No. 12-148

In the Supreme Court of the United States

HITACHI HOME ELECTRONICS (AMERICA) INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF NATIONAL CUSTOMS BROKERS AND FREIGHT FORWARDERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The National Customs Broker and Freight Forwarders Association ("NCBFFA") represents nearly 870 member companies with 100,000 employees in international trade - the nation's leading freight forwarders, customs brokers, ocean transportation intermediaries, non vessel operating common carriers, and air cargo agents. The Association was established in 1897 in New York. Its member firms serve more than 250,000 importers and exporters. The NCBFFA is the national voice of the customs brokerage industry.[1]

The NCBFFA is providing this *amicus curiae* brief in order to bring to the Court's attention the conflict among the Supreme Court cases, among other things, most of which were cited by the Federal Circuit's majority and dissenting opinion. The Association agrees with Hitachi Home Electronics (America), Inc. ("Hitachi") and supports its petition for certiorari. The NCBFFA also agrees with the dissenting opinion by Circuit Judge Reyna, (Circuit Judge

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[1] Pursuant to Rule 37.2 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. The e-mail and letter granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus and its counsel has made a monetary contribution to the preparation and submission of this brief.

Newman joined in this opinion), 676 F.3d 1041 (Fed. Cir. 2012).

The NCBFFA believes that the Federal Circuit's majority misinterpreted 19 U.S.C. § 1515(a), and that an administrative protest that has not been decided by Customs within the two-year statutory period is deemed approved.

SUMMARY OF ARGUMENT

The Federal Circuit's decision below, 676 F.3d 1041 (Fed. Cir. 2012) cites to conflicting Supreme Court case law and its practical effects are inimical to importers.

The appellate court determined that this Court had held that the courts should not find that Congress intended there to be a consequence to a party's failure to act when a statute does not expressly so provide. *Hitachi Home Electronics (America), Inc. v. United States*, 661 F.3d 1343, 1346 (Fed. Cir. 2011) (citing *Brock v. Pierce County*, 476 U.S. 253, 266 (1986); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) among others).

Contrary to this interpretation, the Supreme Court has also held that directory language in a statute creates a mandatory obligation on a party (i.e., [t]he word "shall" is ordinarily "the language of command."). *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); *Anderson v. Yungkau*, 329 U.S. 482, 485, (1947); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *Nat'l Ass'n of Home Builders*, 551 U.S. 661, 669 (2007). *Amicus curiae* request that the Supreme Court grant certiorari in this matter to resolve this inconsistency regarding mandatory language used in a statute in Supreme Court case precedents and as interpreted by the Federal Circuit.

Furthermore, *amicus curiae* believe that the Federal Circuit should not have needed to reach

its conclusion because the legislative history of the Customs Courts Act of 1970 indicated a clearly contrary result. Determining the intention of the legislature is the cardinal rule of statutory construction – Before a court resorts to statutory interpretive devices or canons of construction; the plain language of the statute should be used. In this case, the plain language of the statute *and* the legislative history indicated a result different from that determined by the Federal Circuit. Moreover, the dissent's analysis would have reached a result consistent with prior customs case law. There was no need for the Federal Circuit to resort to its statutory construction interpretation.

Finally, this matter is important to the NCBFAA because customs brokers advance duties on behalf of their importer clients and must often wait for protests to be resolved before they are reimbursed. As the dissent correctly explained, undecided protests represent "a very large number of imports" and "a massive sum of contested duties" for importers. 676 F.3d at 1044. The majority decision by the Federal Circuit creates a means for Customs to refuse to act on a protest indefinitely despite the clear statutory direction to do so within two years.

ARGUMENT

(a) The Supreme Court Should Resolve its Conflicting Case Law and Interpret the Protest Statute

The protest statute on its face indicates that Customs "shall" take one of two actions - either "allow or deny" an administrative protest. The administrative protest statute, 19 U.S.C. § 1515(a), provides that:

> Unless a request for an accelerated disposition of a protest is filed in accordance with subsection(b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title shall review the protest and shall allow or deny such protest in whole or in part....

This Court, as the Federal Circuit's dissenting opinion explained, has held that the use of the term "shall," in a statute creates an obligation. *Nat'l Ass'n of Home Builders*, 551 U.S. at 669 (discussing "shall approve" as mandatory language); *Anderson v. Yungkau*, 329 U.S. 482, 485, (1947); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (explaining the use of a "shall" clause in a statute).

Conversely, the Federal Circuit's majority opinion in *Hitachi* cited to *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993), and explained that the Supreme Court had determined that when a statute does not provide a statutory consequence, the courts cannot assume that Congress intended there to be a consequence for a failure to act in conformity with a statute - even though "shall" is used. *Hitachi Home Electronics., v. United* States, 661 F.3d 1343, 1346 (Fed. Cir. 2011); *see also Brock v. Pierce County*, 476 U.S. 253, 266 (1986). The appellate court did not need rely on case law and make its "no consequence" interpretation when applying it to the protest statute. The statute was clear on its face. Essentially, the Federal Circuit's majority and dissent decisions disagreed as to the proper application of Supreme Court precedent regarding the interpretation of directory statutory language. The Supreme Court should grant certiorari to resolve this issue.

(b) The Clear Statutory Language and Legislative History Support the Dissent's Interpretation.

Statutes are to be interpreted according to the intention of the legislature - the cardinal rule of statutory construction. Thus, the plain language of the statute controls before recourse to any interpretation through case law. The plain language of the protest statute and its legislative

history indicated a contrary result to that determined by the majority.

The statute never contemplated that a protest could continue indefinitely. In the Hearings before the Senate, Mr. Eugene Rossides from the Treasury Department (who participated in the drafting of bill S. 2624) indicated that:

> [t]he bill gives to importers a 90-day period from the date of liquidation in which to protest any administrative determination and permits the importer and Customs **to take up to 2 years to resolve their differences at the review level** before the importer must resort to judicial review.

Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 91st Cong., First Sess., at 80 (Aug. 4-5 and Sept. 8, 1969) (emphasis added). The protest statute as passed into law only provided two options to Customs – "allow or deny." Moreover, as the legislative history indicated (and the statute facially states) Customs only has up to two years to review a protest and make its decision.

The statute does not provide "wait indefinitely" or "ignore" as an option for the government. Similarly, the prior protest statute stated that "upon the filing of such protest the collector *shall* within ninety days thereafter review his decision and *may* modify the same in

whole or part...." 19 U.S.C. § 1515 (1965) (emphasis added).

Simply stated, the current protest statute (and its predecessors) does not contemplate a limitless amount of time for government review and action on a protest. The seminal treatises on the proper interpretation of Customs law were originally written by Ruth F. Sturm, who served as a Law Assistant to five judges at the Customs Court over 25 years. In her 1974 edition, *A Manual of Customs Law*, she explained that under the prior protest law, after the filing of a protest the Collector of Customs only had 90 days in which to review it. If he affirmed his original decision, the entry was automatically sent to the Customs Court for review. *Id.* at 8. In this manner, the protest was originally the underlying pleading in an action before the Customs Court. *Id.* at 10. Additionally, the historical note to the protest statute indicates that "provisions similar to those of this section were contained in Act Sept. 21, 1922." 19 U.S.C. § 1515. Under the prior statute, at the end of ninety days, the protest went to the Customs Court.

The legislature again used mandatory language in the current statute. The Federal Circuit's decision is analogous to having a statute of limitations, but interpreting the statute of limitations so that it may extend indefinitely. That type of interpretation is clearly contrary to the statute's facial (and historical) intent. In her 1980 edition, *Customs Law and Administration*, Ms. Sturm explained that "[u]nless a request for

accelerated disposition of a protest has been filed (*infra*, § 11.2) or the protest relates to the exclusion of merchandise, a protest must be reviewed, allowed or denied, within 2 years of filing. " *Id.* at 92. She had previously explained in "A Manual of Customs Law" that the accelerated disposition provision for the modern statute was to be used *prior* to the expiration of the two years - concurrently running with the statute rather than consecutively to the statute. Specifically, "[a] request for accelerated disposition of a protest may be made any time after 90 days following the filing of such protest. A protest which has not been allowed or denied in whole or in part within 30 days after mailing such a request shall be deemed denied." *Id.* at 7.

During the Senate Hearings on S. 2624, Mr. J. Bradley Colburn, President of the Association of the Customs Bar, also made statements to the Senate. He explained that under the pre-1970 protest law the only option for Customs was to either to approve the protests or to deny it in whole or in part and then transmit the denial and record to the Customs Court. Mr. Colburn testified that the two year time period would be detrimental to importers because:

> The longer the time permitted for review after liquidation, the greater will be the built-in delay before an importer can know his final duty liability. For these reasons, the existing limit of the present law of 90 days should, in our opinion, be expanded at most to 180 days

> and we think that would be entirely adequate.

Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 91st Cong., First Sess., at 124 (Aug. 4-5 and Sept. 8, 1969). These statements are as true today as they were when the bill was passed into law.

Similarly, statements made in the hearings before the Senate during consideration of the bill by its authors indicate that the protest review period, although expanded to two years, would continue as mandatory. *Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate*, 91st Cong., First Sess., Aug. 4-5 and Sept. 8, 1969. Specifically, William Ruskelshaus, then Assistant Attorney General, Civil Division, United States Department of Justice stated that:

> There will be a 2-year period in which the Bureau of Customs itself has a chance to act on any protest that is filed, so that there will be a timelag here in which an importer will have the opportunity to decide if he really wants to file a case . . . .

Id. at 84. The revised protest statute was passed into law because customs cases were automatically

filed with the Customs Court when a protest was denied. Thus, as explained by the legislative history, "[t]he most significant change is that, upon final rejection by the Treasury, there will no longer be an automatic referral of the dispute to the customs court." *Id.* at 83. Additionally, Leonard Lehman, Deputy Chief Counsel for the Bureau of Customs stated that:

> the bill provides a 2-year maximum period in which a protest can be held under consideration by the Bureau of Customs.

Id. The Department of the Treasury, The Department of Justice, and The Bureau of Customs are *all* consistently on record as having testified to Congress that the existing law imposed a mandatory deadline for a protest's review and that the government anticipated that the new 2 year deadline would continue under the new law – and be mandatory.

(c) This Matter is Important to the Entire Importing Community of the United States.

The NCBFFA's member firms serve more than 250,000 importers and exporters. As a practical business matter, importers require timely certainty as to their liability for duties on imported goods. As the dissent explained, "[a]ny interpretation of the law that creates even a technical possibility that Customs may refuse to act on a protest for more than two years is simply

inconsistent with today's business realities." *Hitachi*, 676 F.3d at 1042.

An importer's right to protest a Customs decision only arises 314 days after an entry is filed. Customs should not be allowed to ignore the time limitation imposed by the legislature on the consideration of a protest without consequence – the allowance of that protest. Customs has two years to act upon a protest and its failure to do so should result in a reversal of the protested decision.

The legislative history indicates that Congress intended that the Protest review period be limited to two years. This Court should, therefore, grant Hitachi's petition for certiorari and reverse the Federal Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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