when the State expanded the scope of taxable activities well beyond the severance of coal.

The Tax Commissioner has long advocated that severance activities extend far past the removal of coal from the earth. Prior to 1980, the Business and Occupation Tax applicable to the severance of coal was imposed “[u]pon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resources products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided. . . .” W. Va. Code §11-13-2a (1971). Under this statute, the Tax Commissioner unsuccessfully urged that the severance of coal extended through its cleaning and processing. This Court rejected that argument and held that the severance of coal ended when the coal was reduced to possession on the ground. *See Gilbert Imported Hardwoods v. Dailey*, 167 W. Va. 587, 280 S.E.2d 260 (1981).

In 1980, perhaps in anticipation of this holding, the Legislature amended the portion of the Business and Occupation Tax pertaining to coal severance to include

those values arising from the ordinary processing and preparing of such coal for sale or commercial use, where such processing and preparing are done by the producer of the coal. Ordinary processing and preparing of coal activities by the producer thereof are considered an integral part of the production privilege and include crushing washing, cleaning, drying, sorting, sizing, blending, *loading for shipment* and the like applied in the ordinary mining of such products.

1980 W.Va. Acts, c.123, effective April 1, 1980 (emphasis added).

In 1985, the Business and Occupation Tax applicable to coal mining was repealed and replaced by the current tax. While "severing" or "severed" were defined generally to mean the physical removal of natural resources from the earth or waters of this state by any means, *see* W. Va. Code § 11-13A-2(b)(14),¹⁰ the Legislature specifically provided that certain treatment processes, when applied by the mine owner or operator, "shall be considered as mining and part of the privilege taxed." W. Va. Code § 11-13A-4(a). In the case of coal, "[c]leaning, breaking, sizing, dust allaying, treating to prevent freezing and *loading for shipment*" were deemed to be part of mining so that they could be taxed. W. Va. Code § 11-13A-4(a)(1) (emphasis added).

In 1992, the Tax Commissioner promulgated a regulation providing that, "[i]n the case of coal, the term "production of coal" shall include all activities and values arising from the severance or extraction of coal and/or the ordinary processing activities including crushing, working, cleaning, drying, sorting, sizing, dust allaying, *loading for shipment* and freeze-treatment. When any of the activities are performed, the value added to the coal shall be considered gross value attributable to the owner of the coal taxable under the severance tax." W. Va. Code St. R. 110 § 13A-4.1.1 (1992) (emphasis added).

If the State had retained the delineation of severance announced by this Court in *Gilbert Imported Hardwoods*, namely, that severance ended when coal was reduced to possession on the

¹⁰ This definition currently appears at W. Va. Code § 11-13A-2(c)(11).

ground, a much different issue would have been presented in this case, at least insofar as analysis of the tax under the literal terms of the statute is concerned. All severance activities would have been completed well before the coal was committed to a common carrier for export. As it is, however, the State has deliberately extended its definition of the taxable event under the terms of the statute, so that it applies to coal as it is committed to a common carrier for export. By this action, the State has violated the Import-Export Clause and incurred the obligation to refund severance taxes paid.

This is not how it had to be. The Tax Commissioner asserts that the inclusion of “whatever value is involved in loading the coal for shipment” is “merely a statutory recognition of real-world reality.” Comm. Br. at 30. However, the Legislature treats other natural resources differently, and excludes loading for shipment (as well as other post-severance processing operations) not only from the subject of those taxes, but also their taxable value. *See, e.g.*, W. Va. Code § 11-13A-4(e) (“The privilege of severing and producing limestone and sandstone by quarrying or mining shall end once the limestone or sandstone is severed from the earth.”); W. Va. Code § 11-13A-2(c)(6)(H) (“For limestone or sandstone quarried or mined, gross value is the value of such stone immediately upon severance from the earth.”); W. Va. Code § 11-13A-4(c) (“The privileges of severing and producing oil and natural gas shall not include any conversion or refining process.”); W. Va. Code § 11-13A-2(c)(11) (“‘severing’ or ‘severed’ oil and natural gas shall not include any separation process of oil or natural gas commonly employed to obtain marketable natural resource products”); W. Va. Code § 11-13A-2(c)(6)(G)

("For natural gas, gross value is the value of the natural gas at the wellhead immediately preceding transportation and transmission.").¹¹

Neither the Tax Commissioner nor a single one of the *amici* addresses these disparities, which not only highlight the fact that, unlike other natural resources, the terms of the coal tax statute do not tax the mere extraction of coal; they show that the Legislature *intended* to tax much more in the case of coal. Indeed, the Legislature *abandoned* its more limited tax in 1980. Even assuming *arguendo* that the Legislature had a "rational and necessary" reason for treating loading as part of mining activity (as *amicus* West Virginia Association of County Officials argues), the fact remains that under the terms of the statute, the tax that is on the books simply is not constitutional under the Import-Export Clause as regards exported coal.

B. In Addition to Being Unconstitutional as Taxes on the Loading of Coal under the Literal Terms of the Statute, the Taxes are Unconstitutional because they Accrue, in Operation and Effect, on the Sale of Coal in the Export Stream.

1. The Tax Commissioner is Bound by His Administrative Findings that Liability for the Taxes Accrues at the Time of Sale, After the Coal is in the Export Stream.

In his administrative decision, the Tax Commissioner found:

During the respective refund petition periods, the various Petitioners were engaged in the State of West Virginia in the business of severing and processing coal and immediately placing that coal in the export stream to purchasers in foreign countries.

* * *

This Tribunal also finds 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.

¹¹ Thus, *amicus* Municipal League's fear that "if the coal Severance Tax were to be found unconstitutional, the extractors of oil and gas soon will be before this court with a like argument," is unfounded.

In re U.S. Steel Mining Co., LLC and Consolidation Coal Company, et al. (Final Decision of the Office of Hearings and Appeals, March 31, 2003), at 4.

The Tax Commissioner attempts to disown his findings, dismissing them as “careless drafting.” Comm. Br. at 4. Frankly, that is hard to believe, for in the next breath after the Tax Commissioner made those findings, he took pains in his decision to note that this case is a “vitally important matter.” *In re U.S. Steel Mining Co.*, at 4. Moreover, the Tax Commissioner made these findings on the basis of a comprehensive evidentiary hearing, as well as extensive briefs filed by the parties that focused, in large part, on the “accrual” issue, which was hardly a peripheral matter. After considering the parties’ arguments, the Tax Commissioner agreed with Appellants and made the above findings, which are straightforward and are not at all “confusing,” as *amicus* West Virginia Association of County Officials tries to portray them.¹²

The Tax Commissioner also claims that he simply disavows the “reasoning employed” in his decision. *Id.* at 3. The Tax Commissioner is not disavowing any “reasoning.” The reasoning he employed to rule against Appellants was based on *Michelin*, and was set forth in the “Issues and Determinations” section of his decision. *See In re U.S. Steel Mining Co.*, at 5-7. What the Tax Commissioner is attempting to disavow are his *findings* regarding the accrual of the taxes, which were set forth in the “Facts” section of his decision. *See id.* at 3-4. As *amicus* West Virginia Association of County Officials correctly points out, these findings were “adopted by the Circuit Court.” Appellants respectfully submit that this Court should not lightly toss aside these findings simply because the Tax Commissioner now recognizes that his reliance on

¹² The Tax Commissioner disparages Appellants’ focus on the “accrual” of the taxes as a “curious fixation.” Comm. Br. 20. The Tax Commissioner’s remark is itself puzzling, given that the crucial inquiry in this case is “whether at the time the tax *accrued* the [coal] was an export” *Richfield Oil*, 329 U.S. at 78 (emphasis added).

Michelin is flawed and that his findings regarding the accrual of the taxes mandate reversal of his decision, and that of the circuit court.

2. If this Court Considers the Tax Commissioner's Arguments Regarding the Accrual of the Taxes, it Should Reject Them on the Merits.

If, however, this Court does consider the Tax Commissioner's arguments regarding the accrual of the taxes, it should reject them on the merits. As Appellants demonstrated in their opening brief, the Tax Commissioner's findings were correct. *See* App. Br. at 11-19. Appellants have established (1) that the severance of coal creates what is merely a contingent liability, (2) that the Supreme Court's cases "have emphasized that 'a liability does not accrue as long as it remains contingent'" (*United States v. Hughes Properties, Inc.*, 476 U.S. 593, 600 (1986), quoting *Brown v. Helvering*, 291 U.S. 193, 200 (1934)), and (3) that actual tax liability arises only upon the sale (or, in the absence of a sale, the commercial use) of coal. As discussed below, the Tax Commissioner's and *amici*'s arguments in response do not have any merit.

a. The Sale of Coal, Rather than Severance, Gives Rise to Liability for the Taxes.

A recurring theme in the Tax Commissioner's brief is his assertion that "*liability* for the severance tax arose at the time of severance, although the *amount* of the liability could not be accurately determined until some time later, when the coal is weighed." Comm. Br. at 30 (emphasis in original). The Tax Commissioner maintains that "[t]here is nothing contingent about the accrual of the severance tax liability once severance takes place. What remains uncertain is the measurement of the liability." *Id.* Most of the *amici* echo this contention.

This argument is refuted by the Tax Department's own publication regarding the "Special Tax" imposed under W. Va. Code § 22-3-32(a). *See* West Virginia St. Tax Dept. Pub. TSD-382

(Mar. 1999) (“Commonly Asked Questions About the Special Tax on Coal”). The Special Tax is imposed in the same fashion as the other taxes in question, namely, upon “every person in [West Virginia] engaging in the privilege of severing, extracting, reducing to possession or producing coal for sale, profit or commercial use.” W. Va. Code § 22-3-32(a). Publication TSD-382 unequivocally states (emphasis added):

4. **When does the special tax on coal accrue?**

Answer: *Liability* for payment of this tax *accrues* when the coal is *sold* by the producer, or the coal is shipped for commercial use by the producer.

Notably absent is any statement that “liability” accrues upon the mere severance of coal. Neither the Tax Commissioner nor any of the *amici* offer any explanation as to how the Tax Commissioner’s litigation position, that liability accrues upon severance, can be reconciled with Publication TSD-382.

b. **The Tax Commissioner’s Arguments Regarding the Calculation of the Tax Base do not Support the Conclusion that Liability Accrues Upon Severance. Indeed, the Calculation of the Tax Base Confirms that the Taxes Accrue Upon the Sale of Coal.**

In an attempt to show that the subject taxes accrue upon the severance, rather than the sale of coal, the Tax Commissioner does precisely what he takes Appellants to task for supposedly doing, and focuses on how the coal is valued for tax purposes.¹³ Specifically, the

¹³ Though Appellants do not rely exclusively on the point, it is of course true that the severance tax is measured based on the sale of coal. The Tax Commissioner’s observation (Comm. Br. at 20) that the taxable value is not the same as the contract price in non-F.O.B. mine sales, because outbound freight charges are not taxed, misses the point. The sale price still provides the benchmark from which the taxable value is ultimately derived. Also, Appellants note that one should not confuse the terms of sale with the point at which the coal enters the export stream, as *amicus* West Virginia Association of County Officials does. The coal enters the export stream at the same point – upon its loading for shipment – regardless of the terms of sale. The terms of sale dictate when the sale is consummated, and since all sales take place no earlier than the loading of coal (in most instances, the sales occur much farther into the

(continued . . .)

Commissioner, and several *amici*, emphasize (1) that the statute excludes from taxable value the freight charges from the loading facility to the port, and (2) that the statute provides for a basis for valuing coal in the absence of a sale. Putting aside the Tax Commissioner's conflicting positions regarding the significance of how the tax base is calculated, the Tax Commissioner's arguments fail on the merits.

As to the first point, the allowable deduction for outbound freight does not change the fact that the Legislature has taxed a value through and including the loading of coal for shipment, which is the act that commits the coal to the stream of export and the zone of immunity under the Import-Export Clause. Although the Tax Commissioner claims at one point that the "value that forms the tax base results from actions that occur prior to receipt of the coal" by the rail carrier (Comm. Br. at 9), the Tax Commissioner later refutes his own contention, acknowledging that the taxable value of coal includes "whatever value is involved in loading the coal for shipment." Comm. Br. at 30. Indeed, the statute defines "gross value" as the market value of the natural resource product, in the immediate vicinity, where severed, determined *after application of post production processing* generally applied by the industry to obtain commercially marketable or usable natural resource products." W. Va. Code § 11-13A-2(c)(6) (emphasis added). In the case of coal, such processing includes "loading for shipment." *Id.*, § 11-13A-4(a)(1). Thus, in *Kanawha Eagle*, with regard to the statutory deduction for outbound freight, this Court was careful to note that transportation "subsequent to" the initial loading of coal for shipment is not taxed. 609 S.E.2d at 883.

export stream, such as when the coal arrives at the port or crosses the ship's rail), the imposition of the taxes on the sale of coal violates the Import-Export Clause regardless of the terms of sale in a particular transaction. See App. Br. at 4-5, 18-19.

In any event, the backing-out of freight does not change the key fact that tax liability arises only if there is a sale of the coal or, in the absence of a sale, the coal is commercially used by the producer. In no case does tax liability arise upon the mere severance of coal. The Tax Commissioner argues to the contrary, relying on W. Va. Code § 11-13A-2(c)(6)(C), which provides that, “[i]n the absence of a sale, gross value shall be the fair market value for natural resources of similar grade and quality.” But contrary to the Tax Commissioner’s assertion, this provision does not contemplate that the alternate tax base shall apply *any time* there is an absence of a sale. The Tax Commissioner has failed to consult his own regulations, which confirm that aside from sales to a related party, the alternate basis for calculating the taxable value of coal applies *only* when coal is commercially used by the taxpayer. See W. Va. Code St. R. 110 § 13A-2a.6. That regulation states:

In a transaction involving related parties, or in the absence of a sale where the taxpayer produces the natural resource for consumption by the taxpayer in the taxpayer’s business, gross value shall not be less than the fair market value for natural resources of similar grade and quality. . . .

Id. The fact that there is no provision in the regulations for calculating a tax base — by any method — if severed coal is neither sold nor commercially used, confirms that the severance of coal merely creates a contingent liability. Actual liability (and the concomitant calculation of a tax base) occur only if a sale or commercial use of the coal takes place.

The Tax Department’s publication on the Severance Tax, TSD-210, which the Tax Commissioner also ignores, further proves the point. The Tax Department’s explanation of the tax base states, in its entirety:

Q5. What is the tax base for the severance tax on coal?

Severance tax is imposed on the “gross value” of the coal. “Gross value” is determined by the sale price of the coal less freight expenses incurred in transporting the coal to a customer, if the transportation is performed by a common carrier. Freight expenses are also deductible when performed by the

taxpayer, if the charges are separately stated on the invoice. Freight expenses related to the transporting of coal from a mine to a processing area are not deductible. Only outgoing freight charges incurred in shipping coal to a customer are exempt.

State and federal taxes, royalties, sales commissions, or any other expense, such as black lung excise taxes or reclamation fees, may not be deducted in determining the "gross value" subject to severance tax.

In transactions involving related parties, gross value can never be less than the fair market value of the coal of similar grade and quality. *In situations where coal is consumed or used by the severer or processor*, the gross value is the fair market value of coal of similar grade and quality.

West Virginia St. Tax Dept. Pub. TSD-210 (Jan. 2005) (emphasis added).

Publication TSD-210 thus confirms what the Tax Department's regulations provide, *i.e.*, that a tax base is calculated only in the following scenarios: (1) the sale of coal, (2) transactions involving related parties, and (3) situations where coal is consumed or used by the severer or processor. Notably absent from Publication TSD-210 is any statement that a tax base will be calculated *at all* if coal is severed but neither sold nor commercially used. The fact that there is no provision for calculation of a tax base absent a sale (whether to related or unrelated parties) or commercial use of the coal by the producer is not some happenstance. Rather, it reflects the operation of the statutes and regulations, under which no tax *liability of any amount* arises absent a sale or commercial use of the coal. The Tax Commissioner's bald assertion that liability would exist in such circumstances, and would just be "more difficult" to determine (Comm. Br. at 31), is simply wrong.¹⁴

In sum, it is no mere coincidence that Tax Department Publication TSD-382 states that that "[l]iability for payment of this tax accrues when the coal is sold by the producer, or the coal

¹⁴ *Amicus* West Virginia Association of County Officials notes that the statute reflects State policy to tax coal that is severed for sale, profit or commercial use, but not coal that is severed for non-commercial purposes. The key point, however, is that coal severed for sale, profit or commercial use still is only *potentially* subject to tax upon its severance. It is *actually* subject to tax only if the intended sale or commercial use in fact takes place.

is shipped for commercial use by the producer,” while Tax Department Publication TSD-210 provides for the calculation of a tax base only in instances in which coal is sold or commercially used by the producer. Contrary to the arguments by the Tax Commissioner and *amici* that the severance of coal gives rise to liability while the sale only determines the tax base, it is the sale which *both* gives rise to liability and determines the tax base. In instances where there is no sale but the coal is commercially used by the producer, it is the commercial use that both gives rise to liability and determines the tax base.¹⁵ And if there is neither a sale nor the commercial use of the coal by the producer, there is no liability and no determination of a tax base, the severance of the coal notwithstanding.¹⁶

Citing to no authority, the Tax Commissioner asserts that if a rail or barge carrying severed coal out of West Virginia derailed or sank, and the sale was never consummated because the coal never reached the port (the Tax Commissioner’s assumption being that the terms of sale were F.O.B. Terminal or F.O.B. Vessel, rather than F.O.B. Mine), “the State would be entirely correct in demanding that severance tax be paid with respect to that coal.” Comm. Br. at 19. To the contrary, if the Commissioner tried to collect the tax on such coal, the assessment would be successfully challenged on the basis of the aforementioned Tax Department regulations.¹⁷

¹⁵ All of Appellants’ exported coal is sold rather than commercially used. A.R. 605, 715, 816.

¹⁶ The last scenario is not a mere hypothetical. *See, e.g.*, Adm. Dec. 86-1-B (W. Va. St. Tax Dept.), available at 1986 WL 221126 (involving situation where severed coal was determined to be unmarketable and thus was neither sold nor commercially used by the coal producer; Tax Department held that no Business & Occupation Tax was incurred); W. Va. Tax. Dec. 85-110 B (W. Va. Off. Hrg. App.), available at 1996 WL 473674 (same). *See also*, App. Br. at 15.

¹⁷ It is, of course, possible that following an accident of the sort described by the Tax Commissioner, tax would be owed, but only because the coal was retrieved and sold or commercially used. Such retrieval and sale is entirely possible. For example, last year near Topeka, Kansas, coal spilled into a creek following a train derailment and was recovered and sold to a salvage company, which, in turn, sold the coal to small utilities companies and steel mills able to use dirty coal. *See Cause of Derailment Still Under Investigation*, Topeka Capital Journal, March 30, 2004, available at 2004 WLNR 11243854.

Indeed, in the two Business & Occupation Tax decisions discussed *supra* n.16, the West Virginia Tax Department, based on regulations similar to the current severance tax regulations, ruled in favor of taxpayers who challenged the assessment of tax on coal that was severed but, due to its high ash and moisture content, was neither salable nor suited for commercial use. In holding that no tax liability was incurred, the Tax Department relied upon regulations that provided:

(b) A person who produces natural resource products and does not make sale of the same but uses or consumes said resources in his business shall report the value of such resources under the applicable production classification on the business and occupation tax return. In determining the value of the natural resource products, the taxpayer must adhere to § 2 of these rules and regulations.

(c) Where the relationship between the producer of the natural resource products and the purchaser thereof is such that the gross proceeds derived from the sale are not indicative of the true value of the natural resources, the taxpayer shall determine value by application of one of the rules set forth in section 2 of these rules and regulations.

W. Va. Tax. Dec. 85-110 B, 1996 WL 473674, at 4 (quoting W. Va. Leg. Reg. (BOT) 11-10, Series XIII § 2a.01(a) and § 2a.01(b), pp. 56); *see also* Adm. Dec. 86-1-B, 1986 WL 221126, at

*3 (same). Summarizing these provisions, the Tax Department stated:

[T]hese authorities provide that the basis to value a natural resource product is the gross proceeds from a bona fide sale. Other methods of value may be utilized when either the resources are consumed within the taxpayer's business or the relationship between the buyer and seller is such that the gross proceeds do not indicate the true value of the product.

Petitioner's 8,611.25 tons of coal do not fall within either exception. The auditor's work papers insinuate that the coal was consumed within Petitioner's business. The evidence is to the contrary.

Since there was no sale of the coal, this tonnage cannot be taxed.

W. Va. Tax. Dec. 85-110 B, 1996 WL 473674, at *5; Adm. Dec. 86-1-B, 1986 WL 221126, at

*4.

Although the Tax Commissioner characterizes the B&O Tax provisions' lack of a valuation method for coal that was neither sold nor commercially used as an "oversight," which the Legislature wished to cure when it enacted the current taxes, he once again cites no authority for his assertion. The two B&O Tax decisions did not suggest anything of the kind, and indeed, as demonstrated above, the current regulations, like the B&O Tax regulations, do not provide a valuation method for coal that is severed but neither sold nor commercially used.

c. The Tax Commissioner's Reliance on Cases and Statutes Involving Other States' Taxes is Misplaced.

Ignoring his own department's publications and regulations regarding the very taxes in question, the Tax Commissioner relies upon cases and statutes involving other States' taxes to argue that other States have imposed taxes on the privilege of severing natural resources that are merely calculated based on sale. See Tax Comm. Br. at 15-17. But none of the cases cited by the Tax Commissioner involved a determination of when the taxes accrue, which is the pertinent inquiry under *Richfield Oil*.

For example, the Tax Commissioner relies extensively on a South Dakota case, *Homestake Mining Co. v. Johnson*, 374 N.W.2d 357 (S. D. 1985), which involved various State constitutional challenges as well as a challenge under the Commerce Clause of the U.S. Constitution, but not one under the Import-Export Clause. In *Homestake Mining*, the South Dakota Supreme Court evaluated whether the "operating incidence" of the tax, *i.e.*, severance of precious metals, had a sufficient nexus to South Dakota so as to permit the state to levy the tax. *Id.* at 363-65. As Appellants demonstrated in their opening brief, the concept of the "operating incidence" of a tax involves "the question [of] whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." *Commonwealth Edison*,

453 U.S. at 625 (citations omitted). In contrast, the pertinent inquiry under the Import-Export Clause is “whether at the time the tax accrued the [coal] was an export” *Richfield Oil*, 329 U.S. at 78. Like the U.S. Supreme Court in *Commonwealth Edison*, the South Dakota Supreme Court in *Homestake Mining* had no cause to analyze the timing of the “accrual” of the tax, and its holding that the operating incidence of the tax was on severance sheds no light on the issue facing this Court.¹⁸

The Tax Commissioner’s reliance on a Louisiana case, *Rojo Oil Co., Inc. v. McNamara*, 547 So.2d 1096 (La. App. 1 Cir. 1989), is similarly misplaced. There, the Louisiana Court of Appeals found that the tax in question was on the privilege of severing because the taxes were to be paid and valued at the time of severance, and the taxable event ended at severance. 547 So.2d at 1097. Here, by contrast, the taxes are paid and valued at the time of sale, and, as discussed *supra*, the taxable event, even under a literal reading of the statute, is not on mere severance.

The Tax Commissioner also cites a New Mexico statute, though without any actual explanation. But even a cursory examination of that statute reveals that it undercuts the Tax Commissioner’s position. The New Mexico statute provided that in the case of natural resources *other than coal*, “the ‘taxable incident’ is the severance,,” while in the case of coal, the statute provided that “the taxable event is the sale.” Compare N.M. Stat. Ann. § 7-26-6 with N.M. Stat. Ann § 7-26-4. Thus, the New Mexico statute only serves to highlight the similar dichotomy in West Virginia’s statutes between the State’s treatment of coal and its treatment of

¹⁸ *Homestake Mining* also relied on the fact that the legislature labeled the tax as a severance tax, noting that while it did not determine the nature of a tax, it did provide some evidence of legislative intent. 374 U.S. at 362. However, as discussed *supra*, West Virginia’s Legislature clearly did not intend to tax the mere severance of coal.

other natural resources. While the Legislature has taxed merely the severance of the latter, it clearly has not done so with regard to coal.

III. The Taxes in Question are Unconstitutional as Applied to Exported Coal Even Under *Michelin*.

A. The Taxes Undermine the Federal Government's Ability to Speak with One Voice in Matters of Foreign Commerce.

The Tax Commissioner maintains that the taxes pose no impediment to the federal government's ability to speak with one voice in matters of foreign commerce because (1) the severance taxes do not affect the price that foreign buyers will pay for West Virginia coal, and thus pose no risk of foreign retaliation, and (2) they are nondiscriminatory, *i.e.*, they do not single out exported coal. *See* Comm. Br. at 37-40. Neither contention has merit.

The Tax Commissioner's first argument, that if there is no risk of foreign retaliation, there can be no impairment of *Michelin's* "one voice" prong, is squarely undercut by one of the cases upon which the Tax Commissioner relies most heavily, *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). In that foreign Commerce Clause case, the Supreme Court recognized that "[a] state tax may, of course, have foreign policy implications other than the threat of retaliation." *Id.* at 195.

In their opening brief, Appellants cited two Import-Export Clause decisions (decided pre-*IBM*) in which the courts recognized that where, as here, a State's taxation of exported goods adversely impacts the level of U.S. exports, *Michelin's* first prong is satisfied, regardless of whether there is the possibility of foreign retaliation. *See Virginia Indonesia*, 910 S.W.2d at 915 (tax implicated first *Michelin* prong because Indonesia "might turn to other countries for its imported goods or might engage in retaliatory taxation of its own exports destined for the United States) (emphasis added); *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d

816, 821 (5th Cir.) (relying on the fact that Alabama's taxation of oil sold for export "adversely affect[ed] United States' foreign commerce with respect to this very important commodity" because it would discourage foreign parties from using U.S. ports to transport fuel into foreign countries), *cert. denied*, 498 U.S. 897 (1990).¹⁹

The Tax Commissioner does not take issue with the analysis in either *Virginia Indonesia* or *Louisiana Land*, nor does he dispute any aspect of the testimony and written report by Appellants' expert witness, Dr. Robert L. Sansom (discussed in App. Br. at 37-39), which confirms that although the West Virginia taxes do not increase the price of exported coal, they nevertheless adversely affect U.S. competitiveness and the level of U.S. coal exports to a significant degree.²⁰ Instead, the Tax Commissioner merely argues that

[t]he cases cited by Taxpayers for the proposition that foreign policy is implicated by a state's tax which might decrease the price competitiveness of its exported products are not applicable to this case, because all of the cases cited by Taxpayers involve taxes imposed on goods as they were in the stream of export commerce. The coal at issue in this case is not in the stream of export commerce when the severance taxes apply.

Comm. Br. at 40-41. If this Court agrees with Appellants that the subject taxes do, in fact, fall on the coal while it is in the export stream, there can be no question that there is ample basis upon which to find in Appellants' favor, even if the Court were to apply *Michelin* rather than *Richfield Oil*, given that neither the Tax Commissioner nor any of the *amici* even attempts to rebut the reasoning of the Texas Supreme Court and the Fifth Circuit.

¹⁹ The Tax Commissioner asserts that eliminating the taxes in question and thereby boosting the competitiveness of U.S. coal internationally could *invite* retaliation from Australia or China, whose governments might attempt to retain market share. Comm. Br. at 40. Aside from being speculative, it is irrelevant. In *Louisiana Land*, the court recognized that abatement of the tax on oil would result in greater shipments from the United States, and presumably less from other countries, but the court still found that the tax impaired *Michelin's* first prong. The same conclusion must be drawn here.

²⁰ As Dr. Sansom noted, West Virginia coal accounts for approximately 40% of U.S. coal exports. *See* Tr. 112.

The Tax Commissioner nonetheless argues that nondiscriminatory taxes such as West Virginia's, by definition, cannot impair the federal government's ability to speak with one voice in matters of foreign commerce. Like the circuit court, the Tax Commissioner bases this assertion on a statement in *Michelin*. See Comm. Br. at 38. However, as Appellants pointed out (see App. Br. at 35), *Michelin* referred only to nondiscriminatory taxes "imposed on imported goods that are *no longer in import transit*" and qualified its statement by noting that "*such nondiscriminatory property taxation*" has no impact on the federal government's exclusive regulation of foreign commerce. 423 U.S. at 286 (emphasis added). The Tax Commissioner's failure to heed this important qualification results in his reliance on a case, *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. Ct. 1998), whose analysis undercuts his argument. For in *Saudi Refining*, the court found that a nondiscriminatory gross receipts tax did not violate the Import-Export Clause precisely because it was "*not directed at imported goods still in transit.*" *Id.* at 91 (emphasis added).

In addition, the Tax Commissioner ignores the fact that both *Virginia Indonesia* and *Louisiana Land*, on the strength of the aforementioned qualification in *Michelin*, invalidated nondiscriminatory taxes as applied to exports because the taxes were imposed on goods in the export stream. In *Virginia Indonesia* the Texas Supreme Court recognized that "by explicitly articulating an exception for in-transit goods, *Michelin* appears to preserve bright-line immunity for goods in the stream of export." 910 S.W.2d at 911 & n.3 (citations omitted). Similarly, in *Louisiana Land*, the Fifth Circuit explained that "the United States Government must speak with one voice when regulating commercial relations with foreign governments. To permit any and every state to impose a direct tax on goods in the export stream would circumvent this objective." 900 F.2d at 821 (citation omitted).

Once again, in view of the fact that neither the Tax Commissioner nor any of the *amici* even attempt to rebut the reasoning of the Texas Supreme Court and the Fifth Circuit in this regard, if this Court agrees with Appellants that the subject taxes do, in fact, fall on the coal while it is in the export stream, the Court should find in the Appellants' favor, even if it were to apply *Michelin*.

B. The Taxes Have the Potential to Undermine Harmony Among the States.

The Tax Commissioner argues that the subject taxes do not undermine harmony among the States because *Commonwealth Edison* upheld Montana's severance tax against a Commerce Clause challenge, and *Washington Stevedoring* applied the four-part Commerce Clause test to analyze *Michelin's* "State Harmony" prong under the Import-Export Clause. Comm. Br. at 41.

The Tax Commissioner's assertion that *Commonwealth Edison* addressed a "State Harmony" argument similar to that of Appellants is incorrect. *Commonwealth Edison* observed that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States," but rejected the notion that this gives residents of one State a right to "reasonable" prices to resources located in another State. 453 U.S. at 619. Here, Appellants do not contend that the Import-Export Clause's State Harmony prong is implicated because West Virginia's taxes raise the prices that residents of neighboring States must pay for West Virginia coal. To the contrary, there is no dispute that the export taxes do not raise the price of the coal. What is important, however, is that it is also undisputed that the taxes nevertheless adversely affect the *amount* of coal that is shipped through neighboring States. This effect of West Virginia's taxes goes to the very purpose of "creat[ing] an area of free trade among the several States" (*id.*) because the taxes *diminish* such trade insofar as they reduce the amount of coal shipped through neighboring States. While the tax in Montana did not impact interstate

commerce itself (it only affected the price that individual purchasers would pay for the coal), West Virginia's taxation of exported coal indisputably decreases the level of commerce itself.

The Tax Commissioner is also incorrect in asserting that Appellants' State Harmony argument somehow conflicts with their statement that they "do not contend that West Virginia is absolutely forbidden from imposing taxes on coal to recoup expenses for services rendered." App. Br. at 40. Although the Tax Commissioner asserts that Appellants' State Harmony argument "demands, precisely that West Virginia may not impose *any* tax that increases the price of West Virginia coal" (Comm. Br. at 43) (emphasis in original), that plainly is not the case. West Virginia's taxes can and do result in price increases for West Virginia coal sold *domestically*, which accounts for 80% or more of all West Virginia coal production.²¹ Appellants do not contend that West Virginia cannot impose the severance taxes on domestic sales.

Moreover, the Tax Commissioner's assertion is not even accurate as to export sales of coal. The Tax Commissioner argues that "[a]ny and all taxation imposed in any manner on a coal producer or the act of producing coal, or even the property taxes on the coal before it is severed, will 'have a direct and identifiable impact on whether West Virginia coal producers are able to sell coal in the world market.'" Comm. Br. at 43 (quoting App. Br. at 39). Perhaps so, but again, Appellants do not contend that West Virginia cannot impose severance taxes on coal if the taxes are imposed in such a manner that they do not accrue when the coal is in the export stream.

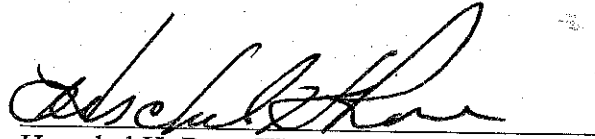
²¹ See App. Br. at 3 n.2 (citing Dr. Sansom's report, A.R. 585). As Dr. Sansom noted, unlike in export transactions, the severance tax is "frequently" passed on to customers in domestic coal contracts "because the domestic coal price isn't set by the world coal market," where U.S. coal exporters lack the market power to pass on the tax. Tr. 117; see also, A.R. 551.

Thus, West Virginia may indeed recoup its expenses not only on the 80 % of severed coal that is sold domestically, but also on exported coal, provided that with respect to the latter, the State enacts a tax that comports with constitutional requirements under the Import-Export Clause, and does not tax coal while in the process of exportation. As enacted, however, the taxes fall on coal in the export stream. They are therefore invalid regardless of whether they are analyzed under *Richfield Oil* or *Michelin*, for as the courts confirmed in *Virginia Indonesia* and *Louisiana Land*, with whose analysis the Tax Commissioner does not take issue, taxes on goods in the export stream violate *Michelin's* first prong. A violation of *Michelin's* first prong is independently sufficient to invalidate the taxes as applied to exported coal, even if this Court was to conclude that the taxes do not implicate *Michelin's* State Harmony prong.

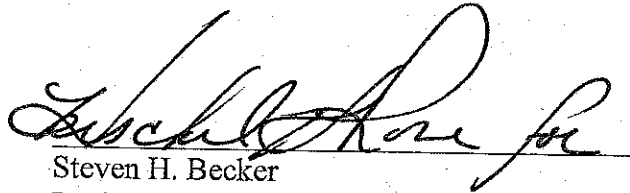
CONCLUSION

The taxes in question fall on coal in the stream of export and are therefore unconstitutional as applied to Appellants' coal exports under both *Richfield Oil* and *Michelin*. The circuit court's decision should be reversed.

Respectfully submitted,



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Dated: May 4, 2005

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