IN THE SUPREME COURT OF THE UNITED STATES

No. 22A143

UNITED STATES OF AMERICA, APPLICANT

v.

TRAFIGURA TRADING LLC

APPLICATION FOR A FURTHER EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Pursuant to Rules 13.5 and 30.3 of this Court, the Solicitor General, on behalf of the United States of America, respectfully requests a further 29-day extension of time, to and including October 20, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment on March 24, 2022 and denied a petition for rehearing en banc on May 23, 2022. By order dated August 18, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 21, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). A copy of the opinion of the court of appeals, which is reported at 29 F.4th 286, is attached. App., infra, 1a-14a.

1. The Export Clause of the United States Constitution bars Congress from imposing a "Tax or Duty" on "Articles exported from any State." Art. I, § 9, Cl. 5. It does not, however, prevent Congress from imposing a "user fee" on exports. United States v. U.S. Shoe Corp., 523 U.S. 360, 363 (1998) (citing Pace v. Burgess, 92 U.S. 372 (1876)).

This case involves a per-barrel "tax" on crude oil that is transported in the United States. 26 U.S.C. 4611. Section 4611 imposes a fee -- which applies only once to each barrel -- on either an importer, a refiner, a user, or an exporter. 26 U.S.C. 4611(b)(1)(B), (d). Amounts received under Section 4611 are appropriated to the Oil Spill Liability Trust Fund, 26 U.S.C. 9509(b)(1), which is used for certain oil-spill-related purposes, including costs of removing oil, reimbursement of cleanup costs above a statutory cap, third-party compensation, research and development about oil-spill pollution, and administration of the Oil Pollution Act of 1990, see App., infra, 5a.

2. Respondent, Trafigura Trading LLC, is a firm that purchases domestic crude oil and exports it from the United States. 485 F. Supp. 3d 822, 824. During tax years 2014 to 2017, it paid the fee under Section 4611 for approximately 50 million barrels of oil that it exported. Ibid. In 2017, it requested a refund of those taxes. Ibid. The Internal Revenue Service denied the refund, and respondent filed this suit in the United States District Court for the Southern District of Texas, seeking a refund of those

taxes on the ground that they were assessed in violation of the Export Clause. Ibid.

The district court granted summary judgment for respondent. 485 F. Supp. 3d 822. The district court recognized that the Export Clause does not preclude a charge that "is actually a 'legitimate user fee.'" Id. at 825 (quoting U.S. Shoe, 523 U.S. at 367). It concluded, however, that, in light of its reading of this Court's decisions in Pace and U.S. Shoe, "the charge imposed under § 4611(b) is an unconstitutional tax on exports." Id. at 826.

3. The court of appeals affirmed. App., infra, 1a-14a. Judge Ho authored a plurality opinion, id. at 1a-9a, and Judge Wiener concurred in the judgment without filing a separate opinion, id. at 2a n.*. Judge Graves dissented. Id. at 9a-14a.

a. The plurality opinion concluded that "§ 4611(b) imposes a tax on exports in violation of the Export Clause" and that "[t]he United States may not enforce § 4611(b) on crude oil 'exported from the United States." App., infra, 9a. In Judge Ho's view, this Court's decisions in Pace and U.S. Shoe supply two criteria for determining whether the Section 4611(b) charge is a tax or a user fee: "First, [a court] must consider whether the charge under § 4611(b) is based on the quantity or value of the exported oil -- is so, then it is more likely a tax." Id. at 7a. "Second, [a court] must consider the connection between the [Oil Spill Liability Trust] Fund's services to exporters, if any, and what exporters pay for those services under § 4611(b)." Ibid. Judge Ho

stated that "th[e] connection need not be a perfect fit" but it "must 'fairly match' or 'correlate reliably with' exporters' use of government services." Ibid. (citation omitted).

The government did not dispute that the amount of the charge is proportional to the quantity (in barrels) of the oil exported, and the plurality opinion concluded that the charge is not proportional to the services that oil exporters receive. App., infra, 7a-8a. The plurality reserved judgment on the government's contention that the Section 4611(b) "charge operates essentially as a premium for government-provided insurance, in the form of capped liability for oil spills." Id. at 7a. In Judge Ho's view, the provision also funds several "other things," which cannot "plausibly be conceived as 'services' provided to exporters in exchange for their payment[s]." Id. at 8a. It therefore "saddles exporters with the cost of anti-pollution measures that generally benefit society at large." Ibid.

b. In his dissenting opinion, Judge Graves disagreed with the plurality opinion's interpretation and application of Pace and U.S. Shoe. App., infra, 11a-13a. In his view, the Section 4611(b) charge's dependence on the quantity of oil exported (rather than the value of that oil) is consistent with a user fee and analogous to the stamp duty for tobacco intended for export that this Court upheld in Pace. Id. at 11a-12a. He additionally disagreed with the plurality opinion's premise that, in determining whether a charge is sufficiently correlated with the benefits, a court should

consider only the benefits to exporters. Id. at 12a. And Judge Graves reasoned that, in any event, oil exporters are the primary beneficiaries of the services that the Section 4611(b) charge is used to fund, id. at 12a-13a, and that the fee is "not imposed on exporters" but on "oil and its uses," id. at 13a.

c. The government filed a petition for rehearing en banc, which was denied on May 23, 2022. App., infra, 15a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed for further consultation within the Department of Justice and with the Internal Revenue Service, and to assess the potential legal and practical ramifications of the court of appeals' decision. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

SEPTEMBER 2022

APPENDIX

Court of appeals opinion....................................1a

Court of appeals order denying petition for rehearing.........15a

ing compensatory damages, including for "emotional pain" and "mental anguish," and punitive damages for certain claims brought under the civil rights statutes); *see also Henry v. Corpcar Servs. Hous., Ltd.*, 625 F. App'x 607, 617 (5th Cir. 2015) (per curiam) (affirming the award of damages for a hostile work environment claim involving a single incident of racial harassment).

Accordingly, we remand for further consideration not inconsistent with this opinion. In all other respects, the district court judgment is affirmed.

AFFIRMED in part. REVERSED in part. REMANDED.

TRAFIGURA TRADING LLC, Plaintiff—Appellee,

v.

UNITED STATES of America, Defendant—Appellant.

No. 21-20127

United States Court of Appeals, Fifth Circuit.

FILED March 24, 2022

Background: Commodity trading company brought tax refund action alleging that statute imposing tax on domestic crude oil exported from United States on per-barrel basis violated constitutional prohibition against export taxes. The United States District Court for the Southern District of Texas, Andrew S. Hanen, J., 485 F.Supp.3d 822, entered summary judgment in company's favor, and United States appealed.

Holdings: The Court of Appeals, Ho, Circuit Judge, held that charge was unconstitutional tax on exports.

Affirmed.

Graves, Circuit Judge, dissented and filed opinion.

1. Customs Duties ⚷1

Export Clause categorically bars Congress from imposing any tax on exports. U.S. Const. art. 1, § 9, cl. 5.

2. Customs Duties ⚷1

Federal tax on exports may be recharacterized—and upheld—as user fee if it is designed as compensation for government-supplied services, facilities, or benefits. U.S. Const. art. 1, § 9, cl. 5.

3. Customs Duties ⚷1

To determine whether charge on exports is tax barred by Export Clause, court must consider: (1) whether charge is based on quantity or value of exported goods—if so, then it is more likely tax, and (2) connection between services funded by charge to exporters, if any, and what exporters pay for those services. U.S. Const. art. 1, § 9, cl. 5.

4. Customs Duties ⚷1

Charge is not tax under Export Clause simply because it is proportional to quantity or value of export. U.S. Const. art. 1, § 9, cl. 5.

5. Customs Duties ⚷1

Charge imposed on crude oil exported from United States on per-barrel basis was unconstitutional tax on exports, even though proceeds were paid into Oil Spill Liability Trust Fund; funds were used to pay for variety of anti-pollution measures for general benefit of society, rather than services used or usable by exporters. U.S. Const. art. 1, § 9, cl. 5; 26 U.S.C.A.

§ 4611(b); Oil Pollution Act of 1990 § 1002, 33 U.S.C.A. § 2702.

West Codenotes

Held Unconstitutional

26 U.S.C.A. § 4611(b)

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:19-CV-170, Andrew S. Hanen, U.S. District Judge

Steven Jon Knight, Lawrence W. Sherlock, Esq., Chamberlain Hrdlicka, Houston, TX, Michael J. Haungs, Esq., Supervisory Attorney, U.S. Department of Justice, Tax Division, Appellate Section, Washington, DC, for Plaintiff-Appellee.

Judith Ann Hagley, Esq., Francesca Ugolini, U.S. Department of Justice, Tax Division, Appellate Section, Washington, DC, Manuel Paul Lena, Esq., U.S. Department of Justice Tax Division, Dallas, TX, for Defendant-Appellant.

Before WIENER, GRAVES, and HO, Circuit Judges.

JAMES C. HO, Circuit Judge:*

Alexander Hamilton was non-stop. There were a million things he wanted done. So when he was chosen for the Constitutional Convention, he spoke like he was running out of time. He talked for six hours. The Convention was listless. And among his ideas was the power to tax exports.

But the Southern states feared export taxes would disproportionately harm their economies. They worried Congress would tax them relentlessly, and then turn around and run a spending spree. They knew that, if Congress could tax exports, it would not be a question of if, but of which one.

So they demanded a categorical ban on export taxes. They knew they would have to holler just to be heard. But they would rather be divisive than indecisive. So they didn't throw away their shot. They made an all-out stand: No ban on export taxes, no Constitution.

Northern delegates expressed their disgust—but the South's agenda was there discussed. The North wanted to tax exports and regulate commerce. But the South wanted neither. The delegates were diametrically opposed—foes. But they took a break. And they eventually emerged with a compromise, having open doors that were previously closed: The federal government could regulate commerce, but not tax exports.

The compromise no doubt frustrated many citizens. But they had no say in what their leaders traded away—they weren't in the room where it happened. A group of delegates suggested another approach—export taxes only if approved on a supermajority vote—hoping that would be enough. But the South was not satisfied. It worried that, if it stood for nothing, what would it fall for? So rather than wait for it, they let the proposal burn.

Ultimately, though, Hamilton got more than he gave. And he wanted what he got. But as for the power to tax exports, he was helpless.

As a result, the Constitution forbids Congress from taxing exports. And that resolves this case. The federal government insists that Trafigura Trading must pay a tax on domestic crude oil that it exports from the United States. But the district court said no to this. We affirm.[1]

*. Judge Wiener concurs in the judgment.

1. *Cf.* Lisa A. Tucker, ed., *Hamilton* and the Law: Reading Today's Most Contentious Legal Issues through the Hit Musical (2020).

I.

The Constitutional Convention began in Philadelphia on May 25, 1787. 1 Max Farrand, ed., THE RECORDS OF THE FEDERAL CONVENTION of 1787, at 1 (1966). Hamilton did not speak during the first few weeks of the Convention. But "[i]t was predictable that when the wordy Hamilton broke silence, he would do so at epic length." Ron Chernow, ALEXANDER HAMILTON 231 (2004). "On Monday morning, June 18, the thirty-two-year-old prodigy rose first on the convention floor and in the stifling, poorly ventilated room he spoke and spoke and spoke. Before the day was through, he had given a six-hour speech (no break for lunch) that was brilliant, courageous, and, in retrospect, completely daft." *Id.*

In that speech, Hamilton set forth his vision for a strong central government, armed with a number of powers that had been omitted in the Articles of Confederation. In particular, he was the first delegate to suggest that the new federal government should have a broad power to tax that would specifically include exports: "Whence then is the national revenue to be drawn? from Commerce, even {from} exports which notwithstanding the common opinion are fit objects of moderate taxation." 1 Farrand, *supra*, at 286.

The power to tax exports was endorsed by a number of fellow delegates. James Madison agreed that "the power of taxing exports is proper in itself, and as the States cannot with propriety exercise it separately, it ought to be vested in them collectively." 2 Farrand, *supra*, at 306. Gouverneur Morris likewise affirmed that "[t]axes on exports are a necessary source of revenue." *Id.* at 307. James Wilson was also "decidedly agst prohibiting general taxes on exports," *id.*, for "[t]o deny this power is to take from the Common Govt. half the regulation of trade," *id.* at 362.

But Southern delegates were firmly opposed to export taxes. The South was the nation's primary exporter, so any federal export tax would disproportionately burden Southern states. *See, e.g.*, Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 8 (2003). Southerners feared that the North would control the majority of seats in both Houses of Congress, and would use that power to aggrandize itself at the South's expense by taxing exports. As George Mason put it, "a majority when interested will oppress the minority.... If we compare the States in this point of view the 8 Northern States have an interest different from the five Southn. States, — and have in one branch of the legislature 36 votes agst 29. and in the other, in the proportion of 8 agst 5." 2 Farrand, *supra*, at 362.

So a number of Southern delegates voiced firm opposition to the Constitution unless it explicitly prohibited taxes on exports. Charles Pinckney warned that, "if the Committee [of Detail] should fail to insert some security to the Southern States agst.... taxes on exports, he shd. be bound by duty to his State to vote agst. their Report." *Id.* at 95. His fellow South Carolina delegate Pierce Butler likewise made clear that "he never would agree to the power of taxing exports." *Id.* at 374.

Northern delegates soon appreciated that, as Roger Sherman of Connecticut put it, "[a] power to tax exports would shipwreck the whole." *Id.* at 308.

There would be no Constitution, then, unless the delegates reached a compromise on the question of export taxes. They did so by trading the power to tax exports for the power to regulate commerce. Specifically, the South wanted to prohibit export taxes and impose a super-majority voting rule for commercial regulations, while the North wanted to permit export taxes and require only a simple majority to regulate

commerce. *See* Ben Baack et al., *Constitutional Agreement During the Drafting of the Constitution: A New Interpretation*, 38 J. LEGAL STUD. 533, 546–47 (2009). So a deal was struck: A group of Northern delegates agreed that they would vote to prohibit export taxes, and in return, a group of Southern delegates agreed that they would vote for the simple majority rule for regulations of commerce. *Id.* at 541 (citing sources).

When the Convention returned to these topics for a final vote, a group of delegates tried to revive the power to tax exports. They proposed a super-majority voting rule for export taxes, "requiring the concurrence of 2/3 or 3/4 of the legislature in such cases." 2 Farrand, *supra*, at 359. Madison formally moved "to require 2/3 of each House to tax exports — as a lesser evil than a total prohibition." *Id.* at 363. But the proposal failed, with every Southern delegation voting in the negative. *Id.* Another proposal would have allowed export taxes for the purpose of regulating trade, while prohibiting such taxes "for the purpose of revenue." *Id.* But that too failed. *Id.*

The Convention eventually adopted the language that now appears in Article I, Section 9 of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

[1] The Supreme Court has repeatedly recognized the importance as well as the breadth of the Export Clause. As the Court observed in one of the primary precedents we examine today, "the Export Clause categorically bars Congress from imposing any tax on exports." *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). "[T]he Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." *Id.* at 367, 118 S.Ct. 1290. It is a "simple, direct, unqualified prohibition" on any tax on exports. *Id.* at 368, 118 S.Ct. 1290. *See also Fairbank v. United States*, 181 U.S. 283, 290–93, 21 S.Ct. 648, 45 L.Ed. 862 (1901) (observing that it is "obvious" from the text and history of the Export Clause "that the National Government should put nothing in the way of burden upon . . . exports"); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 70, 43 S.Ct. 485, 67 L.Ed. 865 (1923) (recognizing that exports enjoy "liberal protection" from taxation); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 860, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) ("there is substantial evidence from the [Convention] Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language").[2]

II.

Trafigura Trading is a commodity trading company that purchases and exports crude oil from the United States. Between 2014 and 2017, Trafigura exported around 50 million barrels of crude oil from oilfields in Texas, Louisiana, and North Dakota. Trafigura remitted over $4 million to the

2. Indeed, the Export Clause played a central role in the defense of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Without judicial review, Chief Justice Marshall explained, Congress would be able to enact an export tax, and the federal judiciary would have no choice but to enforce it: "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." *Id.* at 179. To Chief Justice Marshall, denying judicial enforcement of the Export Clause was so obviously absurd that it served as a powerful argument in support of judicial review itself.

IRS for these exports, as required by 26 U.S.C. § 4611(b). That provision imposes a "tax"—at a rate of 8 or 9 cents per barrel, depending on the year—on domestic crude oil "used in or exported from the United States." *Id.* § 4611(b)–(c)(2)(B).

Proceeds from § 4611(b) go to the Oil Spill Liability Trust Fund. *See id.* § 9509(b)(1). The Fund serves several functions.

To begin with, the Fund operates "much like insurance for the oil transportation industry": Parties pay into the Fund via § 4611(b), and if they are ever liable for the cleanup costs of an oil spill under 33 U.S.C. § 2702, the Fund reimburses them for all expenses above a statutory cap. *In re Frescati Shipping Co.*, 886 F.3d 291, 308 n.24 (3rd Cir. 2018), *aff'd sub nom. CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, ––– U.S. ––––, 140 S. Ct. 1081, 206 L.Ed.2d 391 (2020).

But that's not all. The Fund also covers costs incurred by federal, state, and Indian tribe trustees for natural resource damage assessment and restoration; removal costs of discharged oil from foreign offshore units; and related administrative, operational, and personnel expenses. 33 U.S.C. § 2712(a). More still, the Fund supports, among other things, research and development for oil pollution technology; studies into oil pollution's effects; marine simulation research; simulated environmental testing; and grants to universities and other research institutions. *Id.* § 2761(c).

Trafigura contends that § 4611(b) imposes an unconstitutional tax under the Export Clause. It sought a refund for the amount it paid under § 4611(b). But the IRS denied the request. Trafigura then sued to challenge the constitutionality of § 4611(b). The district court agreed with Trafigura that § 4611(b) imposes an unconstitutional tax and granted the refund accordingly. The United States appealed.

We review de novo the district court's grant of summary judgment. *Hernandez v. Reno*, 91 F.3d 776, 779 (5th Cir. 1996).

III.

When it comes to federal power to tax exports, the text of Article I, Section 9 of the Constitution is categorical: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

The ban on the power of the states to tax exports, by contrast, is less sweeping. It states that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection Laws.*" U.S. CONST. art. I, § 10, cl. 2 (emphasis added).

The inclusion of this exception in Article I, Section 10—allowing states to impose fees on exports that are "absolutely necessary for executing its inspection Laws"—naturally raises the question: Can the federal government impose similar fees on exports under Article I, Section 9?

Trafigura might argue that the omission of this language from Article I, Section 9 was intentional and must be given meaning. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (courts generally presume that drafters act "intentionally and purposely in the disparate inclusion or exclusion" of language) (quotations omitted); *United States v. Estrella*, 758 F.3d 1239, 1252 (11th Cir. 2014) ("When language is included in one . . . provision but not included in another related provision, that omission has an important meaning that [courts] cannot ignore.").

But the United States might respond that Article I, Section 10 simply makes explicit what is implicit in Article I, Sec-

tion 9—and that the Supreme Court has construed other provisions of the Constitution in a similar manner. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499–500, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (applying equal protection principles to the federal government); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213–17, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (same).

[2] In any event, the Supreme Court has resolved this question. It has held that a federal "tax" on exports may be recharacterized—and upheld—as a "user fee," if it is "designed as compensation for Government-supplied services, facilities, or benefits." *U.S. Shoe*, 523 U.S. at 363, 118 S.Ct. 1290.

In doing so, however, the Supreme Court has cautioned that courts must carefully "guard against . . . the imposition of a duty under the pretext of fixing a fee." *Pace v. Burgess*, 92 U.S. 372, 376, 23 L.Ed. 657 (1876).

A.

We must decide, then, whether § 4611(b) imposes a tax or a user fee. On its face, the text of § 4611(b) refers to the charge as a "tax." But "we must regard things rather than names" and consider whether the charge functions as "a bona fide user fee." *U.S. Shoe*, 523 U.S. at 367, 118 S.Ct. 1290 (quotations omitted).

Two Supreme Court decisions guide the analysis in this case—*Pace* and *U.S. Shoe.*

Start with *Pace*—the "time-tested" and "guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." *Id.* at 369, 118 S.Ct. 1290. *Pace* involved a federal excise tax on tobacco. Congress specifically exempted tobacco intended for export from the excise tax. To combat fraud, however, Congress required all exported tobacco to bear a stamp on its packaging. The stamps cost exporters 25 cents per package (later reduced to 10 cents per package) and were "intended for no other purpose than to separate and identify the tobacco [intended for] export, and thereby, instead of taxing it, to relieve it from . . . taxation." 92 U.S. at 375.

The Court held that the stamp charge was a user fee, not a tax prohibited by the Export Clause. The charge was "in no sense a duty on exportation," but was simply "compensation given for services properly rendered." *Id.* The amount of the fees was "proper" and not "excessive." *Id.* at 375–76. For example, "Congress did *not* limit the quantity or value of the tobacco packaged for export or the size of the stamped package; 'these were unlimited, except by the discretion of the exporter or the convenience of handling.' " *U.S. Shoe*, 523 U.S. at 369, 118 S.Ct. 1290 (quoting *Pace*, 92 U.S. at 375) (cleaned up, emphasis added).

Two features of the stamp charge made it a user fee rather than an export tax, as the Court noted in *Pace* and reaffirmed in *U.S. Shoe.* First, it "bore no proportion whatever to the quantity or value of the package on which the stamp was affixed," and second, it "was not excessive" given the cost of the services to prevent fraud and to "give the exporter the benefit of exemption from taxation." *Id.* (cleaned up).

Next up is *U.S. Shoe*, which involved a "harbor maintenance tax" applicable to "[e]xporters, importers, and domestic shippers" of commercial cargo passing through the nation's ports. *Id.* at 363, 118 S.Ct. 1290. The tax was computed on an ad valorem basis, in the amount of 0.125% of the cargo's value. Proceeds were deposited into a trust fund used to finance harbor maintenance and development projects. *Id.* An exporter filed a protest with the Customs Service alleging the unconstitutionali-

ty of the toll "to the extent it applies to exports." *Id.* at 363–64, 118 S.Ct. 1290.

The Court unanimously agreed that the ad valorem harbor maintenance charge was indeed an unconstitutional tax under the Export Clause, and not a permissible user fee. *Id.* at 363, 118 S.Ct. 1290. As the Court explained, a charge is a user fee only if it "fairly match[es] the exporters' use of" government services. *Id.* at 370, 118 S.Ct. 1290. That wasn't the case in *U.S. Shoe.* "The value of export cargo . . . does *not* correlate reliably with the federal harbor services used or usable by the exporter." *Id.* at 369, 118 S.Ct. 1290 (emphasis added). So the tax was barred by the Export Clause.

[3] *Pace* and *U.S. Shoe* tell us the following. First, we must consider whether the charge under § 4611(b) is based on the quantity or value of the exported oil—if so, then it is more likely a tax. Second, we must consider the connection between the Fund's services to exporters, if any, and what exporters pay for those services under § 4611(b). That connection need not be a perfect fit. *See Pace*, 92 U.S. at 375–76. But a user fee must "fairly match" or "correlate reliably with" exporters' use of government services. *U.S. Shoe*, 523 U.S. at 369–70, 118 S.Ct. 1290. Finally, we apply "heightened scrutiny," *Matter of Buffets, LLC*, 979 F.3d 366, 380 (5th Cir. 2020), and strictly enforce the Export Clause's ban on taxes by "guard[ing] against . . . the imposition of a [tax] under the pretext of fixing a fee," *U.S. Shoe*, 523 U.S. at 370, 118 S.Ct. 1290 (quotations omitted).

B.

The United States admits, as it must, that the "amount of the [§ 4611(b)] charge is based on the volume of oil transported." Exporters pay at a rate of 8 or 9 cents per "barrel"—or 8 or 9 cents per "42 United States gallons." 26 U.S.C. §§ 4611(c)(2)(B), 4612(a)(8). This proportional fee scheme—more oil, more money—is true down to the fraction: "In the case of a fraction of a barrel, the tax imposed by section 4611 shall be the same fraction of the amount of such tax imposed on a whole barrel." *Id.* § 4612(a)(9). So § 4611(b) is by design more like the tax in *U.S. Shoe* than the user fee in *Pace.*

[4] But the analysis does not end there. A charge is not a tax under the Export Clause simply because it is proportional to the quantity or value of the export. Under *U.S. Shoe*, we also consider whether the charge imposed by § 4611(b) fairly matches Trafigura's use of government services.

The United States claims that the charge operates essentially as a premium for government-provided insurance, in the form of capped liability for oil spills. Those who create more risk (*i.e.*, by exporting more oil) pay a higher premium. And as for the various other government activities supported by the Fund, such as research and development for oil pollution technology, the United States characterizes them as "oil-spill-related services." Based on that characterization, the United States concludes that the charge is a fee for those services, and not an effort to raise general revenue.

Trafigura counters, however, that the charge does not offset the cost of any service that it receives from the government. It challenges the government's insurance analogy. And it stresses that § 4611(b) finances a broad range of initiatives that are not "services" provided to exporters under any reasonable sense of the word. This last point is dispositive, so there is no need to address the government's insurance analogy.

A user fee is a charge for a specific service provided to, and used by, the pay-

or. *See U.S. Shoe*, 523 U.S. at 369, 118 S.Ct. 1290. A public agency might charge a user fee to visit a public park, tour a museum, or enter a toll road. In each case, you pay the fee, and in return, you get access to something of value—natural beauty and recreation, intellectual or aesthetic enrichment, uncongested roads. Put simply, user fees arise in the context of "value-for-value transaction[s]." Jensen, *supra*, at 37.

[5] There is no such discrete transaction here. Oil exporters subject to § 4611(b) are forced to pay for, among other things, reimbursements to federal, state, and Indian tribe trustees for assessing natural resource damage; research and development for oil pollution technology; studies into the effects of oil pollution; marine simulation research; and research grants to universities. *See* 33 U.S.C. §§ 2712(a), 2761(c). None of these things can plausibly be conceived as "services" provided to exporters in exchange for their payment.

To be sure, exporters do benefit indirectly from these activities. But the same could be said for virtually every other tax. After all, the government is supposed to use tax proceeds to provide benefits for taxpayers. The fact that people pay taxes to fund police and fire protection does not somehow turn those taxes into user fees. Likewise, the fact that oil exporters like Trafigura also happen to benefit from the government's "oil-spill-related" activities is beside the point—such benefits are not tied to a specific service that exporters receive as part of a value-for-value transaction. Exporters pay, society benefits.

So this case is far afield from *Pace.* When an exporter pays the government for a stamp to shield the exporter from taxation, that is a value-for-value transaction that is exempt from the Export Clause. *See* 92 U.S. at 375 (stressing that "[t]he stamp was intended for no other purpose than to . . . relieve [exported tobacco] from the taxation to which other tobacco was subjected"). Here, by contrast, exporters subsidize a mishmash of anti-pollution measures for the general benefit of society.

In sum, Congress has crafted a scheme in which crude oil exporters are forced to subsidize activities that are not "services used or usable by the exporter." *U.S. Shoe*, 523 U.S. at 369, 118 S.Ct. 1290. Section 4611(b) saddles exporters with the cost of anti-pollution measures that generally benefit society at large, and not specifically the exporter who pays the charge.

C.

A few words of response to the dissent. The dissent essentially theorizes that the oil industry, taken as a whole, causes oil spills, oil pollution, and environmental damage—and that the industry should therefore be held "responsible for [its] own actions and business practices." *Post*, at 297 (Graves, J., dissenting).

Forcing any industry or citizen to internalize their externalities is of course entirely reasonable as a policy matter. Many taxes are designed with precisely this goal in mind. Think of gasoline taxes designed to pay for road and infrastructure repair, mass transit, or air pollution mitigation—or carbon taxes crafted to force taxpayers to absorb the social cost of their emissions—or "sin taxes" on alcohol or gambling that are used to cover the cost of the social consequences of alcoholism or gambling addiction.

These are commonplace measures designed to achieve important ends for society—ends that go well beyond merely defraying the costs of the government providing a particular service or benefit to members of the public. But that's pre-

cisely what makes them a tax, rather than a fee. As the dissent's theory confirms, this is not a "value-for-value" transaction, in which a feepayer pays the fee to receive a service or benefit in return, and is thus better off as a result of the transaction. *See, e.g., U.S. Shoe*, 523 U.S. at 363, 118 S.Ct. 1290 (defining " 'user fee' " as "a charge designed as compensation for Government-supplied services, facilities, or benefits"); *Pace*, 92 U.S. at 374–75 (upholding user fee to cover "the expense attending the providing and affixing [tobacco export] stamps" in order to "relieve [the exporter] from ... taxation"). To the contrary, it's a "penalty-for-penalty" transaction, in which the taxpayer is penalized for engaging in anti-social behavior that penalizes others.

The dissent responds that the oil export tax is indeed a "value-for-value" transaction, because oil exporters pay the fee for the right to use our nation's valuable natural resources to conduct their for-profit business. *Post*, at 298 n.8 (Graves, J., dissenting). But that proves too much. *Every* export tax can be characterized as payment for the right to use our nation's resources to conduct one's for-profit business, such as our stature and diplomatic prowess on the world stage, our defense and national security capabilities, and our access to international trade protections and governance structures.

So under the dissent's approach, Congress would be fully empowered to tax exports "under the pretext of fixing a fee." *Pace*, 92 U.S. at 376. And that would contradict not just text but history as well.

Delegates at the Constitutional Convention debated a last-minute suggestion to allow export taxes enacted for the purpose of "regulations of trade," and to prohibit only those export taxes designed "for the purpose of revenue." 2 Farrand, *supra*, at 363. But they quickly rejected the idea.

If the Constitution forbids export taxes designed to further trade policy—and it plainly does—then there's no principled basis to allow export taxes designed to further environmental policy. That would defy the plain text as well as the Founders' understanding of our nation's charter. And Alexander Hamilton would not just "get more than he gave"—he would get more than the Constitution permits.

* * *

We hold that § 4611(b) imposes a tax on exports in violation of the Export Clause. The United States may not enforce § 4611(b) on crude oil "exported from the United States." We affirm.

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

Because there are genuine issues of material fact as to whether 26 U.S.C. § 4611 imposes a legitimate user fee, I would vacate the district court's grant of summary judgment on liability to Trafigura Trading LLC and remand. Thus, I respectfully dissent.

Trafigura is a commodity trading company that purchases and exports crude oil from the United States. Trafigura asserts that it exported some 50 million barrels of oil from Texas, Louisiana and North Dakota between 2014 and 2017. As a result, Trafigura said that it paid in some $4,215,924 pursuant to 26 U.S.C. § 4611.[1] Trafigura later requested and was denied a refund for the amount paid. Trafigura then filed suit challenging the constitution-

1. There has been a petroleum fee in some form since approximately 1981. Pub. L. No. 96-510, 94 Stat. 2767.

ality of 26 U.S.C. § 4611 and seeking a refund of $4,215,924 collected pursuant to the statute. *See* 26 U.S.C. § 4611(b). The district court ultimately granted summary judgment on liability to Trafigura. The government appealed.

Amounts collected under § 4611(b) are transferred to the "Oil Spill Liability Trust Fund," along with amounts collected via various other acts, to be used only for specific expenditures related to oil spills. *See* 26 U.S.C. §§ 9509(b), (c); *see also* 33 U.S.C. §§ 2712(a), 2761(e). The fund also provides a limitation on liability for the responsible party. *See* 33 U.S.C. § 2704; *see also* 33 U.S.C. §§ 2701(32) (definition of "responsible party"), and 2702 (elements of liability).

The issue is whether 26 U.S.C. § 4611(b) levies an unconstitutional tax on crude oil under the Export Clause. *See* U.S. Const. art. I, § 9, cl. 5. The district court found that it does. The majority agrees. I disagree for the reasons stated herein.

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 238 (5th Cir. 2016). Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We construe all facts and inferences in the light most favorable to the nonmoving party. *Naquin*, 817 F.3d at 238.

The district court's "function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Trafigura, the district court, and the plurality [2] cite *Pace v. Burgess*, 92 U.S. 372, 23 L.Ed. 657 (1876), and *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998) as controlling authority.[3] *Pace* involved a federal excise stamp on tobacco. *Pace*, 92 U.S. 372. The Supreme Court held that the stamp was a user fee, not an unconstitutional tax. *Id.* at 375 The plurality here "cleaned up" a quote from *U.S. Shoe* on the Court's observations of *Pace.* The original quote states:

> The Court upheld the charge, concluding that it was "in no sense a duty on exportation," but rather "compensation given for services [in fact] rendered." In so ruling, the Court emphasized two characteristics of the charge: It "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed"; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption from taxation, and ... to secure ... against the perpetration of fraud."

U.S. Shoe, 523 U.S. at 369, 118 S.Ct. 1290 (internal citations omitted) (alterations in original).

In *U.S. Shoe*, the Supreme Court held that an ad valorem charge of 0.125% of the cargo's value to finance harbor mainte-

2. Judge Wiener concurs only in the judgment, which means that Judge Ho's opinion does not have a quorum and does not constitute precedent in this Circuit. *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Wiener, J., concurring). Thus, I refer to it as the plurality when referencing any portion other than the judgment.

3. As an initial matter, the Court in both cases reiterated that "we must regard things rather than names." *Pace*, 92 U.S. at 376; *U.S. Shoe*, 523 U.S. at 367, 118 S.Ct. 1290. Thus, the use of "tax" in 26 U.S.C. § 4611 is not self-defining.

nance and development projects was an unconstitutional tax. *Id.* at 363, 118 S.Ct. 1290. The Court distinguished *Pace*, saying:

> *Pace* establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the [harbor charge] is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging.

U.S. Shoe, 523 U.S. at 369, 118 S.Ct. 1290 (citation omitted). The Court also reiterated that the Export Clause "does not rule out a user fee, provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." *Id.* at 363, 118 S.Ct. 1290.

The district court ostensibly relied on *Pace* and *U.S. Shoe* but then misapplied the standards set out in those cases in pronouncing a test which the plurality now adopts, saying:

> *Pace* and *U.S. Shoe* tell us the following. First, we must consider whether the charge under § 4611(b) is based on the quantity or value of the exported oil—if so, then it is more likely a tax. Second, we must consider the connection between the Fund's services to exporters, if any, and what exporters pay for those services under § 4611(b). That connection need not be a perfect fit. *See Pace*, 92 U.S. at 375–76. But a user fee must "fairly match" or "correlate reliably with" exporters' use of government services. *Id.* at 369–70, 118 S.Ct. 1290.

See also Trafigura Trading LLC v. United States, 485 F.Supp.3d 822, 826 (S.D. Tex. 2020). The plurality also includes a requirement of strict enforcement that does not appear in *U.S. Shoe*, which said "[i]n sum, if we are 'to guard against . . . the imposition of a [tax] under the pretext of fixing a fee,' [citing *Pace*, 92 U.S. at 376], and resist erosion of the Court's [precedent], we must hold that the HMT violates the Export Clause as applied to exports." *U.S. Shoe*, 523 U.S. at 370, 118 S.Ct. 1290. Importantly, the Court also said, "[t]his does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities." *Id.*

I agree that *Pace* and *U.S. Shoe* are the applicable authority. But I disagree with the plurality's characterization under the first part of the standard that "if so, then it is more likely a tax." I also disagree with the plurality's characterization of the second part that we only look at services.

The plurality misapprehends *Pace* and repeatedly conflates quantity or volume with value. While the *Pace* court did say "[i]t bore no proportion whatever to the quantity or value of the package on which it was affixed," the stamps were clearly required on each and every package of tobacco. *Id.* at 375. Thus, more packages equaled more stamps and more fees.[4] The same can be said here where the fees

4. The size of the packages was determined by "the discretion of the exporter or the convenience of the handler." *Id.*

applied to each barrel and more barrels equal more fees. Also, importantly, the fees do not in any way depend on the value of the barrel.[5] The plurality's statement that the fee here is more like the tax in *U.S. Shoe* than the user fee in *Pace* is unsupported. The fee here is not based on the value of the oil, as in *U.S. Shoe.* Instead, the per-barrel fee here is the equivalent of the per-package stamp in *Pace.*

Under the second part, the plurality states that we must consider the government services provided to the exporters. However, *U.S. Shoe* says that we look to whether the fee is "designed as compensation for Government-supplied services, facilities, or benefits." *Id.*, 523 U.S. at 363, 118 S.Ct. 1290. The *U.S. Shoe* Court held that the ad valorem tax was "not a fair approximation of services, facilities, or benefits furnished to the exporters." *Id.*

Here, the plurality essentially disregards the "services, facilities, or benefits" provided to the exporters by concluding that "[n]one of these things can plausibly be conceived as 'services' provided to exporters in exchange for their payment." The plurality then concedes that "[t]o be sure, exporters do benefit indirectly from these activities" before attempting to equate exporting oil with police and fire protection. Specifically, the plurality says:

> But the same could be said for virtually every other tax. After all, the government is supposed to use tax proceeds to provide benefits for taxpayers. The fact that people pay taxes to fund police and fire protection does not somehow turn those taxes into user fees. Likewise, the fact that oil exporters like Trafigura also happen to benefit from the government's "oil-spill related" activities is beside the point—such benefits are not tied to a specific service that exporters receive as part of a value-for-value transaction. Exporters pay, society benefits.[6]

But that rationale is severely flawed and unsupported by the controlling authority.

Neither *Pace* nor *U.S. Shoe* provide any requirement that *only* the exporter must benefit. Regardless, it is implausible to suggest that random taxpayers or random members of society are the primary beneficiaries of exporters simply being responsible for their own actions and business practices. There would be no oil spills, resulting damage, or need for research and development regarding oil pollution if oil was not exported. The oil was not exported by random taxpayers or random members of society, and they are neither responsible for any subsequent pollution/damage of precious natural resources nor the beneficiaries of any cap on liability.[7] The oil is exported by exporters, who are not forced to share any resulting profit with random taxpayers or random members of society.

5. To the extent the plurality adopts the district court's analysis regarding the statutory definition of barrel, i.e., 42 gallons, that is the historic industry standard in the United States, not a statutory creation or requirement.

6. The plurality also states, without support, that "exporters subsidize a mishmash of anti-pollution measures for the general benefit of society" and "[s]ection 4611(b) saddles exporters with the cost of anti-pollution measures that generally benefit society at large, and not specifically the exporter who pays the charge." Surely the plurality is not suggesting that random taxpayers should subsidize the operations of for-profit corporations.

7. In fact, taxpayers and members of society pay fees for various activities. For example, if a taxpayer wanted to take his boat into the Gulf of Mexico to go fishing, he would have to purchase the appropriate registration, license, certification, etc. He would also be responsible for any damage he caused. But, much like an exporter and its profit, he would get to keep any legal amount of fish all for himself.

To borrow from the plurality, exporters pay and exporters benefit.[8]

The plurality dismisses any suggestion that the oil industry generates the need for these anti-pollution measures as a matter of policy. However, cleaning up oil spills or restoring natural resources to their pre-damaged state are not merely policy motivations. The plurality further states that "Congress has crafted a scheme in which crude oil exporters are forced to subsidize activities that are not 'services used or usable by the exporter.' *U.S. Shoe*, 523 U.S. at 369, 118 S.Ct. 1290." What the *U.S. Shoe* Court actually said, though, is that "[t]he value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter." *Id.* "As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging." *Id.* Again, here, the fee is not based on the value of the oil. The charge of a fee per barrel is more akin to the above factors, like size and tonnage of a vessel, than any alleged "subsidizing" of "a mishmash of antipollution measures for the general benefit of society."[9] The plurality cites no evidence in support of the conclusion that the nominal per-barrel fee does not reliably correlate to the services used or usable by the exporter. Moreover, the fee here is substantially less than the tax in *U.S. Shoe* and provides substantially more in return.

Trafigura also asserts that exporters are solely responsible for paying the fee under § 4611. That is incorrect. The fee is not imposed on exporters; it is imposed on oil and its uses. *See* 26 U.S.C. § 4611. Trafigura is comingling separate sections and subsections when it says "nothing in § 4611 requires owners, operators, or demise charterers of vessels to pay § 4611(b) export taxes. *See* 26 U.S.C. § 4611(d)(3)." Subsection (d) states:

> (d) Persons liable for tax.--
>
> (1) Crude oil received at refinery.--The tax imposed by subsection (a)(1) shall be paid by the operator of the United States refinery.
>
> (2) Imported petroleum product.--The tax imposed by subsection (a)(2) shall be paid by the person entering the product for consumption, use, or warehousing.
>
> (3) Tax on certain uses or exports.--The tax imposed by subsection (b) shall be paid by the person using or exporting the crude oil, as the case may be.

8. The plurality cites a law review article, Erik M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 37 (2003), for the proposition that there is no "value-for-value transaction" here. But the plurality reasons that charging a fee to visit a public park, tour a museum, or enter a toll road would be a "value-for-value transaction." It seems reasonable that charging a fee for using this country's valuable natural resources to conduct one's for-profit business would also be a "value-for-value transaction." Notwithstanding that either would be a "value-for-value transaction," fees for a museum, park or toll road are also used for upkeep, maintenance, damage, etc.

9. The district court found that there are various factors Congress could have "considered to structure a fee which more closely matches the service rendered." *Trafigura*, 485 F.Supp.3d at 829. However, some or all of those factors appear to have been considered, i.e., "the route taken" is in proximity to natural resources, and "the quantity of oil" is the number of barrels. *See* 33 U.S.C. § 2701(20) (" 'natural resources' includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government or Indian tribe, or any foreign government.").

26 U.S.C. § 4611(d). Despite Trafigura's claims to the contrary, this provision explicitly lists multiple others who may be responsible for the fee, depending on the situation. Moreover, the language Trafigura searches for actually comes from 33 U.S.C. § 2701(32), which references "any person owning, operating, or demise chartering." Additionally, the fee under § 4611(b) is only imposed if "before such use or exportation, no tax was imposed on such crude oil under subsection (a)." *See* § 4611(b)(1)(B). In other words, if someone else pays it pursuant to subsection (a), then it would not be imposed a second time under subsection (b). Simply because Trafigura was the appropriate person to pay here does not mean that only an exporter ever has to pay. Moreover, Trafigura is free to negotiate its contracts with other entities in a manner to attempt to recoup any required fees.

Trafigura also asserts that exporters are omitted from the definition of "responsible party" and would not benefit from the liability limits. *See* 33 U.S.C. § 2701(32). That statement is also not entirely correct. While § 2701(32) does not specifically list "exporters," it clearly lists numerous others, including "the owner of the oil being transported." Trafigura acknowledges that it "purchases and exports domestic crude oil from the United States." Thus, Trafigura concedes ownership of the oil in question which would establish its status as a potential responsible party.

The plurality fails to distinguish this case from *Pace*; it fails to reference any facts to support its conclusion that the fees here were excessive or improper; and it fails to cite or apply the full standard of review. We are reviewing the district court's grant of summary judgment; not weighing the evidence or determining the truth of the matter. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. This court is required to construe all facts and inferences in the light most favorable to the government. *See Naquin*, 817 F.3d at 238. "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014). As set out herein, Trafigura failed to show that there is no genuine dispute of material fact or that it was entitled to judgment as a matter of law. Thus, summary judgment was improper.

For these reasons, I would vacate the district court's grant of summary judgment on liability to Trafigura and remand. Accordingly, I respectfully dissent.

LA UNION DEL PUEBLO ENTERO; Friendship–West Baptist Church; The Anti-Defamation League Austin, Southwest, and Texoma; Southwest Voter Registration Education Project; Texas Impact; Mexican American Bar Association of Texas; Texas Hispanics Organized for Political Education; JOLT Action; William C. Velasquez Institute; James Lewin; Fiel Houston, Incorporated; Mi Familia Vota; Marla Lopez; Paul Rutledge, Plaintiffs—Appellees,

v.

Gregory W. ABBOTT, in his official capacity as Governor of Texas, et al., Defendants,

United States Court of Appeals for the Fifth Circuit

No. 21-20127

TRAFIGURA TRADING LLC,

Plaintiff—Appellee,

versus

UNITED STATES OF AMERICA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-170

ON PETITION FOR REHEARING EN BANC

Before WIENER, GRAVES, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.