No. 07-308

In The

Supreme Court of the United States

United States of America,
Petitioner,

v.

Clintwood Elkhorn Mining Company, Et Al.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 2, 2007

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No. 07-308

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. a. The Export Clause of the Constitution directs that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, cl. 5. For more than a century, this Court has made "clear that the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States* v. *International Bus. Machines Corp.*, 517 U.S. 843, 848 (1996); see *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) ("[T]he Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit."); *Fairbank* v. *United States*, 181 U.S. 283 (1901) (invalidating federal stamp tax on bills of lading for export goods).

Consistent with that constitutional command, Congress has broadly exempted export sales from federal taxation. See 26 U.S.C. 4221(a)(2). In 1978, however, Congress departed from that historic tradition and levied a tax that, *inter alia*, expressly taxed exports of coal from United States mines. See Pub. L. No. 95-277, § 2(a), 92 Stat. 11 (1978); see also 26 U.S.C. 4121(a); 26 U.S.C. 4221 (excluding the tax imposed under Section 4121 from the general tax exception for exports).

More than a decade ago, domestic companies that export coal from the United States challenged the constitutionality of the export tax. In response to those claims, "the government [did] not provide[] * * * any basis" for defending the tax as constitutional, *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998), and when the tax was promptly declared unconstitutional, the government did not appeal, Pet. App. 2a. The Internal Revenue Service then formally acquiesced in the invalidation of the tax on exports. See Notice 2000-28, 2000-1 Cum. Bull. 1116 (May 22, 2000).

b. Seven years ago, in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit addressed the remedies available to coal exporters and held that the government's violation of the Export Clause gives rise to a claim for money damages under the Constitution itself. The court of appeals reasoned that "[t]he necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted," and that "the language of the Export Clause leads to the ineluctable conclusion that the clause

provides a cause of action with a monetary remedy." *Id*. at 1373; see *id*. at 1374.

The Federal Circuit further held that, like the Judicial Compensation Clause, U.S. Const. Art. III, § 1, and the Just Compensation Clause of the Fifth Amendment, the Export Clause not only "mandat[es] compensation by the Federal Government," but also is a "self-executing" right that permits injured parties to recover the money wrongfully exacted in an action directly under the Constitution itself. *Cyprus Amax*, 205 F.3d at 1372-1373. The court stressed, however, that there are constraints on such suits. In particular, suits for damages under the Export Clause are limited by the Tucker Act's six-year statute of limitations on damages claims against the federal government, 28 U.S.C. 2501. See 205 F.3d at 1372; see also *Venture Coal Sales Co.* v. *United States*, 370 F.3d 1102, 1104-1105 (Fed. Cir.), cert. denied, 543 U.S. 1020 (2004). In so holding, the court in *Cyprus Amax* rejected the government's assertion that coal producers were required to pursue their damages claims under the Internal Revenue Code's tax refund scheme. 205 F.3d at 1374.[1]

The United States sought this Court's review of the Federal Circuit's ruling. This Court, however,

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[1] Under 26 U.S.C. 7422(a), taxpayers must file an administrative claim with the IRS before filing suit to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." That administrative claim must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever occurs later. 26 U.S.C. 6511(a).

denied the petition for a writ of certiorari in 2001. 532 U.S. 1065.

2. In compliance with 26 U.S.C. 4121, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company (collectively, "the Companies") paid taxes on their export sales of coal through 1999. Pet. App. 3a, 9a, 36a. In April 2000, the Companies filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a), seeking damages in the amount of the export taxes paid over the previous six years. See Pet. App. 2a, 31a. The complaint also sought interest under 28 U.S.C. 2411 for their overpayment "in respect of any internal revenue tax."[2] With respect to damages for the three-year period immediately preceding the lawsuit (1997-1999), the Companies had also filed administrative refund claims, pursuant to 26 U.S.C. 6511(a). The government paid the Companies in full with interest for the taxes paid from 1997 through 1999, but has opposed compensating the Companies for their losses from 1994 through 1996. See Pet. 4; Pet. App. 3a.

The Court of Federal Claims held that the Companies were entitled to damages in the amount of the excise taxes paid during the six-year period from 1994 through 1999, and not just for the three-year period covered by the administrative claims. Pet. App. 7a-9a, 11a-28a. The court held that the Companies' claim to compensation under the Tucker Act was controlled by the Federal Circuit's earlier

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[2] Section 2411 of Title 28 provides for the payment of interest on "any judgment of any court" rendered for any "overpayment in respect of any internal-revenue tax."

decision permitting such claims in *Cyprus Amax*. *Id*. at 14a. The court held, however, that the Companies were not entitled to interest. *Id*. at 14a-28a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. The court first declined to revisit its holding in *Cyprus Amax* that the Export Clause gives rise to a claim for money damages under the Tucker Act, explaining that the issue "was fully aired at the time of *Cyprus Amax,* which "was decided by a unanimous panel, was denied rehearing and rehearing *en banc*, and the government's petition for a writ of certiorari was denied." Pet. App. 3a. The court could "discern no basis for reopening this question." *Ibid*.

The court then held that the Companies were entitled to interest on their damages claim as well, pursuant to 28 U.S.C. 2411. The court held that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." Pet. App. 5a. With respect to the petitioner's argument that interest was only available for claims pursued through the administrative tax refund scheme, the court held that the "straightforward" text of Section 2411 precluded adoption of "[s]uch a convoluted threshold" to the recovery of interest. *Ibid*. The court emphasized that Section 2411 authorizes the payment of interest on "any judgment" of "any court" for "any overpayment" that is "in respect of" an internal revenue tax, and, further, that this Court had held there was "no basis for making ['overpayment'] into a word of art." *Id*. at 6a (quoting *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 532 (1947)).

ARGUMENT

The petition for a writ of certiorari seeks this Court's review of an infrequently arising statute-of-limitations question that this Court has already declined to review once before. The only things that have changed since the Court last denied certiorari are that (i) the filing of any new claims has been barred due to the passage of time, (ii) the number of pending cases raising the issue has declined even further as cases have been resolved in the intervening six years, (iii) the number of cases presenting the issue is even closer to dissipating completely, and (iv) petitioner's prognostication of dire consequences arising from the court of appeals' decision has proven to be unfounded. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner principally seeks this Court's review (Pet. 8-22) of the Federal Circuit's holding that a party can recover damages for a violation of the Export Clause in litigation under the Tucker Act, rather than through an administrative tax refund proceeding. That claim did not merit this Court's review six years ago, see *United States* v. *Cyprus Amax Coal Co.*, 532 U.S. 1065 (2001) (No. 00-360), and it is even less worthy of an exercise of this Court's certiorari jurisdiction now.

First, the question whether a violation of the Export Clause should be vindicated through a damages claim under the Tucker Act or through the Internal Revenue Code's administrative procedure almost never arises. Congress has broadly excluded exports from excise taxes on sales under the Internal Revenue Code. 26 U.S.C. 4221(a)(2). The sole exception to Section 4221's proscription on export

taxes has been the coal tax at issue here. See *ibid.*[3] That coal tax was held unconstitutional almost a decade ago, and has not been enforced by the government since then.

Second, export sales of coal account for less than 10% of the total sales of coal by United States companies. Pet. App. 35a. Accordingly, the number of damages claims that were more than three years old, but less than six years old, arising from the unconstitutional tax on coal exports – the only body of claims affected by the question presented – was already limited when this Court denied certiorari in 2001.[4] The filing of any new claims has now been barred by the Tucker Act's statute of limitations. Moreover, numerous cases have been resolved in the decade since the tax was held unconstitutional and in the six years since *Cyprus Amax*. As a consequence, the practical relevance of the question presented has done nothing but diminish since this Court denied certiorari in 2001.

Third, the question has little prospect of recurring. Historically, congressional efforts to impose taxes on exports have been few and far between. Petitioner identifies no other tax law that might even arguably implicate the question whether the administrative tax refund scheme is the sole

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[3] Under Section 4221(a), vaccines are exempt from export taxes as long as certain IRS regulations are satisfied. See 26 C.F.R. 48.4221-3(e). Section 4221(a) does not provide fuels with an export tax exemption, but IRS regulations do. See 26 C.F.R. 48.4081-3(f)(2).

[4] The *Cyprus Amax* case itself involved claims filed by almost 40 coal companies. See 00-360 Pet. ii-iv.

avenue for relief from an unconstitutional tax on exports. Nor should this Court predicate an exercise of its certiorari jurisdiction on the assumption that Congress would again attempt to impose an unconstitutional tax on exports. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution"). And even were such a law to be enacted in the future, the question presented here would only arise in the unlikely event that the legislation was declared unconstitutional and the damages claims were filed more than three, but less than six, years after the taxes were paid. The remoteness of that scenario makes an exercise of this Court's certiorari jurisdiction unwarranted.

Petitioner argues (Pet. 25) that the issue will recur because the court of appeals' holding allegedly creates a "large loophole" in the tax remedial scheme, and that "any tax alleged to violate a provision of the Constitution would be a potential candidate for an independent action." The problem with that argument is that, were there such a loophole, it would have been created not by the court of appeals' decision here, which simply reaffirmed *Cyprus Amax*, but by the court's decision seven years ago in *Cyprus Amax*, which first recognized a cause of action under the Export Clause. Indeed, the petition in this case simply repeats the same arguments about the implications of the court of appeals' decision that petitioner advanced in *Cyprus Amax*.[5] Those

[5] Compare Pet. 25 (warning that the Federal Circuit's national jurisdiction will give rise to claims under any provision

arguments did not warrant certiorari then, see 532 U.S. 1065 (No. 00-360), and they do not warrant review now. Quite the opposite, the passage of substantial time, during which none of petitioner's dire predictions have been borne out, empties their arguments of any force they might once have had. Petitioner cites no intervening decision of the Federal Circuit expanding *Cyprus Amax* to claims arising under different constitutional provisions or to any other effort to bypass the Internal Revenue Code's administrative tax scheme. To the contrary, in the seven years since the Federal Circuit decided *Cyprus Amax* – and in the six years since the government made the same mistaken predictions in its petition for certiorari – the court of appeals has repeatedly refused to extend the *Cyprus Amax* decision. See, *e.g.*, *Ontario Power Generation, Inc.* v. *United States*, 369 F.3d 1298, 1302-1303 (Fed. Cir. 2004) (purchasers of coal may not bring claims under the Tucker Act or the Export Clause to recoup export taxes that were paid by the seller but allegedly passed through to them); see also *Forest Prods. Northwest, Inc.* v. *United States*, 453 F.3d 1355, 1359-1360 (Fed. Cir. 2006) (claim for refund of countervailing duties cannot be brought in the Court of Federal Claims under the Tucker Act); *McCormac* v. *United States Dep't of Treasury*, 185 Fed. Appx. 954, 955-956 (Fed. Cir. 2006) (Court of Federal

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of the Constitution and will fatally impair the administration of tax laws), with 00-360 Pet. 14 n.9, *United States* v. *Cyprus Amax Coal Co.* (warning that the Federal Circuit has "abandon[ed], for constitutional claims, the complex system of tax administration established by Congress); *id.* at 23 (decision has created "an exception for an entire class of refund suits").

Claims lacks jurisdiction over States' claims to savings bonds held by the U.S. Treasury); *Norman* v. *United States*, 429 F.3d 1081, 1094-1096 (Fed. Cir. 2005) (claim for "illegal exaction" of property arising out of an Appropriations Act falls outside the Court of Federal Claims' Tucker Act jurisdiction), cert. denied, 126 S. Ct. 2288 (2006).[6]

Petitioner also cites no evidence of a flood of taxpayer lawsuits attempting to circumvent the tax refund scheme generally, or even under the Uniformity and Direct Tax Clause scenarios, U.S. Const. Art. I, § 8, cl. 1 and § 9, cl. 4, that the government hypothesizes (Pet. 25). Nor is it apparent that, if such claims ever arose in the future, the Federal Circuit would conclude that those provisions – which are worded differently from the Export Clause and the Judicial and Just Compensation Clauses – even qualify as the type of money-mandating provisions that could give rise to a constitutional claim for damages. See *Cyprus Amax*, 205 F.3d at 1373-1373 (discussing the distinct wording of the few constitutional provisions that have been held to be money-mandating). In fact, having presumably studied the problem for seven years, the *only* evidence the government cites of additional claims arising (Pet. 25) is the residuum of claims under the same long-since invalidated coal tax at issue here. Those leftover cases do not merit this Court's review.

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[6] Cf. *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374, 1379-1381 (Fed. Cir. 2003) (applying *Cyprus Amax* to Export Clause claims).

Fourth, contrary to petitioner's argument (Pet. 10-16), this Court's decisions in *Hinck* v. *United States*, 127 S. Ct. 2011 (2007), and *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), do not make the question for which this Court has already denied certiorari any more worthy of review. In *Hinck*, this Court held that the Tax Court provides the exclusive forum for a challenge to the Secretary of the Treasury's decision not to abate interest on an income tax liability. 127 S. Ct. at 2015-2017. The Court stressed that Congress, "in a single sentence," had identified with specific reference to abatement claims, the single forum for their adjudication, the class of eligible plaintiffs, the statute of limitations, the appropriate standard of review, and the authority for judicial relief. *Id*. at 2015. The Court further explained that the exclusivity of the Tax Court forum was underscored by the "past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, * * * the remedy provided is generally regarded as exclusive." *Ibid*.[7]

In *EC Term of Years*, the Court held that a statutory provision establishing a specific nine-month

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[7] *Hinck* – a case in which this Court affirmed the Federal Circuit – also demonstrates that the court of appeals' jurisprudence is in accord with this Court's decisions addressing the coverage of the Tax Code's jurisdictional provisions, so that the remand the government seeks is unwarranted. The Federal Circuit's decision in *Hinck* underscores that, outside the context of the unique constitutional question involved in this case, Federal Circuit law channels tax challenges into the "specific procedure for reviewing IRS determinations" that Congress established for most statutory and constitutional tax challenges. See *Hinck* v. *United States,* 446 F.3d 1307, 1314 (2006).

limitations period for third-parties to challenge tax levies on property precluded pursuit of the same claim through the general tax refund scheme. 127 S. Ct. at 1767-1768. The Court expressed concern that permitting suits under the general tax scheme would impede a procedure "thought essential to the Government's tax collection" efforts. *Ibid*.

Neither of those cases speaks directly to the question presented here. Both *Hinck* and *EC Term of Years* involved choosing between two alternative statutory procedures for enforcing a purely *statutory* claim for relief. This case, by contrast, involves the appropriate mechanism for vindicating a *constitutional* right, and the question whether Congress clearly expressed its intent to foreclose a remedial mechanism created by the Constitution itself, something the Court would not "lightly conclude." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); see *id*. at 1012 n.15.

Underscoring the distinct issues raised by displacing constitutional causes of action, this Court's precedents have entertained such constitutional challenges without questioning their jurisdictional footing. See *United States* v. *Hatter*, 532 U.S. 557, 565, 581 (2001) (reviewing challenge brought directly under the Judicial Compensation Clause, U.S. Const. Art. III § 1, to the withholding of Social Security taxes from judicial salaries; neither the United States government, nor the Court, questioned jurisdiction, although it had been litigated in the court of appeals); *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360 (1998) (rejecting argument that Export-Clause challenge to Harbor Maintenance Tax could not be

brought under the Court of International Trade's residual jurisdictional provision).[8]

Beyond that, while the government repeatedly asserts (see, *e.g.*, Pet. 8, 9) that the general administrative tax scheme is the type of "precisely drawn, detailed statute" that should preempt a suit under the Export Clause itself, that conclusion is not self-evident. In fact, that same tax scheme that petitioner advances as narrow and specific was denominated by this Court in *EC Term of Years* to be the very "general remedy" that was preempted by a more claim-specific remedial mechanism. 127 S. Ct. at 1767-1768. Like the challenge to a tax lien in *EC Term of Years* or the interest-waiver in *Hinck*, the Export-Clause-specific cause of action invoked here is also a narrow and targeted avenue for relief that is available only to challenge a single and particular exercise of governmental authority. While the government is correct that the "general tax refund jurisdiction" that it favors, *EC Term of Years*, 127 S. CT. at 1767, comes with a somewhat shorter limitations period, shorter is not the same as "precisely drawn." In fact, the general tax scheme is not precisely targeted to taxes on exports, as the Export Clause cause of action is.

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[8] Nor, given the rapidly diminishing significance of this already obscure procedural question, is there any reason for the Court to override its general reluctance to address constitutional questions unnecessarily. See, *e.g.*, *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (declining to address a constitutional question that was not "absolutely necessary to a decision of the case") (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Furthermore, this Court explained in *EC Term of Years* that enforcement of the shorter limitations period was important there because the challenge to the tax lien would have both delayed and directly impeded the government's "tax collection" efforts. 127 S. Ct. at 1767-1768. This Court has long acknowledged that, with respect to the collection of tax revenues, time is often of the essence. See *Hibbs* v. *Winn*, 542 U.S. 88, 90 (2004) (noting "the Government's need to assess and collect taxes expeditiously"); *South Carolina* v. *Regan*, 465 U.S. 367, 387-388 (1984) (O'Connor, J., concurring in the judgment) (stressing the courts' reluctance to "interfere with the process of collecting the taxes on which the government depends for its continued existence"). Here, by contrast, there is far less reason to assume congressional displacement of the Export Clause claim because respondents seek only an after-the-fact recovery of a small portion of all of the unconstitutional taxes collected by the government over decades under a tax provision for which the government ultimately offered no constitutional defense.

Finally, petitioner argues that the court of appeals' decision conflicts with older decisions of this Court. Pet. 16-24 (citing, *e.g.*, *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906)). That is identical to the argument the government made seven years ago in its petition in the *Cyprus Amax* case, see 00-360 Pet. 20-22 (citing *Kreider*, *supra*, and *Cuba Mail*, *supra*). It did not warrant an exercise of this Court's certiorari

jurisdiction then, and it warrants no different outcome now.

2. Petitioner also seeks this Court's review (Pet. 22-24) of the court of appeals' award of interest on respondents' damages recovery pursuant to 28 U.S.C. 2411. Because the court's decision to permit a damages award itself does not merit this Court's review, neither does this ancillary aspect of that same judgment. Again, this question infrequently arises – indeed, the petition identifies no other decision by any court that has ever addressed the question whether Section 2411 requires in a Tucker Act case the inclusion of interest in a damages claims under the Export Clause. Nor is the question likely to recur with any frequency, given the limited number of challenges remaining to the long-since invalidated tax on coal exports.

Beyond that, the government's argument that Congress limited interest payments to awards made through the tax refund scheme is belied by the plain text of 28 U.S.C. 2411. That provision, which notably is not housed in the Internal Revenue Code and was not enacted as part of the tax refund provisions in Title 26, directs that "interest shall be allowed" on "*any* judgment of *any* court * * * for *any* overpayment *in respect of* any internal-revenue tax." (Emphases added.) Not only does that text not confine interest to awards entered under the specific internal revenue code provisions on which the government relies, the text, in fact, expressly envisions the entry of judgments by a variety of courts against a variety of defendants ("whether against the United States or" internal revenue officials, 28 U.S.C. 2411) for any type of overpayment that may be made and that

could be characterized as "in respect of" internal revenue taxes.[9] Thus, the court of appeals' decision was faithful to the straightforward text of Section 2411. Given the rarity with which the issue arises, there is no need for this Court to grant review simply to confirm that the statute means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2, 2007

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[9] This Court, moreover, has stressed that the term "overpayment" should be construed capaciously and not as "a word of art." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 532 (1947).