No. 07-308

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY,
GATLIFF COAL COMPANY AND
PREMIER ELKHORN COAL COMPANY

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

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The text of the controlling statute governs this case. To challenge the coal excise tax that respondents had paid as "erroneously or illegally assessed," respondents were required to file timely refund claims, and to allow the Internal Revenue Service (IRS) time to review those claims. Had respondents taken those steps and not received relief, they could have proceeded to court under the Tucker Act and 26 U.S.C. 7422. But they did not file their refund claims until mid-1999, and accordingly "[n]o suit or proceeding shall be maintained in any court for the recovery of" respondents' taxes with respect to tax years 1996 and before. 26 U.S.C. 7422(a).

Respondents' attempts to avoid the clear import of that plain language are unavailing. No matter how much respondents wish to emphasize the clarity and allegedly distinctive qualities of the Export Clause, a claim under that

Clause remains a claim that the tax was "erroneously or illegally assessed," 26 U.S.C. 7422(a). Congress has not singled out constitutional claims for disfavor, but neither has it exempted them from the requirements that apply to *all* claims for recovery of taxes erroneously or illegally assessed, no matter what the source of the illegality. Instead, Congress has required that respondents proceed according to the single, orderly procedure that the law prescribes—*i.e.*, the tax-refund regime, which offered a fully adequate remedy (including interest) for respondents' Export Clause claim.

Respondents seemed to recognize the applicability of the tax-refund scheme in seeking and receiving a refund for the tax years for which their claims were timely. But as to earlier tax years, respondents contend that the Export Clause guarantees them a second, independent remedy, also under the Tucker Act but without the procedural requirements that expressly apply to all claims for the recovery of taxes. Accepting respondents' contentions would not give a judicial remedy to taxpayers who now lack one, nor would it give a pre-payment remedy to taxpayers who otherwise could proceed only after paying their taxes. Instead, it would serve only to excuse, without warrant, respondents' 21-year failure to assert in any forum a constitutional violation that they now describe (Br. 24, 25, 49) as so "patent" as to render the tax "indefensible" and "facially unconstitutional." Respondents can point to no basis in law for the extraordinary and unprecedented relief they seek, and their untimely claims should be rejected.

A. The Plain Text Of The Internal Revenue Code Forecloses Respondents' Contentions

Although respondents touch on the text of Section 7422(a) only briefly, in a passage buried deep in their brief

(Br. 43-45), the correct answer to the question presented begins and ends with the unambiguous language of that statute: "*No* suit or proceeding shall be maintained in *any* court for the recovery of *any* internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed." 26 U.S.C. 7422(a) (emphases added). Under the only possible reading of that pellucid and explicit text, respondents' suit is barred. Respondents nonetheless urge three grounds for denying that text its clarity, but none is correct.

Respondents assert (Br. 42, 44) that the coal excise tax is not a "tax" within the meaning of Section 7422(a) because the government had no "colorable claim of authority to have collected the money in the first instance." This Court has already rejected that line of argument, because Section 7422(a) applies by its own terms to sums "alleged to have been * * * illegally assessed or collected" as a tax. Construing the word "tax" in a statute that "was *in pari materia* with" the predecessor of Section 7422(a), this Court confirmed that there is "no force in the suggestion that [the statute], in speaking of a 'tax,' means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute." *Snyder* v. *Marks*, 109 U.S. 189, 192 (1883). Rather, even (perhaps especially) an illegal tax is still a tax, and its legality or illegality is to be determined by the process that begins with a timely refund claim.

Respondents also suggest (Br. 43-44) that the coal excise tax is not an "internal revenue" tax. But the dictionary definition that respondents cite confirms that a tax on "coal from mines located in the United States," 26 U.S.C. 4121(a)(1), is an internal revenue tax. Cf., *e.g.*, *Begier* v. *IRS*, 496 U.S. 53, 55, 60 (1990) (treating an excise tax as an "internal revenue tax" for purposes of another tax provision); 26 U.S.C. 5005(c)(1) (same). Respondents offer an

inapposite analogy to the tax invalidated in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (*U.S. Shoe*), but the Court there did not hold that an unconstitutional "Tax * * * laid on Articles exported" cannot be an internal-revenue tax as the federal statutes use that term. Rather, the Court simply applied an unusual provision of the Harbor Maintenance Tax (HMT) law, directing that the HMT "be treated as if [it] were a customs duty" for jurisdictional purposes. *Id.* at 365 (quoting 26 U.S.C. 4462(f)(2)). Respondents' argument is further belied by the fact that Section 2411—on which they vigorously rely to support their award of interest—applies only to judgments for "overpayment in respect of any *internal-revenue tax*." 28 U.S.C. 2411 (emphasis added). Respondents neglect to explain why the coal tax would be an internal-revenue tax for purposes of Section 2411 but not Section 7422.[1]

Respondents' final textual argument (Br. 45) is that Section 7422(a)'s explicit coverage of all suits for the recovery of "any" internal revenue tax should be read narrowly to avoid "sweep[ing] in questionable and legally sensitive applications." But as this Court recently reemphasized, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5

[1] Respondents' argument would also lead to the absurd result that paying the coal tax did not make them taxpayers for purposes of the Internal Revenue Code, which defines "taxpayer" as "any person subject to any *internal revenue tax*." 26 U.S.C. 7701(14) (emphasis added). And, ironically, it would deprive the federal district courts of jurisdiction under the Tucker Act to hear the very claims that respondents seek to have recognized, because those courts' tax jurisdiction covers only actions "for the recovery of any *internal-revenue tax* alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 1346(a)(1) (emphasis added).

(1997)). Unlike in the cases respondents cite (Br. 45), reading Section 7422(a) to give the word "any" its ordinary meaning will not produce unworkable or anomalous results, extend the statute extraterritorially, or trench upon sovereignty concerns. In the absence of *any* textual or contextual indicator that would "counteract the effect of" the "expansive modifier[]," the word "any" must be given its natural meaning. *Ali*, 128 S. Ct. at 836 n.4; accord *id.* at 844-845 (Kennedy, J., dissenting).

B. No Principle Of Statutory Construction Permits Respondents To Sever The Refund Requirement From The Statutory Framework

Respondents and their amici are altogether incorrect in suggesting that this case requires the Court to choose between applying either the tax-refund regime, on the one hand, *or* the Tucker Act, on the other. The two are in fact inseparable, and the tax-refund procedure does not "withdraw Tucker Act jurisdiction," as respondents mistakenly contend. Br. 25-27. To the contrary, if a taxpayer complies with the requirement of submitting a timely refund claim but does not receive full relief, his remedy is to sue under Section 7422(a) *and the Tucker Act*, which supplies the requisite jurisdiction and waiver of sovereign immunity. Indeed, Section 7422(a) echoes the words of the Tucker Act provision that confers concurrent jurisdiction on the federal district courts. Compare 26 U.S.C. 7422(a), with 28 U.S.C. 1346(a)(1).

This Court recognized as much in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941). The Court held that a claim may be "brought under" the Tucker Act but still be subject to a shorter statute of limitations than the six-year "outside limit" for Tucker Act claims. *Id.* at 447. The Internal Revenue Code provides several such shorter time

limits, and the Court in *A.S. Kreider* held that the predecessor of current 26 U.S.C. 6532(a)(1), which then applied to "proceedings for the recovery of 'internal-revenue tax alleged to have been erroneously or illegally assessed,'" displaced the Tucker Act's more general six-year limitation period. 313 U.S. at 447-448. There was no repeal by implication, because nothing in the Tucker Act rules out applying less generous procedures to "particular actions which, because of special considerations, require[] different treatment." *Id.* at 447; see U.S. Br. 18-20.

The tax-refund statute predates the Tucker Act (see Resp. Br. 9 n.5), and when it was enacted no court had recognized a cause of action like the one respondents seek. Reading Section 7422(a) to govern that cause of action, if it exists, therefore would not constitute an implied repeal. See *United States* v. *Estate of Romani*, 523 U.S. 517, 529-530 (1998) (presumption against implied repeals inapplicable when prior law did not clearly grant the allegedly repealed right). Rather, Section 7422(a) *grants* a right of action under the Tucker Act, one respondents could have pursued. Thus, the correct inquiry is whether, before invoking Tucker Act jurisdiction, respondents must comply with the plainly written prerequisites and limitations set out in Section 7422(a) and its companion provisions, not just the six-year "outside limit" of 28 U.S.C. 2501. *A.S. Kreider*, 313 U.S. at 447.

Even if the plain language were ambiguous—which it is not—this Court's cases would confirm that the more specific tax-refund procedures control. The "better-fitted" procedure for tax claims requires compliance with Section 7422(a), and the associated time limits, before permitting a suit under the Tucker Act. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007); see U.S. Br. 20-26. The tax-refund procedure can provide complete relief; the

requirement to present an administrative claim favors resolution of disputes without litigation where possible; and the shorter limitation period serves the "congressional objective [of] providing the Government with strong statutory protection against stale demands." *United States* v. *Brockamp*, 519 U.S. 347, 353 (1997) (internal quotation marks and citation omitted). Respondents offer no "good countervailing reason," *EC Term of Years*, 127 S. Ct. at 1767, why Congress would have intended to permit their challenge, and theirs alone, to proceed under the catchall provisions of the Tucker Act without first complying with the tax-specific procedures carefully set out, and expressly made exclusive, in Title 26.[2]

C. The Tax-Refund Procedure Is Fully Applicable To Constitutional Claims

Respondents also advance the notion (Br. 32-34) that the refund procedure serves no legitimate function and provides no adequate redress in Export Clause cases. That contention is without merit. The tax-refund procedure is based on sound policy considerations that apply equally—and neutrally—to Export Clause claims, to other constitutional claims, and to other grounds for challenging the va-

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[2] Amicus Alliance Coal suggests (Br. 10-20) that this Court has recognized such exceptions for other taxes, but the cases it cites are inapposite. In several, the taxpayer *did* submit a claim or its equivalent. See *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 261-262, 264-265 (1931); *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 31 (1915); *United States* v. *Finch*, 201 F. 95, 96 (7th Cir. 1912). *Dooley* v. *United States*, 182 U.S. 222 (1901), concerned a customs duty, not an internal revenue tax, and Section 7422's predecessor was irrelevant. And in *South Carolina* v. *United States*, 199 U.S. 437 (1905), this Court mentioned the tax-refund procedure but did not analyze it at all. Several of Alliance's remaining cases merely distinguish between suing the United States and suing the collector. That distinction no longer exists. See 26 U.S.C. 7422(f)(1).

lidity of a tax. There is no policy-based justification for ignoring the plain statutory direction that all efforts to recoup an illegally assessed tax must proceed in compliance with the tax-refund framework.

1. The tax-refund procedure has been repeatedly upheld as an appropriate way to preserve the taxpayer's right to an adequate remedy for any incorrect assessment while protecting the government's interest in the orderly administration of the revenue laws and narrowing the scope of any dispute to be litigated. See U.S. Br. 24. Each of those considerations applies with full force to the coal excise tax, and respondents' contention that their Export Clause claims are uniquely unsuitable for the tax-refund procedure is unavailing.

First, much of respondents' argument proceeds on the premise that export taxes are as unmistakably prohibited by the Constitution as a 33-year-old President. But although the prohibition on export taxes is clear enough, what constitutes an export tax in particular circumstances can be a fact-bound question that the tax-refund procedure can usefully clarify. In the coal-tax context, for example, the validity of an Export Clause objection turns in large part on facts such as whether the coal is in the stream of export when sold by the producer. That determination is quite specialized, and IRS coal-industry specialists review claims to ensure consistent treatment of the associated technical issues. See, *e.g.*, I.R.S. Tech. Adv. Mem. 200417005 (Apr. 23, 2004). Coal may properly be subject to the excise tax even if it is ultimately exported, if it is not in the stream of export when first sold. See *ibid.* (coal producer sought refund of excise tax on all coal sold to a domestic broker, but conceded that some coal was stockpiled and therefore not in the stream of export). And, of course, most domestically produced coal is not exported at all. Pet.

App. 35a. Plainly, therefore, a taxpayer's refund claim requires careful factual examination.

Second, as this Court has repeatedly recognized, a taxpayer who has already recouped an unconstitutional tax (such as by passing the tax on to customers) has no constitutional right to sue for a windfall double recovery. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 350 (1937) ("[T]here is no denial of constitutional right in requiring the claimant to show, where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others."). Congress accordingly has directed claimants seeking a refund of excise tax to verify that they bore the burden of the tax or have the consent of the person who did. 26 U.S.C. 6416(a)(1); *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998). That issue is suitable for examination and resolution during the administrative tax-refund proceeding. Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 47 (1990) ("pass-on" analysis "entails a highly sophisticated theoretical and factual inquiry"). And a determination that the claimant has already recovered the allegedly unconstitutional tax avoids the need to resolve a constitutional question.

2. The tax-refund procedure provides full relief to *timely* claimants in respondents' position. Respondents themselves submitted timely refund claims with respect to tax years 1997 through 1999 and received full refunds and interest. In particular, claimants receive interest at a rate exceeding the federal short-term rate. 26 U.S.C. 6611(a), 6621(a)(1).

Respondents assert (Br. 32-33), for the first time, that the tax-refund remedy is inadequate because it does not provide for consequential damages and because the interest rate on refunds is too low. But respondents' own conduct confirms that those contentions are not credible. Respon-

dents have never sought any consequential damages, see Pet. App. 37a-38a, including for the period for which they received a refund. And they seek interest under the very statute that they claim is inadequate. See Resp. Br. 49-52; Resp. C.A. Br. 1-2. But in any event, this Court's unlawful-tax cases require no more than a fair chance to obtain a remedy that "prevent[s] any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40; see U.S. Br. 39-40. The refund procedure plainly satisfies that requirement.[3]

The tax-refund regime's broad applicability and full remedy conclusively refute respondents' accusation that the government adopted that regime as a means to hold onto—and profit from—illegally collected monies. The government does not reap the time value of the taxpayer's money; it pays that value to the taxpayer as interest.[4] That procedure is more than adequate to carry out what respondents insist is the Export Clause's prime goal: to prevent the federal government from drawing revenue from exports. Respondents' inability to obtain relief for tax years before 1997 is attributable, not to any deficiency in the refund procedure, but rather to their failure to assert their claims in a timely manner.

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[3] Nor is there any constitutional significance to the fact that interest is computed through a point shortly before the refund check is issued (Resp. Br. 33 n.23), a provision attributable to the simple fact that once the amount is computed, issuing a government check takes some little time. *De minimis non curat lex*.

[4] Indeed, if the government's position (in the refund proceedings or in court) is not substantially justified, the government may have to pay the taxpayer's attorney's fees and litigation costs. 26 U.S.C. 7430. The availability of interest and costs refutes respondents' notion that the government might tax exports simply as a way of borrowing money until it could be refunded.

3. The notion that the tax-refund procedure cannot validly redress Export Clause challenges, or constitutional claims more generally (Resp. Br. 33; NFIB Br. 11-13), is simply incorrect. The operative statute requires a refund or a credit *whenever* tax is overpaid. 26 U.S.C. 6402(a). That an unconstitutional tax statute remains on the books does not compel the IRS to continue enforcing it; the Executive Branch can, and does, decline to enforce statutes that it concludes are clearly unconstitutional. See U.S. Const. Art. II, § 3 (Take Care Clause); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994).[5] Accordingly, the IRS examines constitutional challenges to taxes as it does other legal arguments. See, *e.g.*, *IBM Corp.* v. *United States*, 31 Fed. Cl. 500, 502 (1994) (before litigating, IBM presented Export Clause argument to IRS, which extensively analyzed the issue on the merits and determined that the tax was constitutionally defensible), aff'd, 59 F.3d 1234 (Fed. Cir. 1995), aff'd, 517 U.S. 843 (1996). Indeed, the facts of this case confirm the efficacy of the refund mechanism for constitutional claims, because respondents' timely Export Clause claims were *successful* before the IRS. Without any repeal or other action by Congress, or even any holding of invalidity by an appellate court, the IRS determined that it would grant refunds of unconstitutionally assessed coal tax. I.R.S. Notice 2000-28, 2000-1 C.B. 1116.[6]

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[5] Congress has acknowledged as much, by requiring executive agencies to notify Congress when they decide not to defend the constitutionality of a federal statute "in any judicial, *administrative*, or other proceeding." 28 U.S.C. 530D(a)(1)(B)(ii) and (e) (Supp. V 2005) (emphasis added).

[6] The IRS was reviewing coal-tax refund claims in light of this Court's recent Export Clause decisions when the first plaintiff exer-

Furthermore, even if respondents were correct that the IRS would not have granted timely refund claims for the tax years at issue, there is no "futility" exception to the all-encompassing sweep of Section 7422. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (requiring compliance with refund-claim filing requirement notwithstanding lower court's finding "that the filing of a demand which was certain to be refused was a futile and unnecessary act"). As this Court has made clear, "[a]n anticipated rejection of the claim, which the [tax-refund] statute contemplates, is not a ground for suspending its operation," because "the condition upon which the consent to suit is given is defined by the words of the statute," and "it is not within the judicial province to read out of the statute the requirement of its words." *Id.* at 273.

D. The Constitutionality Of The Tax-Refund Procedure Is Not In Doubt

The mere fact that a plaintiff pleads a constitutional claim does not entitle him to sweep aside the procedural limitations that apply to an entire class of litigants, not just exporters. Yet that is precisely what respondents seek to accomplish here. They argue that Congress's decision to treat Export Clause challenges the same way it treats other constitutional and statutory challenges to taxes—permitting taxpayers to proceed in federal district court or the Court of Federal Claims only after payment, within a reasonable time, and subject to an administrative exhaustion procedure—is constitutionally dubious because Congress may not tax exports. That conflation of substance and procedure has no basis in the law.

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cised its right to proceed to court after the expiration of the statutory waiting period. *Ranger Fuel Corp.*, 33 F. Supp. 2d at 467-468.

1. Respondents necessarily concede (Br. 34) that even constitutional claims may become time-barred, and that they are bound *at least* by the Tucker Act's six-year outside limit, 28 U.S.C. 2501. Indeed, if they thought otherwise, they would have sued to recover nineteen years' worth of coal taxes (since 1978), not three. See Pet. App. 36a. And there is no meaningful constitutional distinction between a six-year time period in which to file suit and a three-year time period in which to file a refund claim, see 26 U.S.C. 6511(a). Cf. *Owens* v. *Okure*, 488 U.S. 235, 251 (1989) (applying three-year statute of limitations to constitutional claims under Section 1983); *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985) (same). Respondents cannot credibly assert that a three-year limitation period would "weaken or negate the strict prohibitions of the Export Clause." Br. 34-35. Respondents therefore can identify no constitutional doubt created by requiring their Export Claims to meet the tax-refund procedure's three-year deadline.

2. Their primary quarrel, therefore, is apparently with the refund procedure itself. But they offer no legitimate basis for their attack. Their policy objections to the refund procedure are unavailing, see pp. 7-12, *supra*, and if the requirement to file a refund claim is permissible, it follows *a fortiori* that the statutory requirement that a claimant allow the Commissioner time to review that claim before filing suit is also permissible. See 26 U.S.C. 6532(a)(1).

Nor is there any substance to respondents' argument (Br. 29, 34) that "tax-neutral" limitations on recovery are permissible but "tax-specific" limitations are not. Respondents offer no supporting authority, and there is none. The Internal Revenue Code's procedural limitations do not single out Export Clause claims for uniquely difficult treatment; they apply equally to *all* claims asserting a tax's invalidity, under the Constitution or otherwise. To the extent

neutrality is required, it is clear from nearly 150 years of history that the tax-refund procedure is "Export Clause-neutral."

At bottom, therefore, respondents appear to be objecting (at least in Export Clause cases) to the very notion of allowing the government to resolve constitutional challenges to taxes after collection. That objection is a curious one, because respondents never refused to pay the excise tax or sought to enjoin it. Had they sought injunctive relief, the government could have invoked the tax-injunction bar of 26 U.S.C. 7421, which might be thought a more appropriate target of respondents' constitutional objection. See pp. 15-17, *infra*. But, in reality, respondents concede that they suffered no irreparable injury warranting prospective relief, Br. 40 n.27, and the constitutional cause of action they are asking this Court to recognize is itself a post-payment remedy. Indeed, the relief they are seeking is *indistinguishable* from what they would have received through the tax-refund procedure, if only they had timely filed claims for the period in question.

3. In any event, respondents overlook the constitutional authority for the tax-refund procedure. Congress has power to determine the terms under which the United States will be subject to suit, and it has power to "lay and collect Taxes * * * and Excises," U.S. Const. Art. I, § 8, Cl. 1. To be sure, as respondents assert, Congress lacks the power to tax exports. But that fact alone does not mean that a taxpayer's mere invocation of the Export Clause must halt the collection of taxes while the constitutional claim is resolved—on that reasoning, any taxpayer with an Export Clause objection could unilaterally withhold payment of a tax or fee, even if his objection turns out not to be meritorious. The Export Clause has never been held to

require such unique treatment, and this Court should not so construe it now, for two reasons.

First, respondents fail to recognize that the tax-refund procedure is a conditional waiver of sovereign immunity. See *United States* v. *Dalm*, 494 U.S. 596, 608-609 (1990). The constitutional nature of the claim being asserted pursuant to that conditional waiver does not justify undoing the conditions, as the treatment of other constitutional claims illustrates. For example, the government lacks power to take private property for public use without paying just compensation. Yet a plaintiff who sues for the constitutionally required compensation must proceed according to the terms of the United States' waiver of immunity. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753-754 (2008). Indeed, for nearly a hundred years until the Tucker Act was enacted, there was no general waiver of sovereign immunity, and Congress rather than the courts awarded compensation for takings. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Similarly, a State's action against the United States pursuant to the constitutional equal-footing doctrine must proceed according to the jurisdictional limitations of the Quiet Title Act of 1972, including its time bar. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286-287 (1983).

Second, even if the sovereign immunity of the United States were not at issue, this Court has repeatedly recognized that federal and state taxing authorities have an "exceedingly strong interest in financial stability," and for that reason "it is well established" that those taxing authorities "need not provide predeprivation process for the exaction of taxes." *McKesson*, 496 U.S. at 37. For those reasons, federal law requires some taxpayers (including excise taxpayers) to pay first, and bars them from seeking prospectively to enjoin the operation of any tax. 26 U.S.C. 7421.

"In this manner the United States is assured of prompt collection of its lawful revenue." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (*Williams Packing*).[7] And as this Court has held, that requirement is perfectly legitimate, even as applied to a taxpayer who claims that the Constitution forbids the federal government from taxing him. "[A] suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." *Dodge* v. *Osborn*, 240 U.S. 118, 121 (1916).[8]

Under those principles, the availability of the refund remedy is a complete answer to respondents' Export Clause objections. Had respondents refused to pay the coal tax and sued to enjoin its collection, they would have been directed to pay the tax and file a refund claim, and the constitutional nature of their objection would not have mattered in the slightest. Even the cases that respondents cite

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[7] If excise taxpayers refuse to pay the tax and as a result receive certain notices of levy or lien action, they may request a collection-review administrative hearing (with judicial-review rights), at which they may dispute the existence or amount of the underlying tax liability if they have had no prior opportunity to do so. See 26 U.S.C. 6320, 6330(c)(2)(B) and (d)(1).

[8] Respondents suggest (Br. 47, 49) that there is a distinction between taxes that are unconstitutional per se (such as a tax on exports) and taxes that are unconstitutional only if discriminatory. But this Court has upheld post-deprivation remedies even with respect to taxes that are altogether beyond the government's power. See, *e.g.*, *Dodge*, 240 U.S. at 119 (tax allegedly "void for repugnancy to the Constitution"). And in any event, taxes that are found unconstitutional because they are discriminatory may be invalidated—if, for example, the legislature cannot or will not cure the discrimination retroactively. See *McKesson*, 496 U.S. at 40-41; see also, *e.g.*, *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (striking down income tax on rents from property under the Direct Tax Clause, before adoption of Sixteenth Amendment).

illustrate this point: *Williams Packing* reaffirmed that 26 U.S.C. 7421 limits taxpayers who cannot show irreparable injury (as respondents cannot, see Resp. Br. 40 n.27) to post-payment remedies. See 370 U.S. at 6-7.[9] And respondents' other key case, *Leedom* v. *Kyne*, 358 U.S. 184 (1958), permitted nonstatutory judicial review of the plaintiff's claim before agency proceedings were completed only because the plaintiff had "no other means" to "protect and enforce [its statutory] right." *Id.* at 190. What was "central to [the] decision in *Kyne* was the * * * [deprivation] of a meaningful and adequate means of vindicating its statutory rights"—not, as respondents claim, the agency's exceeding its authority. *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991). Because respondents had—but forwent—a "meaningful and adequate opportunity" to vindicate their own rights under the Export Clause, *Kyne* simply has no application here. *Ibid.*

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[9] *Williams Packing* also held that even if a taxpayer *can* show irreparable injury, it still cannot seek prospective relief unless the government acted without "good faith" in assessing the tax. 370 U.S. at 7. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.* That was not the case in *Williams Packing*, and it is not the case here. The taxes at issue here were for 1994 through 1996. Pet. App. 9a. The proper interpretation of the Export Clause was sufficiently debatable to warrant this Court's attention in 1996 (when *IBM* was decided), as well as in 1998 (when *U.S. Shoe* was decided). But, of course, even if respondents could have satisfied *Williams Packing* had they tried to seek injunctive relief, that would not strengthen their case at this juncture. To the contrary, the possibility of obtaining injunctive relief in extraordinary cases is a further reason why respondents, after making no effort to pursue that avenue and paying their taxes, may not dismiss the entire tax-refund process as woefully inadequate simply by emphasizing that the prohibitions of the Export Clause are emphatic.

Thus, the Export Clause would not have given respondents any different remedy *before* payment. It follows, therefore, that *after* they paid the tax and stood in precisely the same position as any other eligible refund claimant, the Export Clause did not entitle them to a separate cause of action. Not only should Export Clause claims not be read *out* of the tax-refund remedy, the constitutional considerations discussed above explain why Congress would want to keep them firmly *within* the scope of that remedy. Indeed, in this context it appears that the *only* reason respondents can give for why they should be permitted to proceed on a freestanding Export Clause cause of action, as opposed to the refund remedy, is that they would not be time-barred under the former as they are under the latter. Respondents' failure to comply with well-established time limitations is no basis for fashioning out of whole cloth a novel and wholly unnecessary alternative remedy.

E. The Export Clause Does Not Create An Implied Private Right Of Action

The foregoing discussion establishes that respondents were required to proceed under the tax-refund statute before invoking the trial court's Tucker Act jurisdiction, because the refund procedure affords full relief for meritorious and timely constitutional claims and expressly bars all suits to recover tax overpayments not identified in timely refund claims. Thus, respondents' assertion (Br. 8-25) that this Court should recognize a hitherto-undiscovered implied right of action directly under the Export Clause is simply beside the point, because any such cause of action would be subject to the very procedural limitations that respondents seek to evade. Even if that were not the case, however, respondents have failed to show that the Export Clause should be read to create a freestanding constitutional cause of action.

1. Respondents' analysis of the intersection between the Export Clause and the Tucker Act is flawed in numerous respects, but it does include one correct statement: "Congress cannot change the meaning of the Constitution through legislation." Br. 21. Yet respondents are arguing in essence that the effect of the Export Clause is to be determined according to a body of law—"money-mandating" analysis—developed not under the Constitution, but under the Tucker Act. That argument lacks merit.

When a claimant sues the United States, it must identify a waiver of sovereign immunity *and* a cause of action giving it a right to recover money damages. See, *e.g.*, *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003). The Tucker Act provides the waiver of immunity (and the grant of federal jurisdiction), but it does not create a cause of action, which must instead arise from a source of substantive rights. *Id.* at 472. A statute creates a right enforceable under the Tucker Act if it "can fairly be interpreted as mandating compensation by the Federal Government." *Mitchell*, 463 U.S. at 217 (citations omitted). That money-mandating analysis is a method of interpreting federal statutes and regulations to determine whether Congress meant them to create substantive rights enforceable in a Tucker Act suit. *Bowen* v. *Massachusetts*, 487 U.S. 879, 906 n.42 (1988).

Money-mandating analysis does not remotely provide a sufficient basis for inferring causes of action directly under the Constitution itself. Unlike the statutes and regulations to which the courts apply money-mandating analysis, the Constitution was not written with the Tucker Act in mind. Only a very small number of constitutional provisions can be construed to create private causes of action of their own force. The remainder cannot, and Congress's later enact-

ment of the Tucker Act did not, and could not, change that reality.

Respondents object that the text of the Tucker Act does not distinguish between constitutional and statutory claims. But that is unsurprising, because in both cases the Tucker Act serves the same function—waiving sovereign immunity and granting jurisdiction to the courts in which the claim may proceed. In *neither* case does the Tucker Act provide a cause of action. *United States* v. *Testan*, 424 U.S. 392, 398 (1976). And it is in that respect—determining whether a cause of action exists—that constitutional and statutory provisions require different analysis.

Respondents also point to stray statements in this Court's Tucker Act decisions equating constitutional, statutory, and regulatory claims for purposes of the Tucker Act. But those decisions properly are read merely as quoting or paraphrasing the Tucker Act, without applying money-mandating analysis to every source of substantive rights including the Constitution. See, *e.g.*, *Mitchell*, 463 U.S. at 216. Indeed, this Court has never held that a provision of the Constitution confers an express or implied right of action against the United States based merely on a conclusion that a constitutional provision is "money-mandating." The Constitution was not at issue in *Testan*, the first case in the line; nor in the cases that *Testan* cited, see 424 U.S. at 400; nor in the cases that follow it, see, *e.g.*, *Mitchell*, 463 U.S. at 216-217. And *Testan* distinguished cases concerning an express right of action under the Takings Clause. See U.S. Br. 34-35.

The money-mandating analysis is particularly insufficient in the circumstances of this case. Congress has provided a statutory right of action—the tax-refund procedure—through which excise taxpayers may have their Export Clause claims fully vindicated. Perhaps Congress en-

acted that procedure because it perceived the Export Clause to be money-mandating in some sense. More likely, Congress found it appropriate to provide a remedy for all illegally assessed taxes. But whatever the reason for its creation, the fact of the remedy's existence makes any inquiry into the money-mandating nature of the Export Clause irrelevant. Because a monetary remedy for Export Clause violations *already* exists, there is no need to inquire whether such a remedy *must* exist, and no basis for inferring a *second*, enhanced constitutional remedy. This Court has been reluctant to find new *Bivens* remedies even for a plaintiff for whom "it is damages or nothing." U.S. Br. 36-37 (quoting *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)). The hardship of a three-year statute of limitations is hardly a basis for inferring a cause of action here.

2. Nothing in this Court's Export Clause cases contradicts this analysis or endorses respondents' theory of a constitutional cause of action. In *IBM*, of course, the taxpayer filed a refund claim and sued under the tax-refund statute. See p. 11, *supra*. In *U.S. Shoe*, a special provision directed that the HMT be treated not as a tax, but as a "customs duty," so this Court harmonized that special provision with the Court of International Trade's jurisdiction over matters relating to "revenue from imports." 523 U.S. at 365-366 (citations omitted). The Court never discussed the source of U.S. Shoe's cause of action, which simply was not at issue (and has not been at issue in subsequent challenges to the HMT brought under the customs-protest statute). U.S. Br. 32 & n.10. The existence of a cause of action, this Court has often held, is not jurisdictional and may be assumed. See *Bell* v. *Hood*, 327 U.S. 678, 681-685 (1946) (deciding jurisdiction while assuming, but not resolving, the existence of a *Bivens* cause of action long before *Bivens* was decided). And nonjurisdictional assumptions of this sort are not pre-

cedential, let alone binding. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989).[10]

If this Court's Export Clause cases give any indication, they suggest that there is no freestanding constitutional cause of action. Respondents argue (Br. 42 n.30) that *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is off point because the taxpayer pressed its Export Clause argument by bringing a statutory claim for a refund, not a freestanding constitutional claim. But on respondents' theory, *New York & Cuba Mail* would have been decided the opposite way had the taxpayer's complaint simply invoked the Export Clause rather than the refund statute. That suggestion is highly implausible; it is far more likely that no one thought of the Export Clause as giving rise to a constitutional cause of action when the Clause can so readily be enforced by means of the tax-refund remedy.

F. Respondents Can Recover Interest Only By Proceeding Under The Tax-Refund Statute

On respondents' view, the procedural limitations that apply to claims for overpayment of tax do not apply to freestanding claims under the Export Clause—but 28 U.S.C. 2411, the provision awarding interest on judgments for overpayment of tax, *does* apply because their "damages" claims, Pet. App. 37a-38a, are in fact claims for an "overpayment" of "internal revenue tax" within the meaning of

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[10] Nor did the Court address the question in its Compensation Clause cases, as respondents incorrectly suggest. The only jurisdictional question in *United States* v. *Will*, 449 U.S. 200 (1980), was whether federal judges' financial interest in the case affected jurisdiction. *Id.* at 211-212 (holding that it did not). The subsequent decision in *United States* v. *Hatter*, 532 U.S. 557 (2001), did not consider the Federal Circuit's jurisdictional ruling from nine years before, which at that point the government no longer contested.

Section 2411.[11] In combination, respondents' positions are untenable, because they contradict the statutory structure, history, and purpose.

Respondents contend that Section 2411 is a standalone provision, to be read in isolation and without reference to the tax-refund procedure, because the refund procedure was enacted long before. What respondents overlook is that for the first years of the tax-refund statute, no interest was available on refunds, but when Congress decided to make interest available, it enacted parallel provisions: one for interest on overpayment claims resolved by a refund, now 26 U.S.C. 6611, and one for interest on overpayment claims resolved by litigation, now Section 2411. See Revenue Act of 1921, ch. 136, § 1324(a) and (b), 42 Stat. 316. Those provisions are to be read *in pari materia*. Indeed, Congress has treated the two provisions as counterparts since their inception, simultaneously amending or re-enacting both of them on at least six separate occasions. See Gov't C.A. Br. 32 n.9. And when Congress re-codified the Judicial Code, but mistakenly left out the judgment-interest provision, it promptly corrected the error, with the legislative history of Section 2411 noting Congress's intent to restore "the provisions * * * of the former Judicial Code *for the payment of interest on tax refunds*." H.R. Rep. No. 352, 81st Cong., 1st Sess. 19 (1949) (emphasis added).

Section 6611 plainly requires the filing of a timely refund claim, because it provides for interest on "any overpayment" to be paid in conjunction with a credit or refund of that overpayment, see 26 U.S.C. 6611(b), and no credit or

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[11] Respondents seek "damages consisting of a refund," Pet. App. 37a-38a, but insist that other Export Clause plaintiffs should be permitted to seek consequential damages for Export Clause violations, Br. 32. Section 2411 is plainly limited to interest on "the amount of the overpayment," and does not contemplate interest on money damages.

refund can be allowed unless the taxpayer files a timely refund claim, see 26 U.S.C. 6511(b)(1), 6514(a)(1). Section 2411 must be given the same reading. As this Court has recognized, the judgment-interest statute is not meant to permit taxpayers to circumvent limitations in the refund-interest statute. See *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 757 (1961) (applying a limitation from the refund-interest statute to an award of interest on a judgment, to avoid the "anomalous, nonuniform and discriminatory result" and forum-shopping incentive that would result from treating the two parallel interest provisions divergently).

Respondents overread a superficial difference between Section 2411 and Section 7422(a), the provision of the integrated framework that precludes a taxpayer from filing suit at all "until a claim for refund or credit has been duly filed." Respondents claim (Br. 51) that Section 2411 is broader in scope than Section 7422(a) because the latter provision does not use the word "overpayment." But in reality, Section 7422(a)'s scope is broader than just the few words respondents quote, and respondents can identify no substantive difference between the two provisions.

The inescapable inference from the interconnectedness of the statutory framework is that Section 2411 grants interest only to taxpayers who have pursued a timely refund claim and, if the IRS had granted that claim, would have been eligible for interest under Section 6611. Respondents insist that they are proceeding outside the tax-refund procedure, and accordingly, if they may proceed at all, they must do so without the benefit of Section 2411.

As for respondents' claim (which was not advanced in their brief in opposition) that the Export Clause itself grants them interest (Br. 52-53), the Federal Circuit has correctly rejected that contention. See *United States Shoe Corp.* v. *United States*, 296 F.3d 1378, 1384-1386 (2002),

cert. denied, 538 U.S. 1056 (2003). Respondents' analogy to the Takings Clause, whose guarantee of "just compensation" has been construed to require the payment of interest, is unpersuasive. See *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 305-306 (1923) (relying on the term "compensation"). The Export Clause, unlike the Takings Clause, does not guarantee a substantive recovery; it prohibits Congress from taking certain action. Even if this Court were to find that prohibition enforceable through an implied private right of action, a refund would provide constitutionally adequate redress for a wrongly exacted tax. See, *e.g.*, *McKesson*, 496 U.S. at 51-52 (stating that "a refund of the excess taxes paid" would "satisf[y] the minimum federal requirements"); see also *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) (per curiam) (referring to the Takings Clause as "[t]he only exception" to the rule that the United States is not liable for interest without Congress's express consent).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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