



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

October 13, 2022

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Trafigura Trading LLC v. United States*, 29 F.4th 286 (5th Cir. 2022) (No. 21-20127)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to file a petition for a writ of certiorari in the above-referenced case. The judgment affirmed the district court's determination that 26 U.S.C. 4611(b), as applied to exports of crude oil, violates the Export Clause of the U.S. Constitution, Art. I, § 9, Cl. 5. A copy of the decision of the U.S. Court of Appeals for the Fifth Circuit is enclosed.

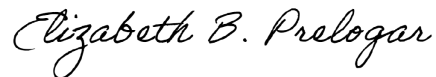
The court of appeals concluded in this tax-refund case that the federal tax on crude oil imposed by 26 U.S.C. 4611(b) cannot constitutionally be applied to exporters. In *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996), the Supreme Court held that the Export Clause precludes even generally applicable or nondiscriminatory federal taxes that apply to goods in export transit. The Supreme Court's most recent decision under the Export Clause, *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998), reaffirmed that holding. *Id.* at 367. The Court in *U.S. Shoe* observed that the Export Clause does not bar Congress from imposing a "user fee" on exports, but the Court concluded that a tax could not be treated as a user fee for Export Clause purposes unless it "lack[ed] the attributes of a generally applicable tax" and was "designed as compensation for Government-supplied services, facilities, or benefits." *Id.* at 363. Applying that principle in this case, the court of appeals held that "§ 4611(b) imposes a tax on exports in violation of the Export Clause," not a permissible user fee, and that "[t]he United States may not enforce § 4611(b) on crude oil 'exported from the United States.'" 29 F.4th at 294 (quoting 26 U.S.C. 4611(b)(1)(A)).

The Department of Justice does not agree with certain aspects of the Fifth Circuit's conclusion that the tax imposed by 26 U.S.C. 4611(b) cannot be treated as a permissible user fee under the Supreme Court's Export Clause precedent, and we remain committed to defending the statute in other circuits. But, in the Department's view, filing a petition for a writ of certiorari in the present circumstances is unwarranted. The Fifth Circuit is the first federal court of appeals to resolve a challenge to the constitutionality of 26 U.S.C. 4611(b). There is accordingly not yet any disagreement in the courts of appeals on that issue. Moreover, no opinion commanded a

majority of the Fifth Circuit panel in this case, because one judge concurred only in the judgment and another dissented. And it may be possible to remedy the putative constitutional infirmity the lead opinion identified through legislative amendment. The Department of Justice is available to assist Congress, if it so desires, in drafting legislation that could accomplish the objectives of this tax through means that do not raise concerns under the Export Clause.

In these circumstances, I have decided not to seek Supreme Court review. A petition for a writ of certiorari in this case would be due, after extensions, on October 20, 2022. Please let me know if we can be of any further assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth B. Prelogar".

Elizabeth B. Prelogar
Solicitor General

Enclosure