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

BRIEF FOR THE RESPONDENTS

STEVEN H. BECKER
PAUL A. HOROWITZ
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4100

PATRICIA A. MILLETT
(Counsel of Record)
THOMAS C. GOLDSTEIN
STEVEN C. WU
MONICA P. SEKHON
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

FEBRUARY 13, 2008

QUESTION PRESENTED

Whether a taxpayer's suit under the Tucker Act, 28 U.S.C. 1491(a), seeking damages and interest for a violation of the Constitution's absolute preclusion of congressional tax power over exports, is foreclosed by the Internal Revenue Code's tax refund scheme.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, the United States of America, was the defendant in the Court of Federal Claims.

The respondents, who were plaintiffs below, are the Clintwood Elkhorn Mining Company, the Gatliff Coal Company, and the Premier Elkhorn Coal Company. The only parent companies or companies that own 10% or more of the stock of those parties are TECO Coal Corporation and TECO Energy, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Constitution, Statutes, and Regulations:

Statutes and Regulations – Continued:

Other Authorities – Continued:

STATEMENT

1. The command of the Export Clause of the Constitution to Congress is direct and absolute: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, cl. 5. Consistent with the Export Clause, Congress has generally exempted export sales from federal taxation. See 26 U.S.C. 4221(a)(2).[1] In 1978, however, Congress levied an excise tax on coal production and sales, 26 U.S.C. 4121, and expressly directed that the tax would apply to sales of coal for export, 26 U.S.C. 4221(a) (excepting from the export ban the tax imposed "under section 4121").[2]

2. In 1998, a number of companies challenged the constitutionality of the export tax on coal. In that case, "the government [did] not provide[] * * * any basis" for defending the tax as constitutional, and the court was "not able to discern any basis to distinguish the Coal Excise Tax from" other taxes previously held unconstitutional. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998). The court accordingly held that the tax violated the Export Clause. *Ibid.* The government did not appeal. Pet. App. 2a. Seventeen months later, the IRS acquiesced

---

[1] That section provides, in relevant part, that "no tax shall be imposed under this chapter [governing manufacturers excise taxes] * * * on the sale by the manufacturer * * * [or] on the first retail sale[] of an article * * * for export, or for resale by the purchaser to a second purchaser for export." 26 U.S.C. 4221(a)(2).

[2] A tax imposed by Congress on the removal of fuel from refineries and terminals, 26 U.S.C. 4081, does not extend to exports. 26 C.F.R. 48.4081-3(f)(2). IRS regulations ensure that vaccine exports are not taxed. 26 C.F.R. 48.4221-3(e).

in the decision. See Notice 2000-28, 2000-1 C.B. 1116 (2000).

3. Respondents, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company ("the Companies"), paid taxes on their export sales of coal under 26 U.S.C. 4121 and 4221(a). 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 monetary relief for the government's violation of the Export Clause, "including recovery" of the export taxes paid over the previous six years, Pet. App. 31a, "such other and further relief as th[e] Court may deem just and proper," and interest, *id*. at 38a. With respect to payments made during the three-year period immediately preceding the lawsuit (1996-1999), the Companies also filed administrative refund claims, pursuant to 26 U.S.C. 6511(a), and the government paid those claims with interest. See Pet. 4; Pet. App. 3a.

Following the Federal Circuit's decision in *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Court of Federal Claims held that the Companies could pursue their "claims for damage under the Export Clause" (Pet. App. 17a) pursuant to the Tucker Act, rather than proceed under the administrative tax refund scheme. See Pet. App. 13a, 17a.[3] The court

---

[3] 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

held, however, that the Companies were not entitled to interest under 28 U.S.C. 2411, because the Companies "are not seeking tax refunds." Pet. App. 17a.[4]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. The court first reaffirmed its holding in *Cyprus Amax* that the Export Clause gives rise to a claim for money damages under the Tucker Act. *Id.* at 2a-3a.

The court of appeals also held that the Companies were entitled to interest on their damages claim under 28 U.S.C. 2411. Pet. App. 3a-6a. The court explained 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," *id.* at 5a, and that "a tax overpayment is not fully remedied unless it includes interest for the time that the money was in the hands of the government," *id.* at 6a.

SUMMARY OF ARGUMENT

1. In *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998), this Court unanimously recognized that the Export Clause is a uniquely "simple, direct, unqualified prohibition" on congressional taxing power that is unlike any other constitutional constraint on the government's taxing authority. *Id.* at 368. That comprehensive excision of taxing authority includes not only the total exclusion of a particular commer-

---

years from the time the tax was paid, whichever occurs later. 26 U.S.C. 6511.

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

cial activity – exporting – as a source of federal revenue, but also the denial of congressional authority to exercise any form of tax regulatory authority over exports and exporters. Thus, while other constitutional provisions regulate *how* Congress can collect tax revenues, the Export Clause is an unbending and unqualified prohibition on the *use* of exports as either a source of revenue or object of tax regulatory power at all.

Because of its unique scope and function, the Export Clause can properly be enforced through an action under the Tucker Act. The Export Clause's command that exports be completely free from taxation and excluded as a source of federal tax revenue mandates monetary compensation for taxes collected in direct contravention of its terms. Practically speaking, the only way to enforce a complete exclusion of funds from revenue is to take the full and equivalent value of those funds back out of the revenue if they have been unconstitutionally collected.

2. That Tucker Act remedy for Export Clause claims has not been clearly withdrawn. Contrary to the government's argument, the test for withdrawal of federal court jurisdiction over constitutional claims is not whether one statutory scheme seems to have more rules than the other, but turns upon which remedial provision is better-fitted to enforcing the right at issue.

The Tucker Act's specific provision for prosecuting constitutional damages claims is the best means of enforcing the Export Clause. The Tucker Act was explicitly designed to provide a forum, with appropriate procedures and limitations periods, to vindicate

specified constitutional interests. The general administrative tax refund scheme, by contrast, cannot properly remediate Export Clause claims because that scheme was specifically designed to protect the very revenue interests that the Export Clause repudiates. Nothing in the text or history of the administrative review provisions evidences Congress's intention to take the constitutionally dubious step of carving Export Clause claims out of the Tucker Act for singularly restrictive limitation and forcing exporters to traverse a congressionally designed, time-delayed, pro-government, and revenue-protective administrative refund procedure before recouping funds taken in the utter absence of any legitimate congressional taxing authority.

At bottom, the government's position assumes that an export tax is no different from any routine tax or tax dispute. But the central point of the Export Clause is that exports are profoundly different and entirely off limits to Congress's tax powers. That is both a substantive and procedural excision of congressional power: where Congress completely lacks the power to tax, it equally lacks the power to insulate violations of that prohibition against comprehensive and prompt judicial remediation, or otherwise to require that any thumb be put on the government's side of the remedial scale.

Finally, as a matter of statutory construction, this Court has already held that other specialized constraints on the review of tax challenges, like the Tax Injunction Act do not apply when the tax at issue is unlawful on its face. See *Enochs v. Williams Packing*

& Navigation Co., 370 U.S. 1 (1962). Neither should they apply here.

3. The Tucker Act remedy for an Export Clause violation includes interest. The plain terms of the interest statute, 28 U.S.C. 2411, embrace "any judgment" of "any court" rendered for "any overpayment" "in respect of" an internal revenue tax, and this Court has directed that "overpayment" be broadly interpreted.

Moreover, the Export Clause, like the Fifth Amendment's Takings Clause, would require the payment of interest in its own right. The only means of enforcing the Export Clause's absolute prohibition on the use of exports as a source of revenue is to return to the taxpayer the full value of funds unconstitutionally exacted. To permit the government to enjoy the time value of export taxes would sanction the very revenue usage of exports that the Export Clause flatly proscribes.

ARGUMENT

CONSTITUTIONAL CLAIMS UNDER THE EXPORT CLAUSE FOR MONETARY COMPENSATION AND INTEREST MAY PROPERLY BE BROUGHT UNDER THE TUCKER ACT

The central premise of the government's argument is that this case involves an ordinary tax challenge to an ordinary exercise of Congress's established taxing power, which Congress plainly intended to be adjudicated through its general administrative tax refund scheme. There are two fundamental flaws with that position.

First, the starting premise is all wrong. This case is about the vindication of a constitutional claim under the Export Clause that, by its terms, denies the very assumption of tax authority and routine tax treatment that the government presupposes. Congress enacted the Tucker Act as the specific remedial scheme for constitutional claims, and, because the Export Clause is money-mandating, the Companies' Export Clause claim is remediable under the Tucker Act.

Second, Congress did not expressly withdraw that Tucker Act remedy for Export Clause claims and, in fact, the Tucker Act is better fitted to redressing such claims. There is substantial doubt that Congress has the constitutional authority to carve Export Clause claims out of the Tucker Act and to subject them to distinct burdens, delays, and constraints in an administrative tax scheme that is predicated on the very existence of the governmental tax power and the revenue-protective interests that the Export Clause renounces. Particularly when the export tax at issue is so plainly beyond Congress's tax authority that it cannot colorably be defended as constitutional, Congress likely intended claims aimed at undoing that illegitimate exaction to proceed under established statutory provisions for enforcing the Constitution.

A. The Unique And Comprehensive Preclusion Of Congressional Authority In The Export Clause Gives Rise To A Cause Of Action Enforceable Under The Tucker Act

1. The Tucker Act Remedies Violations of Money-Mandating Constitutional Provisions

While the government portrays this as a case of taxpayers attempting to circumvent the administrative tax scheme (Br. 12-29), that gets the issue backwards. The Companies seek compensation for the violation of a constitutional right guaranteed by the Export Clause. Congress enacted the Tucker Act specifically to resolve such constitutional claims. That Act regulates and controls when a particular subset of claims – those that are both for money damages and "founded * * * upon the Constitution" or federal law – can be prosecuted in federal court against a particular defendant – the United States. 28 U.S.C. 1346(a)(2), 1491(a)(1). Congress further identified which courts under which circumstances should have jurisdiction over those claims, giving federal district courts jurisdiction only when the amount in controversy is less than $10,000, 28 U.S.C. 1346(a)(2), and assigning all other such claims to the Court of Federal Claims, 28 U.S.C. 1491(a)(1), unless they fall within the exclusive jurisdiction of another specialized court, 28 U.S.C. 1491(c). Congress also adopted a specific six-year statute of limitations that it considered to be appropriate for the preservation and prosecution of money-mandating constitutional claims. 28 U.S.C. 2501. Enactment of the Tucker Act, moreover, postdates Congress's adoption of the

administrative tax refund scheme.[5] The Tucker Act thus constitutes a comprehensive remedial scheme for "any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976).

2. The Export Clause Mandates Monetary Compensation for its Violation

A source of substantive law is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 218 (1983). That "'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). "[A] fair inference" that damages were intended "will do." *Id.* at 473. The Export Clause's unqualified and absolute prohibition on economic diminishment through taxation and complete preclusion of exports as a source of federal revenue "permits a fair inference," *ibid.*, that the law provides monetary relief.[6]

---

[5] The original version of Section 7422 was enacted in 1866 in substantially its current form. See Revenue Act of 1866, ch. 184, § 19, 14 Stat. 98, 152; see also *Flora v. United States*, 362 U.S. 145, 155 n.16 (1960). The Tucker Act was not enacted until two decades later. See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505-08.

[6] The government's suggestion (Br. 34) that the "fairly interpreted" standard applies only to the enforcement of statutes and regulations under the Tucker Act is without merit. The Tucker Act's statutory text provides no basis for adopting two different legal tests for sources of law that the statute treats as equivalents. See, *e.g.*, *Mitchell*, 463 U.S. at 216-217 (a "claim invoking

a. The Export Clause is a unique and uniquely comprehensive preclusion of congressional tax power

"[T]he Export Clause's simple, direct, unqualified prohibition," *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368 (1998), is as comprehensive a preclusion of congressional power as its language suggests. The Clause "strictly prohibits any tax or duty," whether "discriminatory or not, that falls on exports during the course of exportation." *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). The prohibition applies both to direct and indirect burdens on exports, and includes not just the taxation of imports themselves, but also the taxation of activities "embraced in exportation or any of its processes." *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918). See also *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923) (invalidating tax on sales to export carrier); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915) (tax on marine insurance unconstitutional because insurance "is one of the necessities of exportation"); *United States v. Hvoslef*, 237 U.S. 1, 17 (1915) (tax on ship charters "was in substance a tax on the exportation"); *Fairbank v. United States*, 181 U.S. 283, 294 (1901) (invalidating tax on bills of lading as "in effect a duty on the article transported").[7]

---

the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act" if "the source of substantive law" is money-mandating).

[7] The Export Clause, however, does not bar nondiscriminatory taxes on "pre-export goods and services," or on "activities only tangentially related to the export process." *IBM*,

The Export Clause thus is not a mere limitation on an otherwise plenary grant of taxing power, like the constitutional requirements of uniformity for "Duties, Imposts and Excises," U.S. Const. Art. I, § 8, cl. 1, and apportionment for "Tax[es]" (other than the income tax), U.S. Const. Art. I, § 9, cl. 4 & Amend. XVI. Those (and other) constitutional limitations merely constrain *how* Congress exercises its granted tax authority. The Export Clause, by contrast, is a straightforward and unyielding "restriction on the power of Congress" that carves one particular economic activity completely out of Congress's power and flatly "disallows *any* attempt to raise federal revenue from exports." *IBM*, 517 U.S. at 848, 859 (emphasis added). Indeed, this Court has unanimously explained that the Clause's unique character as a "direct [and] unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority" by "completely denying to Congress the power to tax exports at all." *U.S. Shoe*, 523 U.S. at 360.

The Framers "fully intended the breadth of scope that is evident in the language." *IBM*, 517 U.S. at 860. The Framers, of course, well understood the federal revenue failings of the Articles of Confederation and the imperative of independent taxing authority for the national government.[8] That makes it

---

517 U.S. at 850; see *Cornell v. Coyne*, 192 U.S. 418, 427 (1904); *Turpin v. Burgess*, 117 U.S. 504, 507 (1886); *Pace v. Burgess*, 92 U.S. 372, 375 (1875).

[8] See, *e.g.*, *IBM*, 517 U.S. at 874 (Kennedy, J., dissenting) (citing R. Paul, *Taxation in the United States* 4-5 (1954)); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Paterson, J.); *The Federalist No. 30* (Alexander Hamilton).

all the more notable that export taxes emerged from the constitutional drafting and ratification process as the one and "only one exception" to that authority, *Fairbank*, 181 U.S. at 296, and were put completely beyond the reach of Congress's affirmative power. See *U.S. Shoe*, 523 U.S. at 368 (noting uniqueness of the Export Clause's preclusion of congressional action); *Fairbank*, 181 U.S. at 292-293.

Fears of regional discrimination in export tax burdens and of the potentially crippling economic consequences of export taxes inspired virulent and unbending opposition, with many members of the Constitutional Convention insisting that empowering Congress to tax exports would be a constitutional deal-breaker and "would shipwreck the whole." 2 Max Farrand, ed., *The Records of the Federal Convention of 1787* ("*Convention Records*") 305 (1937) (Mr. Sherman) (Aug. 16, 1787).[9] Indeed, so unyield-

---

[9] See *Hvoslef*, 237 U.S. at 15 (Export Clause "was one of the compromises which entered into and made possible the adoption of the Constitution"); 2 *Convention Records* 359 (Mr. Williamson) (Aug. 21, 1787) (if the legislature were given the power to tax exports, "it would destroy the last hope of an adoption of the plan"); 1 *Convention Records* 592 (July 12, 1787) (General Pinkney expressed "alarm[] when the taxation of exports was mentioned"); 2 *Convention Records* 305 (Aug. 16, 1787) ("Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it."); *ibid.* ("Mr. Mercer was strenuous against giving Congress power to tax exports. Such taxes were impolitic, as encouraging the raising of articles not meant for exportation."); *id.* at 359 (Mr. Elseworth) (Aug. 21, 1787) ("The taxing of exports would engender incurable jealousies."); *ibid.* (Mr. Gerry) (he "was strenuously opposed to the power over exports * * * [as] [i]t will enable the Genl Govt to oppress the States, as much as Ireland is oppressed by Great Brit-

ing and far-reaching was this opposition that proposals to require a super-majority before taxing exports or to ban them only when imposed for "the purpose of revenue" were defeated. 2 *Convention Records* 359 (Aug. 21, 1787). The Framers thus intended "not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-293.[10]

Accordingly, after heated debate, the Framers resolved, as the Constitution's text reflects, that congressional power be "wholly taken away to intermeddle with the subject of exports." Joseph Story, 2 *Commentaries on the Constitution* § 1011 (1833). In that "great point[] the hands of the Legislature were absolutely tied." *Convention Records* 220 (Mr. King) (Aug. 8, 1787). Without that explicit constitutional protection for exports, "the Constitutional Convention would have imploded." Erik M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 3 (2003).

---

ain"); *ibid.* ("Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States"); *id.* at 361 (Mr. Sherman) (Aug. 21, 1787) ("It is best to prohibit the National legislature in all cases.").

[10] See *Hylton*, 3 U.S. at 176 (Paterson, J.) ("It was, however, obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, *except exports*." (emphasis added)); *id.* at 174 (Chase, J.) ("general power is given to Congress" over taxes "without any restraint, except only on exports") (emphasis added); *id.* at 181 (Iredell, J.) (exports are a "particular exception" to congressional taxing power).

b. The Export Clause's ban on the use of exports as a source of revenue requires monetary compensation for its violation

By its plain terms and historic design, the Export Clause is a constitutional protection against a particular category of monetary exactions and, more specifically, is a textual immunity against Congress's use of the tax power to deprive exporters of money or to use a particular activity – exporting – as a source of federal revenue. That absolute prohibition against both the imposition of the tax and the retention of funds as a source of revenue creates a "fair inference," *White Mountain*, 537 U.S. at 473, that the Export Clause requires the repayment of funds unlawfully exacted. That is because the core nature of an Export Clause claim "seek[s] the return of money paid by [the plaintiff] to the Government," which bespeaks a money-mandating claim. See *Testan*, 424 U.S. at 400; see also *id.* at 401 (where "the plaintiff is * * * suing for money improperly exacted or retained," no further inquiry into money-mandating character is necessary).

This Court's decision in *U.S. Shoe*, moreover, seemed to take as a given that the Export Clause mandates relief for its violation. In determining that the Harbor Maintenance Tax, 26 U.S.C. 4461, violated the Export Clause, this Court expressly held that the Court of International Trade properly exercised jurisdiction under 28 U.S.C. 1581(i). *Id.* at

366.[11] That provision, like the Tucker Act, "is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provision of law." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980); see also *Humane Soc'y v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001). By expressly upholding jurisdiction for monetary relief against the United States in *U.S. Shoe*, this Court thus necessarily assumed – without any noted disagreement by either the Solicitor General or any Justice of this Court – that the Export Clause gives rise to an action for relief. See No. 97-372, U.S. Br., *U.S. Shoe*, *supra* (acceding to jurisdiction).[12]

There was good reason for that lack of objection. The Export Clause prohibits the financial diminishment of exporters' revenues in the same manner that the Judicial Compensation Clause, U.S. Const. Art. III, § 1, protects against the financial diminishment of judicial salaries. And this Court has unanimously expressed "no doubt whatever as to * * * [the jurisdiction] of the District Court" under the Tucker Act over a suit by federal judges alleging the unconstitutional

---

[11] Section 1581(i) gives the Court of International Trade exclusive jurisdiction over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports or tonnage" and the "administration and enforcement" of such a law. 28 U.S.C. 1581(i)(1) & (4).

[12] The government overreads *U.S. Shoe* when it argues (Br. 32) that this Court expressly foreclosed Tucker Act jurisdiction in a manner that is somehow relevant to this case. This Court explained only that relief under the Tucker Act was unavailable solely because Congress had textually directed that challenges to the tax should proceed through the Court of International Trade. *U.S. Shoe*, 523 U.S. at 365-66 & n.3.

reduction of their salaries. *United States v. Will*, 449 U.S. 200, 210-211 & n.10 (1980).

Indeed, in *United States v. Hatter*, 532 U.S. 557 (2001), this Court exercised jurisdiction over Tucker Act claims challenging the imposition of Social Security *taxes* on judicial salaries. The Court did so, moreover, while acknowledging and without any Justice questioning the court of appeals' underlying jurisdictional ruling that the Judicial Compensation Clause is money-mandating and, thus, that the judges could proceed under the Tucker Act rather than through the administrative tax refund procedure. See *id.* at 564; *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992); see also No. 99-1978, J.A. 36, *Hatter*, *supra* (complaint notes that several of the judges had not filed administrative refund claims).[13]

While those decisions did not address the precise jurisdictional question at issue here, the specific consideration of jurisdiction in *U.S. Shoe* and *Will* and the assumption of Tucker Act jurisdiction in *Hatter* constitute a pattern of jurisdictional exercise that cannot be disregarded lightly.[14]

---

[13] In *Hatter*, the Solicitor General abandoned before this Court the argument it made in the Claims Court and makes here – that a challenge to taxes is not cognizable under the Tucker Act and has to proceed through the administrative tax refund procedure. See *Hatter v. United States*, 21 Cl. Ct. 786, 788-789 (1990), rev'd, 953 F.2d 626 (Fed. Cir. 1992).

[14] See *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality) (Court should not "disregard the implications of an exercise of judicial authority assumed to be proper in previous cases."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

Like the Judicial Compensation Clause and the Takings Clause, the Export Clause protects a purely pecuniary and economic interest in "mandatory and unconditional terms." *Hatter*, 953 F.2d at 628.[15] A critical function of the Export Clause, moreover, is to "disallow[] *any* attempt to raise federal revenue from exports," *IBM*, 517 U.S. at 859 (emphasis added), a purpose unique to the Export Clause. That categorical excision of the government's power to exact funds and to use a particular activity as a source of revenue can only be meaningfully enforced if monetary compensation – removal of the unconstitutional tax revenues from the Treasury – is provided for a violation of the Clause.[16] Liability for monetary compensation thus "naturally follows" from the Export Clause's protection against financial diminution by taxation and "furthers the purpose[] of" the Export Clause to wall off exports as a source of revenue. *Mitchell*, 463 U.S. at 226, 227.[17]

---

[15] This Court has long held that the Takings Clause provides a substantive cause of action against the United States under the Tucker Act. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974); cf. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[The Tucker Act claim] rested upon the Fifth Amendment. Statutory recognition was not necessary.").

[16] Cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (if a tax were "beyond the State's power to impose" or "taxpayers were absolutely immune from tax, * * * [t]he State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress"); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("no statutory authority was essential to enable or require the county to refund the money" when a tax was unconstitutionally collected in contravention of controlling Supreme Court precedent).

[17] The government stresses (Br. 33) that the Fifth Amendment's Takings Clause and the Judicial Compensation Clause

Indeed, the constitutional history of the Export Clause precludes any suggestion that the Framers intended the Clause to be merely hortatory or that exporters would be helpless to undo the effects of unlawful exactions by obtaining monetary compensation for such transgressions. Southern delegates to the Constitutional Convention were particularly concerned that their exporters would become victims of "targeted duties" because of the South's comparatively smaller population and its status as "the primary exporter of goods, largely textiles, tobacco, and related products." Jensen, *supra*, at 8; see also 2 *Convention Records* 307 (Mr. Gerry). That concern extended beyond the harm caused by the lost tax funds alone and included fears about the potentially

---

use the term "compensation," which the Export Clause does not. That is true, but proves nothing. The constitutional question is whether the provision at issue can fairly be understood to mandate monetary relief for a violation, *Mitchell*, 463 U.S. at 218, which is a functional, not a linguistic, inquiry, see *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("the availability of such damages may be inferred"); see also *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (to create Tucker Act jurisdiction, law need "not, in so many words, mandate damages"). Indeed, there is no question that the Fourteenth Amendment's Due Process Clause compels monetary relief in the particular circumstance of state governmental takings of property, even though the word "compensation" appears nowhere in that constitutional provision. See *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897). Moreover, the operative language of the Judicial Compensation Clause is not, as the government argues (Br. 33), the "language requiring the payment of funds from the federal treasury," but the mandatory prohibition of diminishment. See *Will*, 449 U.S. at 18-19; *Hatter*, 953 F.2d at 628. Furthermore, the Takings Clause's "compensation" language makes it less, not more, financially protective than the Export Clause. *U.S. Shoe*, 523 U.S. at 368-369.

devastating economic harm that export taxes could cause by depressing prices in the domestic market for goods the exporters could no longer sell competitively overseas. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 501 (Mr. Clymer) (Aug. 21, 1787) ("The middle States may apprehend an oppression of their wheat flour, provisions &c. and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobo. rice &c."). Joseph Story echoed that concern: "The obvious object of these provisions is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another." 2 *Commentaries on the Constitution*, *supra,* § 1011, at 469-470. "If congress were allowed to lay a duty on exports from any one state," Story warned, "it might unreasonably injure, or even destroy, the staple productions, or common articles of that state." *Ibid.* For that reason, Story concluded that the Export Clause's protection "extends not only to exports, but to the *exporter*." *Id.* § 1012 (emphasis added). "Congress can no more rightfully tax the one, than the other." *Ibid.*

Given (i) how critical the Export Clause's protection was to adoption of the Constitution, (ii) the very specific concern that export taxes not provide a source of revenue for the government, *IBM*, 517 U.S. at 859, and thus not be retained in the federal Treasury, and (iii) the particularized pecuniary interests the Clause was designed to protect *against congressional action*, the Framers would have considered financial compensation to be necessary and, indeed, indispensable to prevent Congress from retaining ex-

port taxes as "federal revenue," *ibid.*, reaping the financial benefits of its own defiance of an explicit and absolute foreclosure of congressional power, and conditioning the exporters' right to remuneration on Congress's good graces. The Framers well knew that "the power to tax involves the power to destroy," *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (Marshall, C.J.), and for that very reason many conditioned their support for the Constitution on jealous protection of exporters against federal taxation. While Justice Holmes later assured that "[t]he power to tax is not the power to destroy while this Court sits," *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), overruled in part by *Alabama v. King & Boozer*, 314 U.S. 1 (1941), that would be an empty assurance if the victims of congressional defiance of the Constitution could not obtain compensation for the harm caused by a constitutionally forbidden tax. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803) ("Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?").

3. Tax Legislation Cannot Alter the Export Clause's Money-Mandating Character

The United States does not appear to dispute that, at bottom, the Export Clause is money-mandating, because it concedes (Br. 34) that, if there were no statutory tax-refund scheme, "[t]he Export Clause might be enforceable by alternative means under the Tucker Act." The government's argument instead

(see, *e.g.*, Br. 35) is that Congress's enactment of tax *legislation* strips the *constitutional* provision of its fundamentally money-mandating character. That cannot be right.

To begin with, whether a constitutional provision is money-mandating is a question of constitutional law – one for this Court to resolve. See, *e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("Statutory recognition [i]s not necessary."); see generally *Marbury*, 5 U.S. at 177 ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). Congress cannot change the meaning of the Constitution through legislation. See, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936). The Export Clause was intended either to have the particular force and effect for which it was adopted, protecting exporters and requiring the removal of unlawfully collected funds from the revenue stream, or to be an unenforceable admonition, the enforcement of which was left entirely in the hands of the Congress the Clause purports to bind. Either way, the Constitution's meaning does not turn on and off as Congress passes and repeals remedial statutes.

That is particularly true when, as here, the constitutional provision at issue is itself a specific negation of congressional authority to act. It would stand the Constitution on its head to conclude that Congress can use its general taxing authority to alter the money-mandating scope or character of a constitutional provision that is itself an explicit exception to

and wholesale denial of legislative authority. See 2 *Commentaries on the Constitution*, *supra*, § 1011 (Congress's power is "wholly taken away to intermeddle with the subject of exports"); see also *Hvoslef*, 237 U.S. at 13 (Export Clause forbids "legislation nominally conforming to the constitutional restriction, but in effect overriding it").

The government relies heavily (Br. 35-38) on this Court's modern hesitation to imply judicially new private rights of action under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007). But that mixes apples and oranges. The question under *Bivens* is whether the Court should reach out as a "common-law tribunal" and, without any specific congressional direction, craft a tort remedy against individual federal officials in their personal capacities that evades long-established sovereign immunity principles and triggers sensitive separation-of-powers concerns. See *Wilkie*, 127 S. Ct. at 2598, 2600. Moreover, under *Bivens*, the Court takes such a step based on nothing more than an instrumental hunch (for which the judiciary is not particularly well-suited) about the effective deterrence of government officials, combined with a very "general" assignment of jurisdiction to decide cases arising under the Constitution, see 28 U.S.C. 1331, that itself gives no signal that Congress intended any remedial litigation against the government or government officials. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001); see *Wilkie*, 127 S. Ct. at 2598.

Here, the question is altogether different. In the Tucker Act, 28 U.S.C. 1346(a)(2) & 1491(a), Congress has already made the judgment that federal courts should adjudicate claims against the United States for damages arising from money-mandating provisions of the Constitution. Congress has picked the defendant – the United States – and has waived the United States' sovereign immunity from suit and assigned jurisdiction to the federal courts. Accordingly, Congress has specifically charged the federal courts with determining, for purposes of Tucker Act jurisdiction, whether a constitutional provision is money-mandating – a straightforward question of constitutional interpretation for which the judiciary is uniquely well-suited. See *Marbury v. Madison*, *supra*. Congress having done so, the "federal courts have a 'virtually unflagging obligation * * * to exercise the jurisdiction given them,'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and "must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively," *Bowen v. City of New York*, 476 U.S. 467, 479 (1986).[18]

Bush v. Lucas, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), are of no help to the government (see Pet. Br. 36-37). In those cases, the Court declined, in the absence of any legislative di-

---

[18] By the same token, the fact that this Court is equally reluctant to imply statutory causes of action, see *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), had no bearing on the Court's separate determination that a statute need only create a "fair inference" that monetary relief is available to trigger Tucker Act jurisdiction, *White Mountain*, 537 U.S. at 472-473.

rection, to infer a *Bivens* remedy that would have conflicted with a pre-existing statutory remedy. See *Schweiker*, 487 U.S. at 423-425 (social security claims); *Lucas*, 462 U.S. at 388-388 (federal employee grievances). Here, by contrast, the court of appeals simply followed Congress's statutory command and undertook the question of constitutional interpretation statutorily assigned to it, attaching to its determination that the Export Clause is money-mandating only the jurisdictional consequences that Congress itself specifically prescribed in 28 U.S.C. 1491(a).

Chilicky and *Lucas* are particularly inapt for a second reason. Those cases each found "special factors counseling hesitation" in the creation of a *Bivens* remedy, *Chilicky*, 487 U.S. at 423; *Lucas*, 462 U.S. at 377, due to Congress's unique competence and expertise in crafting a remedial scheme for the particular claims at issue. But when it comes to claims enforcing the Export Clause – particularly claims where the unconstitutionality of Congress's action is so patent that the government makes no effort to defend it – Congress lacks any relevant expertise or competence and, in fact, has proven its disinclination, and perhaps even its institutional inability, to police categorical prohibitions on its own power. Instead, throughout the Nation's history, it has been this Court that "has strictly enforced the Export Clause's prohibition against federal taxation of goods in export," *IBM*, 517 U.S. at 849, against congressional incursion. See *U.S. Shoe*; *IBM*; *Thames & Mersey*; *Hvoslef; Fairbank*. Where, as here, the Constitution specifically and comprehensively disarms Congress from acting, "special factors counsel[] hesitation," *Lu-*

cas, 462 U.S. at 377, in permitting Congress to divert challenges to its facially unconstitutional actions away from the Tucker Act's established remedial scheme for violations of money-mandating constitutional prohibitions, and into a taxing scheme that is predicated on the very regulatory tax power that the Export Clause expressly rejects. In short, the existence of a refund scheme enacted as part of the taxing power that Congress *does* possess cannot change the money-mandating character of a constitutional provision defining the taxing power that Congress *does not* possess.

B. The Tucker Act Remedy Has Not Been Withdrawn And Is The Remedial Scheme That Best Enforces The Export Clause

1. The Tucker Act Remedy Has Not Been Clearly Withdrawn

When, as here, the Tucker Act is available to enforce a constitutional provision, this Court requires Congress to express "an unambiguous intention to withdraw the Tucker Act remedy." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984). The statute must manifest the "clear and unmistakable congressional intent [that is] necessary to withdraw Tucker Act coverage." *Preseault v. ICC*, 494 U.S. 1, 14 (1990); cf. *Whitman v. Department of Transp.*, 126 S. Ct. 2014, 2015 (2006).

The administrative refund scheme does not expressly or unambiguously withdraw Tucker Act jurisdiction over Export Clause claims. Instead, the government argues that the administrative refund scheme is mandatory because it is a more "finely re-

ticulated" regime (Br. 7, 8, 13, 25) than the Tucker Act. That is incorrect on three levels.

To begin with, this Court's most recent decisions have twice denominated those provisions the type of "general" remedial provisions that are themselves displaced by statutory schemes that have been specifically tailored to a particular type of tax claim, similar to the Tucker Act's unique capacity to vindicate the Export Claus's *sui generis* substantive constraint on congressional tax power. See *Hinck v. United States*, 127 S. Ct. 2011, 2016-17 (2007); *EC Term of Years Trust v. United States*, 127 S. Ct. 1763, 1766-68 (2007).

In addition, the rule that the more general statute is preempted is not iron-clad and only applies "in most contexts." *Hinck*, 127 S. Ct. at 2015. When, as here, Congress has indisputably transgressed an express and unqualified preclusion of its own power, there is "a good countervailing reason" for "[r]esisting the force of" an alternative remedial scheme that was specifically designed to protect the very type of revenue interest that the Export Clause rejects. *EC Term of Years*, 127 S. Ct. at 1767.

Finally, and in any event, the question is not, as the government assumes, which statutory regime has the largest number of rules. It is which statutory provision is "better-fitted" to resolve the type of claim at issue, *EC Term of Years*, 127 S. Ct. at 1767, and whether "special considerations required different treatment" for the claim, *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941). See also *Amell v. United States*, 384 U.S. 158, 159, 165-166 (1966) (contractual claims asserted by government maritime

workers could be prosecuted under the Tucker Act rather than the Suits in Admiralty Act, which "provides only two years for claimants to file suit, and also requires exhaustion of administrative remedies," because the claims were more akin to civil servants' claims than to maritime claims). Resolution of that question "should go in the direction of constitutional policy." *Regional Rail Reorganizaton Act Cases*, 419 U.S. 102, 133 (1974).

The Tucker Act suit is better designed to enforce the Export Clause and is the remedial route Congress most likely intended, for two reasons. First, there is substantial constitutional doubt about Congress's authority to carve Export Clause claims out of the Tucker Act and impose unique constraints and limitations on their vindication as part of Congress's general authority to regulate tax litigation, and the statute should be construed to avoid that constitutional question.[19] Second, Congress did not clearly express its intent to displace the Tucker Act remedy for this unique type of constitutional claim, particularly where the taxing provision is facially and indisputably unconstitutional.

---

[19] See *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (Where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court "is obligated to construe the statute to avoid such problems.") (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

2. Congress's Power to Impose Its Administrative Tax Scheme on Export Clause Claims Is Constitutionally Doubtful

The government asserts time and again that the administrative tax refund scheme should control because its procedures were deliberately crafted and "uniquely tailored" (Br. 7) by Congress to constrain tax challenges in a way that protects the government's interests in revenue collection and "fiscal planning" (Br. 40; see *id.* at 24, 38-39). But that is exactly the problem. That government-protective approach to tax controversies may be all well and good for challenges to taxes that at least arguably fall within Congress's otherwise plenary taxing authority. The government, however, identifies no basis for imputing to Congress the constitutionally dubious intention to extend its confessedly pro-government and "revenue-protective" process, *Hibbs v. Winn*, 542 U.S. 88, 104 (2004), into areas that the Constitution specifically walls off from congressional tax authority and revenue usage.[20]

---

[20] See *Snyder v. Marks*, 109 U.S. 189, 194 (1883) (noting that the tax refund scheme is a "system of corrective justice" with "stringent measures" designed to protect revenue); *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1411 (9th Cir.) (purpose of Section 7422 is to "protect the Treasury"), as amended, 140 F.3d 849 (1998); Press Release, The White House, Office of the Press Secretary (Jan. 31, 1996), reprinted in Tax Analysts, *Administration Urges Treasury to Study Changes for Refund Limitations Cases*, Tax Notes Today, Feb. 2, 1996 (President acknowledges that the refund scheme's time limitations "at times may produce harsh results"); see generally Kristy M. Bowden, *Protective Claims for Refund: Protecting the Interests of Taxpayers and the IRS*, 56 Me. L. Rev. 149 (2004) (discussing complexities in the operation of the administrative refund scheme, in-

No doubt, the Necessary and Proper Clause empowers Congress to establish administrative and judicial procedures and to otherwise "use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue." *M'Culloch*, 17 U.S. at 324.[21] The problem here is that sweeping export taxes within the general taxing authority is "specially prohibited," and the end of raising revenue through export taxation is *not* "legitimate," is not "within the scope of the constitution," and does not "consist with the letter," let alone, the "spirit," of the Constitution's careful insulation of exports from Congress's taxing power. *Id.* at 324, 421. Congress's general taxing authority thus does not empower it to erect tax-specific procedural barriers to enforcement of the Export Clause's explicit preclusion of congressional tax power.

Nor does the Export Clause vest Congress with the authority to impose pro-government and revenue-protective administrative procedures on export tax challenges. In fact, it does the opposite. This Court

---

cluding unpublished procedures, that result in denials of refunds to diligent taxpayers); see *id.* at 152 (in one context, "courts are finding that the only option available to the taxpayer to maintain their right to a refund was to follow a procedure that does not exist in the Internal Revenue Code or in its regulations").

[21] See *Snyder*, 109 U.S. at 194 (tax recovery scheme was "enacted under the right belonging to the government to prescribe the conditions on which it would subject itself" to suit "in the collection of its revenues"); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (the constitutional power to impose and collect revenue includes the power to identify procedures for presenting "any conflict which might arise" and "to prescribe the manner of trial" for its resolution).

has twice explained that, just as affirmative grants of power to Congress should be "construed as to give full efficacy to those powers," the Export Clause's explicit restriction on congressional power should "in like manner * * * be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Hvoslef*, 237 U.S. at 15; *Fairbank*, 181 U.S. at 290. Indeed, "[i]t would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed." *Fairbank*, 181 U.S. at 289. Accordingly, the specificity of the Export Clause overrides any authority otherwise granted by the general words of the other taxing clauses or the Necessary and Proper Clause, and limits Congress to the enactment of measures that give effect to, rather than undermine or nullify, the Export Clause's "simple, direct, [and] unqualified prohibition." *U.S. Shoe*, 523 U.S. at 368. [22]

History confirms that the Export Clause sweeps broadly and proscribes regulating exports and exporters through the tax system. See *IBM*, 517 U.S. at 859 (Export Clause "specifically prohibits Congress from regulating" exports through exercises of the tax power). The Framers specifically considered and re-

---

[22] Congress, accordingly, can provide an administrative refund scheme as an optional means for exporters to vindicate their Export Clause claims without having to initiate judicial action, and the Companies in this case, in fact, availed themselves of that opportunity with respect to the latest three years the export taxes were imposed. Pet. 4; Pet. App. 3a.

jected an amendment that would have limited the Export Clause's prohibition to taxes imposed "for the purpose of revenue." 2 *Convention Records*, *supra*, 359 (Aug. 21, 1787). As this Court explained in *Fairbank*, that reveals that the Export Clause excludes exports "not merely * * * [as] a source of revenue," but from subjection to Congress's regulatory tax power in any manner and for any purpose. 181 U.S. at 292; see *id*. at 293 (history of the Clause requires that the "national government should put nothing in the way of burden upon such exports").

While the Tucker Act would give the Export Clause the same full and fair opportunity for vindication that other constitutional damages claims against the United States receive, the administrative tax refund scheme would obstruct and substantially undermine, rather than carry into effect, the Export Clause's comprehensive withdrawal of congressional tax power.

First, and at the most elemental level, the refund scheme's revenue-protective model stands in diametrical opposition to the Export Clause's simple and straightforward command "disallow[ing] *any* attempt to raise federal revenue from exports." *IBM*, 517 U.S. at 848, 859 (emphasis added). While the financial impact of proceeding under a revenue-protective scheme, with its built-in time lag for the government's interest (see Pet. Br. 24) and risks of procedural bar, see 26 C.F.R. 301.6402-2, may or may not be significant in any given case, "[t]he question of power is not to be determined by the amount of the burden attempted to be cast." *Fairbank*, 181 U.S. at 291. If Congress has the power to impose minor, tax-

specific constraints on the vindication of Export Clause claims, it equally has the power to impose disabling limitations. Indeed, "[t]he question is never one of amount but one of power," *ibid.*, and the Export Clause leaves no room for Congress to treat export taxes like ordinary taxes, or to use its tax power to regulate exports or exporters.

Second, the refund scheme limits exporters to recovering only the measure of funds that were unconstitutionally exacted. There is no provision for recovering the type of economic damages to business that the Framers were so concerned could result from the taxation of exports. Consequently, exporters would be forced to proceed simultaneously on two different tracks to recover all of their damages for a single constitutional violation. In addition, exporters must wait at least half a year before even initiating suit to vindicate their constitutional rights, limit their damages, and recover their funds, 26 U.S.C. 6532(a)(1), with the government enjoying all the revenue benefits of the prohibited funds and perhaps collecting even more in the interim. Indeed, in the *Ranger Fuel* case, in which the coal export tax was held to be unconstitutional, the IRS failed to act at all on the administrative refund claim, and the government delayed for months after the filing of the complaint, before "tak[ing] no position on the constitutionality of the coal excise tax" and requesting further postponement of the question while the government continued to try and "determine whether to defend the constitutionality of the coal excise tax," U.S. Opp. to Pltfs. Mot. for S. J'ment. at 2, *Ranger Fuel Corp. v. United States*, No. 3:98cv370 (E.D. Va.), and, incidentally,

retained and collected more export taxes. To be sure, some provision is made for interest, but its terms (like the administrative refund scheme itself) are sharply skewed in the government's favor.[23]

There is, moreover, no justification for imposing such limitations on recovery – the net effect of which is to retain export taxes in the federal revenue – or administrative hurdles to relief in Export Clause cases. An agency has no expertise either in questions of constitutional law or in the resolution of the relevant constitutional facts (such as whether the item taxed was in the stream of export commerce or qualifies as a user fee, see, *e.g.*, *U.S. Shoe*, 523 U.S. at 367-69; *Cornell v. Coyne*, 192 U.S. 418, 428 (1904)). In addition, when, as here, Congress made explicit its intent to tax coal exports, see 26 U.S.C. 4221(a), an administrative agency has no authority to declare the law unconstitutional.[24]

In short, rather than help to "enforce[] [the Export Clause] in its spirit and to its entirety, *Fairbank*, 181 U.S. at 289, as the Tucker Act does, the administrative refund scheme would ensure that the government will enjoy some (constitutionally proscribed)

---

[23] See 28 U.S.C. 2411 (interest ceases 30 days before refund check is issued); 26 C.F.R. 301.6611-1(g); 26 U.S.C. 6621(a) (tying interest rate to federal short-term rate plus specified percentage points, while sharply lowering the applicable interest rate for corporations).

[24] Cf. *U.S. Shoe*, 523 U.S. at 364 (when constitutionality of tax was challenged, the agency responded "with a form letter" asserting that the tax was a user fee); *Ranger Fuel*, 33 F. Supp. 2d at 467-468 (when presented with Export Clause challenge to the coal tax, the IRS simply took no action for 15 months).

revenue benefits no matter how patently unlawful and indefensible the export tax is.

Third, and to be sure, the Export Clause does not preclude Congress from subjecting exporters' claims to the same general, tax-neutral and revenue-neutral limitations on recovery as other constitutional provisions, such as the Tucker Act's six-year statute of limitations. See 28 U.S.C. 2501. See *Block v. North Dakota*, 461 U.S. 273, 292 (1983) ("A constitutional claim can become time-barred just as any other claim can."). But the question here is quite different: whether, having established a tax-neutral procedure for the litigation of damages claims arising under the Constitution, Congress may carve the Export Clause out for "less liberal[]" treatment (Pet. Br. 27), imposing singularly pro-revenue and government-protective burdens and limitations on that Clause's constitutional enforcement, thereby treating that prohibitory Clause as though it were as amenable to regulation through the general tax scheme as claims under constitutional provisions that *grant* Congress taxing power. See *Spalding*, 262 U.S. at 70 (Export Clause gives exports "liberal protection").

Congress cannot. "[D]oing what the Constitution permits gives no license to do what it prohibits." *Evans v. Gore*, 253 U.S. 245, 255 (1920), overruled on other grounds, *Hatter*, 532 U.S. at 567-571. Congress's general power to control constitutional litigation against the United States must be exercised consistently with Article I's specific constraints on congressional power, and it cannot impose procedural constraints on judicial review that, in operation, weaken or negate the strict prohibitions of the Export

Clause, any more than it could use its affirmative legislative powers to circumvent the constitutionally prescribed limitations on suspension of the writ of habeas corpus, Art. I, § 9, cl. 2. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

In short, the deliberate design of the administrative tax refund scheme is to protect the government's retention of revenue, to put claims on a timeframe that is comfortable for the government (see Pet. Br. 24), to limit the claims permitted, to restrict the available remedies, and to force individuals to protest tax payments one at a time, return-by-return. While Congress's hands were supposed to be "absolutely tied" by the Export Clause, *IBM*, 517 U.S. at 860 (quoting 2 *Convention Records*, *supra*, at 220), forcing all Export Clause claims through that administrative process would untie Congress's hands and transform a comprehensive preclusion of congressional power into little more than a borrowing program. The government could take all the revenue it wants from export taxes and obtain "all the beneficial use of the fund[s]," subject only to the obligation to pay back those funds – but no damages and limited interest – months or years later, as refund claims are processed piecemeal, year by year, within whatever framework of restrictions, stringent limitations, and constraints Congress might choose to impose. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-164 (1980).[25] At the same time, the failure of the exporter

---

[25] See also *Webb's*, 449 U.S. at 162 ("[I]f the [government] were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is

to comply with any of the "procedural requirements on postdeprivation relief" that Congress has broad "freedom to impose" (Pet. Br. 40) could leave all the revenue from that constitutionally unauthorized exaction in the government's hands. It is doubtful that the Framers intended that Congress's general powers under the Constitution would permit such ready circumvention of the Export Clause. "[W]hat cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank*, 181 U.S. at 294.

3. The Design of the Administrative Tax Scheme Does Not Cover Export Clause Claims

This Court, however, need not resolve the substantial constitutional question of whether Congress may impose special, governmentally favorable tax procedures in areas where the Constitution specifically and completely debars Congress from exercising any tax power. That is because the relevant statutory provisions can fairly be read to preserve and prefer the Tucker Act remedy over the Companies' Export Clause claim.

a. An individualized refund scheme does not preclude separate litigation of broad constitutional questions

The administrative refund procedure is designed to handle individualized, as-applied, return-specific

---

held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.").

challenges to tax assessments and to determine, on a case-by-case basis whether money should be refunded. See 26 U.S.C. 6511(a) (referring to claims for refund for "an" overpayment); 26 U.S.C. 6511(b)(1) (referencing the filing of "a" claim); 26 U.S.C. 7422(a) (same); 26 U.S.C. 6532(a)(1) ("the claim"). Refund decisions govern only the particular tax return at issue, and may not control the disposition of a return for the same tax filed the next year. *Flora v. United States*, 362 U.S. 145, 193 & n.16 (1960); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 778, 780-781 (1974) (Blackmun, J., dissenting). Nor do such individualized administrative refund procedures have the capacity to establish broadly applicable rulings about the scope of congressional taxing power. Instead, the IRS administrative scheme is designed to address factual and technical compliance issues, resolved by auditors in local district offices, who generally lack the authority or legal training needed to resolve such constitutional questions.[26] (Br. 24 (noting that the

[26] See generally 26 C.F.R. 601.105(e). The original review of excise claims "is a primary function of examiners in the Examination Division of the office of each district director." 26 C.F.R. 601.105(b)(1). "[S]ubstantially the same procedure is followed * * * as when taxpayers' returns are originally examined." 26 C.F.R. 601.105(e)(2). The review generally focuses on highly technical matters. See Audit Technique Guide for the Coal Tax (May, 2005), available at, http://www.irs.gov/businesses/small/article/0,,id=139335,00.html. Technical advice can be obtained from the National Office on "technical or procedural" subjects, but it is given only for specific cases and never to a general class of cases. 26 C.F.R. 601.105(b)(5)(i)(a), (ii)(b) & (viii)(a). Appeal to a regional office is available, but "the appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of * * * constitutional * * * grounds." 26 C.F.R. 601.106(b).

purpose of the administrative scheme is to provide "specific facts" that allow the IRS to conduct "an administrative investigation" of a taxpayer's claim))

Beyond that, even if the IRS agreed that Congress had exceeded its power, the most it could do is grant refunds one at a time as a matter of enforcement discretion – and the authority to do even that in advance of judicial invalidation of the tax is debatable when, as here, Congress specifically directed that coal exports be taxed and the money is already in the Treasury. Cf. U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *OPM v. Richmond*, 496 U.S. 414, 428 (1990). In any event, any such administrative decisions would offer no protection against the continuing legal obligation to pay the taxes, the need to expend time and resources repeatedly paying them and then pursuing the refund process, the lost time-value of the money, or the risk of a change in agency position.

In an analogous context, this Court unanimously held in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), that the need to ensure judicial review of "substantial statutory and constitutional challenges" to an agency program, *id.* at 680, strongly counseled against interpreting a "reticulated statutory scheme" for review of individual social security benefit determinations as foreclosing federal court jurisdiction over a challenge to the legality of an agency regulation itself, *id.* at 675. See also *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-94 (1991) (jurisdictional limitation on review of "a determination respecting an application" for im-

migration status does not bar review under general federal question jurisdiction statute, 28 U.S.C. 1331, of a constitutional challenge to "a group of decisions or a practice or procedure employed in making decisions"). Likewise here, it is doubtful that Congress intended the individualized administrative refund procedure either to decide or to preclude definitive judicial resolution of facial and far-reaching challenges going to the core of Congress's constitutional taxing power. Indeed, "there would be a serious question about the reasonableness of a system that forced a [taxpayer] to bring a series of backward-looking refund suits to establish repeatedly the legality of [a] claim." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 748 n.22 (1974).

b. Congress has not intended revenue-protective procedural constraints to apply to taxes that are, on their face, unconstitutional

Even with respect to exercises of recognized taxing authority, this Court had repeatedly held that broadly worded statutory restrictions on taxpayers' prosecution of such claims do not apply when the challenged tax unquestionably falls beyond Congress's authority. In *Enochs v. Williams Packing & Navigation Company*, 370 U. S. 1 (1962), this Court addressed the Tax Injunction Act's sweeping command that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," 26 U.S.C. 7421(a). Although the Act's "language could scarcely be more explicit," *Bob Jones*, 416 U.S. at 736, this Court held that the Act does not apply to taxes that are so wholly without

foundation that "it is clear that under no circumstances could the Government ultimately prevail." *Enochs*, 370 U.S. at 7; see *South Carolina v. Regan*, 465 U.S. 367, 374 (1984).

Accordingly, when, "under the most liberal view of the law and facts, the United States cannot establish its claim," and the government itself does not "claim that [the tax] is valid," *Enochs*, 370 U.S. at 7-8, the Court has concluded that permitting a taxpayer suit to go forward outside traditional limitations on taxpayer litigation cannot affect any legitimate governmental interest in tax collection, *Commissioner v. Shapiro*, 424 U.S. 614, 628 (1976). Cf. *United States v. Janis*, 428 U.S. 433, 441-442 (1976) (holding that "the usual rule with respect to the burden of proof in tax cases" does not apply "where the assessment is shown to be naked and without any foundation"). Rather, when the tax is, on its face, in excess of the power granted to the Congress by the Constitution, the assessment is, in the eyes of the law, only "in the guise of a tax," *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), and may be procedurally treated as such.[27]

By the same token, statutorily mandated exhaustion requirements generally do not apply when a

---

[27] The question whether the government has any chance of ultimately prevailing "is to be determined on the basis of the information available to it at the time of the suit." *Shapiro*, 424 U.S. at 627. This type of injunction was not an available remedy for the Companies here, however, because the plaintiff still must establish irreparable harm, *ibid.*, which an ongoing obligation to pay money generally does not establish. See, *e.g.*, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975); *Bob Jones*, 416 U.S. at 745.

party seeks to enjoin agency action that is "in excess of its delegated powers and contrary to a specific prohibition" in the law, where that prohibition is "clear and mandatory." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). That is so because, when government officials act in plain and undisputed violation of direct and unqualified prohibitions on their authority – whether those directives are rooted in statute or the Constitution – the central rationale for exhaustion collapses. The agency can claim neither expertise nor efficiency when it acts wholly outside its lawful bounds, and, by definition, factfinding has little relevance to halting violations of the law that are plain on their face.[28] At the same time, when the Political Branches are heedless of or defy a "simple, direct, unqualified [constitutional] prohibition" on their authority, *U.S. Shoe*, 523 U.S. at 368, the need for direct judicial intervention reaches its apex.[29]

Accordingly, before forcing the Companies to litigate within the administrative tax refund framework, with its revenue-protective procedures, Congress likely intended that that the tax at issue would have

---

[28] See *Thetford Properties IV Ltd. v. Department of Housing and Urban Dev.*, 907 F.2d 445, 448-449 (4th Cir. 1990) ("Of course, in the rare case when a statute is patently unconstitutional or an agency has taken a clearly unconstitutional position, exhaustion may not be required."); *Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir.) ("the *raison d'etre* of the exhaustion doctrine[] [is] simply irrelevant when the Board has clearly breached the bounds of its proper authority as a matter of law," and the violation is plain because the statute is unconstitutional on its face), cert. denied, 431 U.S. 908 (1977).

[29] See Black Lung Benefits Revenue Act of 1977, H.R. Rep. No. 438, 95th Cong., 1st Sess. 73 (1977) (explaining that the usual exemption for "exports" will not "apply to this coal tax").

at least a colorable claim to validity and thus could, with some legitimacy, be defended as a "tax" as Congress employed that term in the statutory refund provisions. In this case, however, the government was unable, even after a year of study, to muster any constitutional defense for the export tax, and the district court was unable to discern any justification for it either. *Ranger Fuel*, 33 F. Supp. 2d at 469. There is no question that a tax used to impose a prior restraint on speech may be enjoined as foreclosed by the Constitution, see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean*, 297 U.S. at 250, without imposition or exhaustion of six-month-long, revenue-protective procedures, cf. *Near v. Minnesota*, 283 U.S. 697 (1931). So likewise may a facially unconstitutional export tax – a tax that was also of substantial concern to the Founders – be challenged through the ordinary mechanism for constitutional litigation, without any procedural thumb on the government's side of the scale. At a minimum, the Court should require a clear statement of congressional intent to insulate such facially unconstitutional measures from ordinary judicial review.[30]

---

[30] The Government's reliance (Br. 16) on the requirement of a *pre-payment* protest in *United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is misplaced for three reasons. First, that case involved a Tucker Act claim "founded" upon a statute, not (as the Government asserts (Br. 16)) "an Export Clause claim under the Tucker Act." See No. 116, Resp. Br. 15, *Cuba Mail*, *supra* ("This action [is] based upon the act of May 12, 1900."); *id.* at 18 ("[T]he petitioner may therefore enforce by an action under the Tucker Act the right given it by the Act of May 12, 1900."); *Hvoslef*, 237 U.S. at 7 (the claims in both

c. The statutory text is ambiguous

The administrative refund statutes, by their terms, do not naturally embrace Export Clause challenges to Congress's foundational taxing authority. To begin with, given the straightforward and unqualified constitutional prohibition on export taxes and the fact that, by definition, the *ad valorem* tax at issue here was imposed on exported coal when it was already in the stream of international commerce, it is far from clear that the coal tax constitutes an "internal" revenue tax, within the meaning of 26 U.S.C.

Hvoslef and *Cuba Mail*, *see id.* at 9, were "based upon" refund statutes). The plaintiffs in both cases raised the Export Clause simply to satisfy the statutory element of proof of an "erroneous or illegal assessment and collection." *Hvoslef*, 237 U.S. at 7; *Cuba Mail*, 200 U.S. at 494-495; No. 116 Resp. Br. 18, *Cuba Mail*, *supra*. Thus, at most, *Cuba Mail* "stands for the unremarkable proposition that a taxpayer suing to recover under a refund statute must satisfy all the requirements attendant to that statute." *Cyprus Amax*, 205 F.3d at 1375. Second, *Cuba Mail* did not address any jurisdictional questions under the recently enacted Tucker Act and, indeed, this Court later explained that jurisdiction was assumed in that case. See *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915). Tellingly, the Court gave no indication that, if a pre-payment protest were not an element of the cause of action, there would have been any jurisdictional problem with proceeding under the Tucker Act, notwithstanding the existence of the separate, *post hoc* administrative refund provisions. Third, no question of Congress's authority to impose procedural constraints on Export Clause challenges was involved. The long-since abandoned requirement of a protest at the time of payment, see Revenue Act of 1924, ch. 234, § 1014, 43 Stat. 253, 343, was the product of judge-made common law, not statute, defining the elements of a common-law tort claim for recovery against a collector in his personal capacity. See *United States v. Kales*, 314 U.S. 186, 198 (1941).

6532(a)(1) and 7422(a). Compare *Black's Law Dictionary* 732 (5th ed. 1979) (defining "internal revenue" as "revenues from internal sources by way of taxes as contrasted with revenues from customs and foreign sources"), with *U.S. Shoe*, 523 U.S. at 365-366 (explaining how an export tax could be understood to fall under a statutory reference to "imports" and thus could be considered a "customs duty"); see also 28 U.S.C. 1340 (establishing district court jurisdiction over claims arising under any Act of Congress "providing for internal revenue" *or* "revenue from imports"); *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515 (1951) (export "acts begin and end at water's edge"); *Dooley v. United States*, 183 U.S. 151, 153-155 (1901) (discussing the foreign commerce aspect of exports).[31]

In addition, Congress's use of the terms "credit" or "refund" in defining the type of claims that are subject to its tax refund scheme, 26 U.S.C. 6511(a) & (b), 7422(a), can naturally be read to presuppose some colorable claim of authority to have collected the money in the first instance. Where, by contrast, money is taken in the complete absence of any lawful authority – for example, if an IRS agent picks a taxpayer's pocket during an audit – the monetary relief sought would not commonly be described as a "tax refund."[32]

---

[31] The fact that the underlying tax provision is codified in Title 26, by itself, does not make it an "internal revenue tax," as the government itself argued in *U.S. Shoe*. See 523 U.S. at 367.

[32] See *United States v. State Bank*, 96 U.S. (6 Otto) 30, 36 (1877) (recognizing "implied contract" claim "where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud" by a Treasury official); see also *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 265 (1931)

Congress's reference to "any" recovery of internal revenue taxes does not help the government. This Court has held that, in the absence of clearer congressional direction, the word "any" should not be read to sweep in questionable and legally sensitive applications "that Congress likely did not consider." *Small v. United States*, 544 U.S. 385, 390 (2005). Instead, "general words" like "'any'" must "be limited" in their application "to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.).[33]

d. The Export Clause exception to the administrative refund scheme is narrow and tightly cabined

The government argues (Pet. 25; Br. 28 n.7) that permitting Export Clause claims to proceed under the Tucker Act will permit taxpayers to circumvent the administrative tax refund scheme by alleging any constitutional defect in a tax. The short answer is that this Court – speaking unanimously – had no trouble understanding that the *sui generis* nature of the Export Clause's "simple, direct, unqualified prohibition * * * distinguishes it from other constitutional limitations on governmental taxing authority."

(recovery of overpayment of taxes allowed by the Commissioner through an "accounts stated" action is not barred by refund procedure's limitations period).

[33] See also *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any'" means "different things depending upon the setting"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer * * * without considering the rest of the statute.").

U.S. Shoe, 523 U.S. at 368. Moreover, Congress's general ban on the imposition of manufacturers' excise taxes on exports, see 26 U.S.C. 4221(a), should ensure that few Export Clause challenges will arise in the future.

Beyond that, only those constitutional provisions that are independently deemed to be money-mandating will support Tucker Act jurisdiction. *Testan*, 424 U.S. at 398. While that class includes export taxes, this Court's recent confirmation that the Export Clause means what it says, see *U.S. Shoe*, *supra*, and *IBM*, *supra* – and the fact that only a small handful of Export Clause cases have arisen since 1787 anyhow – strongly suggests that Tucker Act jurisdiction over Export Clause claims will have no discernible impact on the administrative tax refund process. The Takings Clause is also money-mandating, *Regional Rail*, 419 U.S. at 126, but that has no relevance here because "taxation for a public purpose, however great," is not a "taking of private property." *Mobile County v. Kimball*, 102 U.S. (12 Otto) 691, 703 (1880). Finally, following this Court's decision in *Hatter*, the Judicial Compensation Clause will only give rise to a constitutional claim if Congress imposes a discriminatory tax on judges' compensation, see 532 U.S. at 567, 571, which would presumably be a rare event.[34]

---

[34] Nor has the narrow exception to the Tax Injunction Act recognized in *Enochs* for challenges to taxes that lack any colorable legal defense, 370 U.S. at 7-8, led to artful evasion of general limitations on the adjudication of tax claims, presumably because Congress is not in the habit of enacting such measures.

Contrary to the government's argument (Pet. 25), no court has held that either the Direct Tax or Uniformity Clause, U.S. Const. Art. I, § 8, cl. 1 & § 9, cl. 4, is money-mandating, nor would such a decision follow from this case. Those provisions simply regulate how federal taxes that Congress has the power to adopt are to be designed. Neither is the type of absolute preclusion of congressional taxing authority or explicit exclusion of a particular activity from the federal revenue stream that the Export Clause is.

Accordingly, a violation of either provision would not imply that the government had obtained funds that are constitutionally excluded from federal revenue or wholly beyond Congress's authority to collect at all. Instead, such violations may be remedied – and the same money still collected – by adjusting and increasing the coverage of the tax to make it "proportional" or "uniform." In other words, the essence of a taxpayer's claim under the Direct or Uniform Taxation Clauses is not that its funds are completely immunized from taxation and should be disgorged as an illegitimate source of revenue *per se* (as the claim would be under the Export Clause), but that the burden of legitimate tax collection should have been allocated more widely or proportionately. Cf. *McKesson*, 496 U.S. at 39-40 (where a State imposes an unconstitutionally discriminatory tax, it "retains flexibility in responding to this determination," and "may reformulate and enforce the Liquor Tax during the contested tax period," by "assess[ing] and collect[ing] back taxes from petitioner's competitors" or otherwise "calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme").

Moreover, "logic sometimes must defer to history and experience," *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring), and the fact that the government's predicted impact on the tax scheme has failed to materialize *at all* in the eight years since the Federal Circuit first held that an Export Clause challenge could proceed under the Tucker Act belies the suggestion that courts are incapable of distinguishing between constitutional limitations on authority granted to Congress and complete and unqualified denials of congressional power to intermeddle with a particular economic activity. Indeed, the government's argument ignores Chief Justice Marshall's admonition in an early tax case not to "treat[] a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 444 (1827); see also *Washington Dep't of Rev. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 749 (1978) (distinguishing between constitutional provisions that "state a prohibition" and those that "merely grant[] specific power to Congress"); *Fairbank*, 181 U.S. at 296 (same as *Brown*).

According distinct status to challenges based on an absolute and unqualified preclusion of congressional power makes sense, moreover. Where Congress has the constitutional power to act, its actions are presumptively constitutional, *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883), and it has the concomitant power to establish reasonable rules and procedures for the review of governmental action, see *Chilicky*, 487 U.S. at 423 (where Congress creates a "Government program," it can "provide[] what it con-

siders adequate remedial mechanisms for constitutional violations that may occur in the course of its administration"). When, however, Congress has no power to act and its authority has been specifically withdrawn by the Constitution, measures adopted in express defiance of that prohibition necessarily dispel any such presumption, and there is no apparent source of authority for Congress to erect specific procedural obstacles to judicial review of that action.

Finally, and in any event, nothing in this case requires the Court to go any further than the exception to ordinary tax litigation and exhaustion principles that this Court already recognized in *Enochs*, *supra*, and *Leedom*, *supra*, for facially unconstitutional and indefensible tax laws. Presumably the government does not contend that constitutionally indefensible laws arise with any frequency or that taxpayers can easily meet that exacting standard for review. Giving the Tucker Act that narrow scope, "it is entirely possible for the Tucker Act and [the tax refund scheme] to co-exist." *Monsanto Co.*, 467 U.S. at 1018. Indeed, "it is the duty of the courts" to give effect to both statutes where, as here, it is possible to do so. *Regional Rail*, 419 U.S. at 133.

C. The Export Clause Claim Falls Within The Plain Terms Of The Interest Statute

The court of appeals' holding that the Companies are entitled to interest is compelled by the plain terms of the interest statute, 28 U.S.C. 2411. As relevant here, Section 2411 provides that "interest shall be allowed" on "*any* judgment of *any* court * * * for *any* overpayment *in respect of* any internal-

revenue tax." (Emphases added.). As enamored as the government is with the sweep of the word "any" in the tax provisions (see Br. 15), its argument ignores that word here, even though in this setting all of the surrounding contextual indicia confirm that Congress meant "any" to signal broad coverage. See *Ali v. Federal Bureau of Prisons*, No. 06-9130, slip op. 5 & n.4 (Jan. 22, 2008) ("any" has expansive meaning where there is "no basis in the text for limiting the phrase" and no "other circumstances * * * counteract the effect of expansive modifiers").

Contrary to the government's argument (Br. 44), Section 2411 is not "an integral part" of the administrative tax scheme. Unlike the provision at issue in *Hinck* – which inextricably combined a "shorter statute of limitations" with "a standard of review" "in the *same* statute," 127 S. Ct. at 2016 – Section 2411 is not even housed in the Internal Revenue Code. Instead, it is located in Title 28, which governs judicial procedure broadly, and is part of a chapter entitled "United States As Party *Generally,*" 28 U.S.C. ch. 161 (emphasis added). Moreover, because Section 2411's textually general interest provision was crafted by Congress decades after Congress created the administrative tax refund procedure in 1866, see Revenue Act of 1921, ch. 136, § 1324(b), 42 Stat. 227, 316, Congress plainly did not view that interest provision as part of a single "refund-remedy package" (Pet. Br. 44 n.12).[35]

---

[35] When Congress wished to incorporate Internal Revenue Code provisions in Section 2411, it did so explicitly. 28 U.S.C. 2411 (citing the interest calculation provision in 26 U.S.C. 6621).

The government's effort (Br. 43) to limit "overpayment" to the recovery of taxes "erroneously or illegally assessed," as those terms are used in 26 U.S.C. 7422(a), also fails. The government's argument might have fared better in 1921, when the original version of Section 2241 allowed interest only "for any internal-revenue tax erroneously or illegally assessed," see § 1324(b), 42 Stat. at 316 – language that paralleled the contemporaneously passed predecessor to Section 7422(a), see § 1318, 42 Stat. at 314-15. But, in 1928, Congress replaced that narrow language with the modern interest provision, which permits interest more broadly "for any overpayment in respect of any internal-revenue tax." Revenue Act of 1928, Pub. L. No. 70-562, § 615, 45 Stat. 791, 877. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

This Court, moreover, has stressed that "overpayment" should not be construed as "a word of art," *Jones v. Liberty Glass Co.*, 332 U.S. 524, 532 (1947). This Court's decision in *United States v. Dalm,* 494 U.S. 596 (1990), undercuts, rather than aids, the government's position (see Pet. Br. 43). Putting aside that the Court was not interpreting Section 2411 in that case, the Court gave "overpayment" in 26 U.S.C. 6511 the same "commonsense interpretation" that the court of appeals here gave "overpayment" in Section 2411, explaining that it applies "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *Dalm*, 494 U.S. at 609 n.6. While the Court noted in *Dalm* that "overpayment" "encompasses" erroneously, illegally, or wrongfully collected

taxes under Section 7422, *ibid.*, the Court nowhere said that "overpayment" is limited to those situations or, more generally, that the particular procedural vehicle through which a claim is prosecuted has anything to do with whether the claim itself is for an "overpayment."

Indeed, Congress's own definition of "overpayment" belies the government's attempt to narrow it to "erroneously or illegally assessed" tax payments. Congress has specified that earned-income credit in excess of tax liability is an "overpayment," 26 U.S.C. 6401(b)(1), despite the fact that individuals may be eligible for such credit even if *no* tax is "assessed [against] or collected" from them at all. *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 863 (1986) (such "overpayment" occurs "independent of the individual's actually having made any payment").

Finally, as in the Takings Clause, the Export Clause itself requires the payment of interest on export taxes. See *Jacobs,* 290 U.S. at 16.[36] In *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923), this Court explained that the Takings Clause requires the payment of interest, so that "no specific [statutory] command to include interest is necessary." *Id.* at 306. The Court reasoned that the owner whose property was taken "is entitled to the damages inflicted by the taking," and that interest is part of

---

[36] Although controlling Federal Circuit precedent precluded the Companies from arguing below that interest was constitutionally required, see Resp. C.A. Br. 8 n.7, this Court can affirm the judgment on any ground supported by the record. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

that right to "just compensation safeguarded by the Constitution." *Id.* at 305; see also *Phillips v. Washington Legal Found.*, 524 U.S. 156, 165, 168 (1998) ("interest * * * follows the principal," and "attaches as a property right incident to the ownership of the underlying principal").

By the same token, the Export Clause's specific and unqualified prohibition on the use of exports as a source of tax revenue and insulation of exporters from the task of such revenue generation can only be given effect if Congress is denied the time value of the funds that it has wrongfully collected through export taxes, and the exporter is "put in as good position pecuniarily as he would have been if his property had not been ta[xed]." *Seaboard*, 261 U.S. at 304; see *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (interest might be naturally included when damages claim arises from "the detention of money"). The "present use of * * * money is itself a thing of value," *Procter & Gamble Distributing Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924) (Learned Hand, J.), and failure to compensate for it will result, as it did in *Webb's*, 449 U.S. at 163, in an "exaction" that "is a forced contribution to general governmental revenues," contrary to the specific and unqualified command of the Export Clause that exports not provide a source of tax revenue.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEVEN H. BECKER
PAUL A. HOROWITZ
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036

PATRICIA A. MILLETT
(Counsel of Record)
THOMAS C. GOLDSTEIN
STEVEN C. WU
MONICA P. SEKHON
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

FEBRUARY 13, 2008