No. 03-882

In the Supreme Court of the United States

THOMSON, INC.,
F/K/A THOMSON MULTIMEDIA INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JONATHAN S. LAWLOR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461-4462, continues in force as applied to imports, notwithstanding this Court's holding in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 370 (1998), that the HMT, "as applied to exports," violates the Export Clause, U.S. Const. Art. I, § 9, Cl. 5.

2. Whether the HMT, as applied to imports, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1.

3. Whether the HMT, as applied to imports, violates the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 03-882

THOMSON, INC.,
F/K/A THOMSON MULTIMEDIA INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 340 F.3d 1355. The opinion of the Court of International Trade (Pet. App. 20a-37a) is reported at 219 F. Supp. 2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003. On November 7, 2003, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Congress enacted the Harbor Maintenance Tax (HMT) as part of the Water Resources Development Act (WRDA) of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (33 U.S.C. 2201 *et seq.*). The HMT imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, the amount of the HMT is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of the HMT is to require the entities that benefit from use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The fees collected by the United States are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a) and (c).

2. In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the HMT, as applied to shipments of exports, violates the Export Clause, which states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The Court recognized that the Export Clause imposes no bar against an appropriate port use fee (523 U.S. at 367), and emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance" (*id.* at 370). The Court held that *Pace* v. *Burgess*, 92 U.S. 372 (1876), governs the determination whether an assessment "constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court explained that the more flexible test for identifying

user fees applied in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), is applicable under "constitutional provisions other than the Export Clause," because "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368.

The Court concluded that the HMT, as applied to exports, fails to satisfy the strict test for a bona fide user fee applicable under the Export Clause, because the value of a shipment's cargo, which determines the amount of the HMT, does not adequately correlate to the extent to which an exporter uses federal harbor services, facilities, and benefits. 523 U.S. at 367-370. The Court therefore held that the HMT, as applied to exports, is a tax barred by the Export Clause. *Ibid.* The Court recognized, however, that *ad valorem* assessments that amount to an invalid "tax or duty" under the Export Clause might nonetheless qualify as a valid user fee under other constitutional provisions. *Id.* at 368-369 (citing, *inter alia*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989), which upheld an *ad valorem* fee against a Takings Clause challenge on the ground that the Court has "never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services").

3. Petitioner, an importer, filed this challenge to the constitutionality of the HMT in 1995. The case was pending in the Court of International Trade when *United States Shoe* was decided. On August 25, 1998, the Court of International Trade designated this case as a test case for challenges to the HMT's application to import shipments. On August 21, 2002, the court granted summary judgment in favor of the government. Pet. App. 20a-37a.

a. The court first rejected petitioner's claim that the HMT's application to imports could not be severed from the HMT's invalid application to exports. The court relied on previous decisions of the court of appeals that had held—based on the severability clause of the WRDA (of which the HMT is a part), 33 U.S.C. 2304—"that the unconstitutional export provision in the [Harbor Maintenance Tax] is severable from the remainder of the statute." Pet. App. 22a (quoting *Amoco Oil Co.* v. *United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000)); see *Princess Cruises, Inc.* v. *United States*, 201 F.3d 1352, 1358 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000); *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000).

b. The court next rejected petitioner's claim that the HMT's application to imports was invalid under the Uniformity Clause, which states that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. Petitioner argued that the HMT, as applied to imports, is a tax subject to the Uniformity Clause rather than a user fee, and that the HMT is not "uniform" under the Clause because it contains: (i) a limited exemption for unloading of domestic consumable merchandise (excluding Alaskan crude oil) shipped between the continental United States and Alaska, Hawaii, or United States possessions, 26 U.S.C. 4462(b); (ii) an implied exemption for a 47-mile stretch of the Columbia River in Washington and Oregon, 26 U.S.C. 4462(a)(2)(C); and (iii) an exemption for inland waterways, 26 U.S.C. 4462(a)(2)(A)(i).

The court agreed with petitioner that the HMT, as applied to imports, constitutes a tax rather than a bona fide user fee. Pet. App. 23a-24a. But the court concluded that the HMT's application to imports nonethe-

less does not infringe the Uniformity Clause because there was no evidence of actual regional favoritism or discrimination with respect to the exemptions identified by petitioner. *Id.* at 24a-32a.

c. Finally, the court rejected petitioner's challenge under the Port Preference Clause, which states that "No Preference shall be given * * * to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. Petitioner argued that the HMT's domestic cargo exemption for Alaska and Hawaii and the exemption related to inland waterways constitute an invalid preference for the ports of certain States. The court found that argument unpersuasive, ruling that any benefit or detriment to the ports of certain States does not represent intentional geographic discrimination between States in violation of the Port Preference Clause. Pet. App. 36a-37a.

4. The court of appeals affirmed. Pet. App. 1a-19a.[1]

a. The court of appeals adhered to its previous decisions holding that the "export provision of the HMT is severable" from the HMT's remaining applications. Pet. App. 6a. The court rejected petitioner's contention that the previous decisions should not be followed because the HMT, insofar as it applies to imports but not exports, violates international trade agreements. The court explained that its previous decisions did not turn on whether the HMT infringed international trade agreements, but "relied, instead, on the presence of a

[1] The court of appeals issued a single opinion resolving both the appeal in this case and the appeal in a separate challenge brought by CF Industries, Inc., a domestic shipper that challenged the HMT as applied to domestic shipping. CF Industries filed a separate petition for a writ of certiorari on December 16, 2003 (No. 03-867), and the government has filed a brief in opposition to that petition.

severability clause in the WRDA (of which the HMT was a part) and the fact that 'the legislative history of the statute does not show that Congress would not have imposed the [HMT] without applying it to exports.'" *Ibid.* (quoting *Carnival*, 200 F.3d at 1366-1367).

b. The court of appeals next held that the HMT, as applied to imports, does not violate the Uniformity Clause. Pet. App. 7a-14a. Whereas the Court of International Trade had found that the HMT's application to imports constitutes a tax subject to the Uniformity Clause but does not run afoul of the Clause's uniformity standard, the court of appeals concluded that the HMT's application to imports is a bona fide user fee rather than a tax and thus falls outside the scope of the Clause altogether. The court of appeals, relying on this Court's opinion in *United States Shoe*, reasoned that because this case does not involve a challenge under the Export Clause, the less stringent standard for a bona fide user fee prescribed by *Massachusetts*, 435 U.S. at 464, governs the analysis. Pet. App. 7a-9a. Observing that "*ad valorem* charges are generally upheld in contexts outside of the Export Clause," the court concluded "that the HMT's *ad valorem* charge is based upon a fair approximation of the costs of the benefits provided for port users." *Id.* at 11a-12a.

c. The court of appeals also upheld the HMT's application to imports against petitioner's challenge under the Port Preference Clause. Pet. App. 14a-19a.[2]

---

[2] The government argued in the court of appeals that petitioner, as an *importer*, lacks standing to challenge the HMT's exemption for *domestic* shipments to and from Alaska and Hawaii because, even if the court were to invalidate the exemption, petitioner's own tax burden would remain unaffected. See *Ward* v. *Commissioner*, 608 F.2d 599, 601 (5th Cir. 1979), cert. denied, 446

The court explained that the Port Preference Clause "prohibits only intentional, effectual preference of the ports of one state over the ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 16a.

The court rejected "out of hand" petitioner's reliance on the HMT's exemptions relating to inland waterways, reasoning that the exemptions do not "give[] express preference to the ports of one state over another." Pet. App. 14a n.5. The court next held that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States possessions does not infringe the Port Preference Clause, because "it is clear that the intent and effect" of the exemption was "not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on shipping-dependent states and possessions." *Id.* at 17a-18a. The court further explained that the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state when receiving shipments from Alaska and Hawaii. The court thus found it "difficult to discern an actual preference" for the ports of those States, as opposed to a recognition "that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods." *Id.* at 18a.[3]

U.S. 918 (1980). The court of appeals denied petitioner's challenge without addressing the issue of petitioner's standing.

[3] The court observed that there was no significance to the fact that the HMT singles out Alaska and Hawaii by name, explaining that naming the two States (as well as United States possessions) "merely served as a proxy for a complex formula defining exces-

ARGUMENT

The court of appeals correctly held that: (i) the HMT's application to imports continues in force and is severable from the HMT's application to exports; (ii) the HMT, as applied to imports, falls outside the scope of the Uniformity Clause because it qualifies as a user fee for purposes of that Clause; and (iii) the HMT's exemption for domestic cargo (excluding Alaskan crude oil) shipped to and from Alaska, Hawaii, and United States possessions, as well as the exemptions related to inland waterways, do not violate the Port Preference Clause. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 8-16) that the import provisions of the HMT are not severable from the unconstitutional export provisions. The court of appeals correctly rejected that contention, relying on its previous decisions in *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000), and *Princess Cruises, Inc.* v. *United States*, 201 F.3d 1352, 1358 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000). Pet. App. 5a-6a. Petitions for writs of certiorari raising the severability issue were filed in both of those cases. This Court denied review, and there is no reason for a different result here.

a. The Court has instructed that "an unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). That "inquiry is eased when Con-

---

sive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states." Pet. App. 19a.

gress has explicitly provided for severance by including a severability clause in the statute," in which case, absent "strong evidence that Congress intended otherwise," the unconstitutional provisions are severed and the statute otherwise remains in force. *Id.* at 686.

The WRDA, which enacted the HMT, contains a severability provision. That provision states:

> If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. 2304. It follows, as the court of appeals correctly held, that the HMT's unconstitutional application to exports is severable from the HMT's remaining applications, including to imports.

There is no merit to petitioner's contention (Pet. 14) that the WRDA's severability provision does not apply to the HMT. See *Carnival*, 200 F.3d at 1368-1369 (rejecting that contention). The severability provision was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 949, 100 Stat. 4082, 4201, and it applies whenever "any provision of this Act [*i.e.*, the WRDA], or the application of any provision of this Act * * * is held invalid." 33 U.S.C. 2304. Because the HMT was also enacted as part of the WRDA, § 1402, 100 Stat. 4266-4269, a court ruling invalidating a provision or application of the HMT necessarily constitutes a ruling invalidating a "provision of this Act, or the application of [a] provision of this Act" (33 U.S.C. 2304) within the meaning of the severability clause. Petitioner observes (Pet. 14) that Congress provided in Title XIV of the WRDA, which enacted the HMT, that the Title could be referred to as the "Harbor

Maintenance Revenue Act of 1986," § 1401, 100 Stat. 4266. But there is no dispute that Title XIV was enacted as part of (the fourteenth title of) the WRDA, and there thus can be no dispute that the WRDA's severability provision applies by its terms to the HMT.[4]

Contrary to petitioner's argument (Pet. 14-15), severing the HMT's invalid export provisions would not entail an impermissible judicial re-writing of the statute. Insofar as petitioner means to suggest that severability is permissible only when it entails striking discrete provisions from a statute, petitioner is wrong. This Court has made clear that a statute may be invalidated in certain applications while remaining in force in its valid applications, regardless of whether severing the category of unconstitutional applications can be achieved simply by excising particular statutory terms. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 178-184 & n.9 (1983) (holding that statute barring First Amendment activity on the Supreme Court's "grounds" is invalid as applied to the public sidewalks surrounding the Court, notwithstanding that the law contains no separate provision dealing specifically with the sidewalks); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504-507 (1985); *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 n.2, 234-236 & n.22 (1972).

---

[4] The HMT is categorically exempt from the full complement of administrative and enforcement provisions that generally apply to the tax laws, 26 U.S.C. 4462(f)(3), which includes, among numerous other provisions, a severability clause for tax statutes, 26 U.S.C. 7852(a). Because the HMT's blanket exemption from administrative and enforcement provisions encompasses numerous provisions other than the Internal Revenue Code's severability provision, petitioner errs in suggesting (Pet. 14) that the blanket exemption somehow negates the fact that the WRDA's severability clause, by its express terms, applies to the HMT.

Moreover, the severability clause at issue here applies not only when a "*provision* of [the] Act" is held invalid, but also when any "*application* of any provision of [the] Act to any person or circumstance, is held invalid," and Congress specified that "the remainder of [the] Act, shall not be affected thereby." 33 U.S.C. 2304 (emphasis added). This Court has recognized the distinction between a severability clause that calls for severing discrete provisions and one that calls for severing statutory applications, and has observed that a legislature may specifically "provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 (1992); see *Brockett*, 472 U.S. at 506-507 & n.14 (relying in part on similar severability provision in holding that there was "no obstacle to partial invalidation" of statute).

In any event, the HMT separately provides for imposition of the fee against an "importer" (26 U.S.C. 4461(c)(1)(A)), an "exporter" (26 U.S.C. 4461(c)(1)(B)), and a "shipper" (26 U.S.C. 4461(c)(1)(C)). The text of the HMT thus readily permits severing its unconstitutional application to exports, leaving in place a statute that designates how the amount of the HMT is to be determined (based on the value of cargo), who is to pay it (importers and shippers), and when it is to be paid (at the time of unloading). See *Carnival*, 200 F.3d at 1367. Thus, "the text * * * identifie[s] a clear line" for severance. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (citing *Brockett* and *Grace*).

b. Relying on legislative history primarily consisting of individual floor statements and remarks in congressional hearings, petitioner argues (Pet. 10-13) that Congress would not have enacted the HMT if it could

not be applied to exports. Petitioner's argument does not approach demonstrating the requisite "strong evidence" needed to overcome the presumption that Congress would have favored severing the HMT's invalid application to exports. *Brock*, 480 U.S. at 686. As the court of appeals explained in *Carnival*, the HMT was enacted "to raise money to help fund the port and harbor improvements" envisioned by the WRDA. 200 F.3d at 1367; see H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4 , at 42 (1985); S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The HMT "continue[s] to perform that function, although on a lesser scale," even though it may not be applied to exports. *Carnival*, 200 F.3d at 1367.

Congress of course would have preferred for the HMT to apply to exports. Any inquiry into severability, however, necessarily entails an assessment of what option would have been viewed by the legislature as second-best. Here, the second-best solution is readily apparent. At the time it passed the WRDA, Congress was aware that the Export Clause might bar application of the HMT to exports. *Carnival*, 200 F.3d at 1367. Congress nevertheless enacted the HMT and made it subject to a severability clause. Nothing in the legislative history demonstrates that, if Congress had known that it could not impose the HMT on exports, it would have elected to impose no HMT at all. See *id.* at 1367-1369. Indeed, in the six years since this Court's decision in *United Shoe*, Congress has taken no steps to restrict assessment of the remaining fees.[5]

---

[5] Petitioner errs in suggesting (Pet. 11) that, because the "precise form [of the HMT] enacted by Congress" was "essential to the passage of the entire WRDA," it would be inappropriate to sever the HMT's invalid export provisions. That argument ignores that

Petitioner stresses (Pet. 10) Congress's desire to minimize competitive disadvantages among cargo types in the application of the HMT. As the court of appeals recognized (*Carnival*, 200 F.3d at 1367-1368), however, Congress's concern was to avoid disadvantaging shippers of high-volume products such as coal in relation to shippers of high-value products such as computer chips —not to avoid disadvantaging importers, domestic shippers, or cruise lines in relation to exporters. See H.R. Rep. No. 251, *supra*, at 24-26. To the extent that Congress was troubled by the relative burdens on exporters and importers, the concern was to avoid overburdening exporters, not to achieve equity for importers. *Carnival*, 200 F.3d at 1367-1368.[6]

2. Petitioner contends (Pet. 16-23) that the HMT, as applied to imports, is a tax subject to the Uniformity Clause rather than a bona fide user fee. That contention lacks merit and was correctly rejected by the court of appeals.

a. Congress intended for the HMT to be a user fee rather than a tax. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985) ("The taxes and fees in this legislation

---

"the passage of the entire WRDA" included enactment of the WRDA's severability clause, which applies by its terms to the HMT.

[6] Contrary to petitioner's argument (Pet. 11), any concerns about the effect on trade relations of excluding exports from the HMT would not justify an inference that Congress preferred no HMT at all over an HMT that does not apply to exports. At the time that Congress enacted the WRDA, the implications of any trade disputes that might arise were wholly speculative. In any event, as the court of appeals recognized in *Carnival*, if a trade dispute were to arise and "the result [were] to create serious problems, either the executive or the legislative branch presumably will take appropriate action." 200 F.3d at 1369.

are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.").[7] Because this case concerns the application of the HMT to imports rather than exports, the court of appeals, following this Court's direction in *United States Shoe*, 523 U.S. at 367-368, applied the framework prescribed by *Massachusetts* v. *United States*, 435 U.S. 444, for determining (outside the context of the Export Clause) whether an assessment constitutes a bona fide user fee. See pp. 2-3, *supra*.

Petitioner errs in asserting (Pet. 17-18) that this Court's analysis of the HMT's export provisions in *United States Shoe* "applies with equal force" to the question whether the HMT constitutes a bona fide user fee with respect to imports. The Court made clear throughout its opinion that its analysis applied only under the Export Clause, specifically emphasizing that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The Court therefore applied *Pace* v. *Burgess*, 92 U.S. 372 (1876), "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court ultimately concluded that "*Pace* establishes that, *under the Export Clause*, the connection between a service the Government renders and the compensation it receives * * * must be closer than is

[7] Although the HMT is referred to as a "tax," 26 U.S.C. 4461, that of course is not dispositive of whether the HMT qualifies as a bona fide user fee. See *United States Shoe*, 523 U.S. at 367 ("[W]e must regard things rather than names * * * in determining whether an imposition on exports ranks as a tax.") (citation and internal quotation marks omitted).

present here" in order for the charge to qualify as a bona fide user fee. *Ibid.* (emphasis added). That conclusion was explicitly confined to the particular context of claims arising under the Export Clause, and it has no application here.

Petitioner errs for similar reasons in claiming (Pet. 19-20) that, if a charge when applied to exports is a "tax" prohibited by the Export Clause, the charge when applied to non-exports is necessarily an "excise" subject to the Uniformity Clause. The Court rejected a similar argument in *United States* v. *IBM*, 517 U.S. 843, 857 (1996), concerning the relationship between the term "tax" in the Export Clause and the terms "duty" and "impost" in the Import-Export Clause, U.S. Const. Art. I, § 10, Cl. 2. The Court explained that its decisions have "left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause." 517 U.S. at 857. And the Court made clear in *United States Shoe* that, when Congress intends for an assessment to constitute a user fee, there must be a closer relationship between the charge and the service supplied to satisfy the strict test that applies under the Export Clause than under the more flexible *Massachusetts* test that controls when applying other constitutional provisions. See 523 U.S. at 367-369; *id.* at 368 ("Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.").

b. The *Massachusetts* test provides that assessments constitute valid user fees "so long as they (1) do not discriminate against [the constitutionally-protected

interest], (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464. The court of appeals correctly found that the Harbor Maintenance Tax, as applied to imports, satisfies each prong of the test, Pet. App. 9a-14a, and its fact-bound resolution of that question does not merit review.

There is no merit to petitioner's contention (Pet. 20-23) that the court of appeals erred in applying the second prong of the *Massachusetts* framework. This Court has held that the second prong is satisfied if the charges "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972).

The court of appeals correctly found that, although the HMT's *ad valorem* charge is "imperfect in its application, Congress rationally determined that value was 'the only acceptable basis on which to impose such charges. The national uniform basis minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges.'" Pet. App. 12a (quoting H.R. Rep. No. 228, 99th Cong., 1st Sess. 5-6 (1985)). The court explained, based on the HMT's legislative history, that "Congress carefully considered the basis for the charge, hearing much testimony in favor of an *ad valorem* charge over a port-specific fee or a flat tonnage fee," and that Congress "viewed the *ad valorem* basis as one that would minimize administrative costs associated with collection." Pet. App. 12a (citations omitted). Moreover, "the imperfections urged to be fatal here are no more severe than those attached to other [*ad valorem*] charges * * * upheld [by this] Court" outside the context of the

Export Clause. *Id.* at 12a-13a (citing *United States* v. *Sperry Corp.*, 493 U.S. 52, 59-64 (1989); *Massachusetts*, 435 U.S. at 467-470; *Evansville-Vanderburgh Airport*, 405 U.S. at 717-720; *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950)).[8]

Petitioner also errs (Pet. 19) in claiming that the court of appeals incorrectly found under the third prong of the *Massachusetts* test that HMT collections are not excessive in relation to the cost of the federal services and benefits. HMT collections are deposited in a designated trust fund, and can be used only for the operation and maintenance of harbors and channels. 26 U.S.C. 9505(a) and (c). In upholding other charges as user fees, this Court has noted that the fees were deposited in a dedicated trust fund to cover only the expense of government facilities or services. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 596 (1884); *Morgan's S.S. Co.* v. *Louisiana Bd. of Health*, 118 U.S. 455, 461 (1886). And although the HMT's designated fund has carried a surplus (Pet. 19), the fact that HMT fees can be used only to pay for specific, related purposes demonstrates that the HMT lacks the characteristics of a general revenue-raising tax. Moreover, in view of the long-term "nature of the problem the HMT addresses,

---

[8] See *Massachusetts*, 435 U.S. at 467-470 ("A probable deficiency in the formula [devised by Congress] arises because not all aircraft make equal use of the federal navigational facilities or the airports that have been planned or constructed with federal assistance. But the present scheme (including a fee based upon the size and type of aircraft rather than actual use) nevertheless is a fair approximation of the cost of the benefits each aircraft receives."); *Capitol Greyhound*, 399 U.S. at 545 (user fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted").

it seems inconsequential and almost unavoidable that the HMT pays for future programs." Pet. App. 13a.

c. In any event, even if the HMT, as applied to imports, constituted a tax subject to the Uniformity Clause, the result below would not change. As the Court of International Trade correctly concluded (Pet. App. 24a-32a), the HMT's application to imports does not violate the Uniformity Clause's requirements.

"The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 84 (1983). The Clause was intended to prevent "the national government [from] us[ing] its power over commerce to the disadvantage of *particular States*." *Id.* at 81 (emphasis added). In a case involving assessments at ports, the prohibition of the Uniformity Clause against discrimination in favor of (or against) particular States mirrors the prohibitions of the Port Preference Clause. See *Knowlton* v. *Moore*, 178 U.S. 41, 106 (1900) ("[T]he preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."). See also *Ptasynski*, 462 U.S. at 81 n.10. Petitioner thus treats the two Clauses as entailing parallel prohibitions. See Pet. 23-28. Accordingly, the HMT as applied to imports is valid under the Uniformity Clause for the same reasons that it is valid under the Port Preference Clause. See pp. 18-23, *infra*.

3. Petitioner argues (Pet. 23-30) that the HMT's provisions, as applied to imports, entail an invalid preference for the ports of certain States in violation of the Port Preference Clause. The court of appeals correctly rejected that claim.

The Port Preference Clause provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. The Clause "has never been relied upon by the federal judiciary to hold an act of Congress unconstitutional." *Kansas* v. *United States*, 16 F.3d 436, 439 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994). As this Court has established, "what is forbidden" by the Clause is "not discrimination between individual ports within the same or different States, but discrimination *between States*." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855) (emphasis added). The Court has also made clear that the Clause imposes no bar against a facially non-discriminatory law that has incidental, disparate effects on ports of one or more States. See, *e.g.*, *id.* at 433-436; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 80 (1908); *Louisiana Pub. Serv. Comm'n* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

Petitioner argues (Pet. 25-27) that the HMT, as applied to imports, violates the Port Preference Clause because of the exemptions for inland waterways, for a portion of the Columbia River, and for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories. See p. 4, *supra*. The exemptions for inland waterways and for a stretch of the Columbia River do not constitute "discrimination between States." *Wheeling*, 59 U.S. (18 How.) at 435. Any discriminatory effect on particular States is incidental, and the provisions therefore do not infringe the Port Preference Clause. See Pet. App. 14a n.5, 36a-37a. Cf. *Head Money Cases*, 112 U.S. 580 (1884) (upholding, under Uniformity Clause, tax assessed against persons who immigrated through ports

but not against persons who immigrated at inland cities).

The exemption for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories, likewise does not violate the Port Preference Clause. There is no indication that the exemption was intended as an illicit preference for the States of Alaska and Hawaii (and United States territories) over other States. To the contrary, "Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping," due to their "vast geographic separation" from the continental United States. Pet. App. 16a-17a. Alaska and Hawaii thus enjoy no exemption from the HMT with respect to *international* shipments passing through their ports. See 26 U.S.C. 4462(b)(1). Moreover, the fact that the exemption encompasses United States possessions as well as Alaska and Hawaii confirms that it is grounded in concerns about the burdens of geographic separation rather than an invalid preference for the ports of specific States.

Indeed, the exemption applies not just to ports in Alaska and Hawaii when receiving shipments from the continental United States, but also to ports in *any* State when receiving shipments from Alaska and Hawaii. 26 U.S.C. 4462(b)(1)(A)-(C). Because all ports in all States are exempt from the HMT with respect to the unloading of domestic cargo (other than Alaskan crude oil) shipped to or from Alaska and Hawaii, the exemption is not one for the ports of Alaska and Hawaii alone, but instead is one for a certain class of merchandise, wherever the associated port use occurs. That the exemption may incidentally benefit the ports of certain States (Alaska, Hawaii, and other States where domestic con-

sumables subject to the exemption are unloaded) does not infringe the Port Preference Clause. See *Armour*, 209 U.S. at 80; *Louisiana Pub. Serv. Comm'n*, 284 U.S. at 131. In short, it "is clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions." Pet. App. 17a-18a.

That analysis is supported by this Court's decision in *Ptasynski*, 462 U.S. at 74. There, the Court upheld under the Uniformity Clause a provision exempting certain oil produced in Alaska from the coverage of a general tax on crude oil. The Court explained that the Clause does not "prohibit all geographically defined classifications" and "does not prohibit [Congress] from considering geographically isolated problems." *Id.* at 84. The Court upheld the exemption for certain oil produced in Alaska because of "the disproportionate costs and difficulties * * * associated with extracting oil from this region." *Id.* at 85. The Court explained that "[n]othing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States." *Id.* at 86. In this case, likewise, the HMT's exemption for domestic shipments to and from Alaska and Hawaii addresses "geographically isolated problems" (*id.* at 84) rather than manifesting an "undue preference at the expense of other" States (*id.* at 86). See *City of Houston* v. *FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982) ("Government actions do not violate the [Port Preference] Clause even if they result in some detriment to the port of a state, where they occur * * * more as a

result of the accident of geography than from an intentional government preference.").

The domestic cargo exemption related to Alaska and Hawaii (and United States territories) thus is a far cry from the "paradigm evil the [Port Preference] Clause was explicitly designed to prevent"—"a federal law requiring ships sailing to Baltimore to first enter and clear at Norfolk." *Kansas*, 16 F.3d at 439; see *United States* v. *Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). In view of the geographic isolation of Alaska and Hawaii, it is "difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop * * * in order to avoid HMT liability." Pet. App. 18a. It therefore "is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states." *Ibid.*

Finally, there is no merit to petitioner's suggestion (Pet. 29) that the court of appeals' approach to the Port Preference Clause conflicts with decisions of other courts of appeals. As a threshold matter, there could be no concrete conflict, because no decision—including the decisions identified by petitioner—has invalidated a law under the Port Preference Clause. Moreover, the isolated phrases culled by petitioner from opinions of the Fifth, Seventh, and D.C. Circuits in no way indicate that those courts of appeals would reach a different conclusion in this case. Indeed, contrary to petitioner's suggestion (*ibid.*) that language in the Fifth Circuit's decision in *Houston* (679 F.2d at 1197-1198) is in tension

with the court of appeals' approach in this case, the court of appeals specifically relied on *Houston* in its opinion. Pet. App. 15a-16a.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JONATHAN S. LAWLOR
Attorneys

APRIL 2004

[9] Petitioner also relies (Pet. 29-30) on the D.C. Circuit's opinion in *Kansas*, but that opinion indicates that the "paradigm evil" addressed by the Port Preference Clause is a requirement that ships sail through the ports of specific, favored States before proceeding to other states. See 16 F.3d at 439. The domestic cargo exception for Alaska and Hawaii (and United States territories), as explained, embodies no such preference. Nor does the opinion below conflict (Pet. 29) with the Seventh Circuit's opinion in *City of Milwaukee* v. *Yeutter*, 877 F.2d 540 (1989). That decision rejects a challenge under the Port Preference Clause on the ground that a statute that incidentally benefits the ports of certain states does not infringe the Clause. See *id.* at 545.