No. 12-148

IN THE

Supreme Court of the United States

HITACHI HOME ELECTRONICS (AMERICA), INC.,

Petitioner,

—v.—

THE UNITED STATES; UNITED STATES CUSTOMS AND BORDER PROTECTION; and ROSA HERNANDEZ, PORT DIRECTOR, UNITED STATES CUSTOMS AND BORDER PROTECTION, SAN DIEGO (OTAY MESA), CALIFORNIA,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, amicus curiae the American Association of Exporters and Importers ("AAEI") submit this amicus curiae brief in support of Petitioner.[1]

AAEI has been, for more than ninety years, the voice of American businesses in support of free and open trade among nations. AAEI represents numerous manufacturers, distributors, and retailers of a wide spectrum of products, including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles and apparel—as well as international companies, freight forwarders, customs brokers, and banks. AAEI is the only national association that represents the interests of exporters and importers before the United States, its agencies, Congress, the trade community, foreign governments, and international organizations.

AAEI's members protest decisions of U.S. Customs and Border Protection ("Customs") on a regular basis, and have a continuing interest in ensuring that Protests are processed timely and meaningfully, as intended by Congress.

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[1]Pursuant to Rule 37.6, amicus curiae AAEI affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Pursuant to Rule 37.3(a), Petitioner and Respondent have granted permission for the filing of the instant amicus curiae brief, all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief, and the consent letters have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The issue raised by the Petition for *certiorari* implicates the viability of the United States' unique system for administrative and specialized judicial review of Customs decisions.

For over a century, Congress has prescribed a robust system for review of Customs decisions, comprising two elements: (1) a dynamic system of administrative review of importers' protests, plus (2) where protests are denied, access to specialized Customs courts of national jurisdiction—formerly the United States Customs Court, and today the United States Court of International Trade.

The decision of the United States Court of Appeals for the Federal Circuit, holding that the two-year statutory period provided in 19 U.S.C. §1515(a), during which Customs must "allow or deny" a protest, is merely aspirational, effectively writes the statutory requirement for action out of the law. It also introduces a third alternative, not intended by Congress—rather than "allow or deny" a protest, Customs can elect to disregard it.

If in fact Customs has the power to disregard a protest, or defer decision on it, the agency can act as a gatekeeper, depriving the Court of International Trade of jurisdiction over protest matters, other than in exceptional cases. This is inconsistent with Congressional intent, and threatens the viability of the Congressional scheme for judicial review of Customs decisions in specialized courts.

Customs law issues of the kind framed by administrative protests—such as the classification, appraisement, and rate of duty applicable to

imported merchandise—are of paramount importance to the importing community, which seeks more than 10,000 agency rulings per year on such issues, and protests in excess of 35,000 Customs decisions each year. The decision of the courts below not only deprives importers of timely review of protests, but also allows Customs to block their access to judicial review.

The legislative history of 19 U.S.C. § 1515(a), as added by the Customs Courts Act of 1970, indicates clearly that the statute was intended to force one of two mutually exclusive Customs actions within two-years after the filing of a protest—allowance or denial of a protest. Allowance of a protest is the consequence of not denying it within the statutory two-year period. The lower court below erred by resorting to general rules of statutory construction, rather than the language of §1515(a), to hold the two-year statutory period for action to be directory rather than mandatory.

Because the Petition poses a significant issue of first impression that implicates the viability of a national court, has major implications for the importing community, and has substantial merit, the Court should grant the Petition for *certiorari* filed by Hitachi Home Products (America), Inc.

ARGUMENT

1. Congress' Robust System for Administrative and Judicial Review of Customs Decisions is at Risk

Throughout the nation's history, Congress has sought to provide importers with a robust and effective system for contesting Customs decisions

respecting imported merchandise. For over a century, that system has comprised two main elements: (1) an administrative protest mechanism, giving Customs a time-limited opportunity to reconsider contested decisions of agency officials, and (2) a specialized court of national jurisdiction (currently the United States Court of International Trade) to provide impartial review of denied protests. The Court of Appeals for the Federal Circuit determined in *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343 (Fed. Cir. 2011), *reh'g denied*, *Hitachi Home Elecs. (America), Inc. v. United States*, 676 F.3d 1041 (Fed. Cir. 2012), *aff'g Hitachi Home Elecs., Inc. v. United States*, 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010), that Customs may leave protests undecided for an indefinite time—or even cease processing protests altogether. The decision threatens the viability of the protest system, thereby depriving the importing community of an effective way to challenge Customs decisions. It would allow Customs, by inaction, to block Court of International Trade review of the agency's duty assessments. Indeed, Customs protest cases, which once comprised the largest part of the Customs courts' caseload, have slowed to a relative trickle in the Court of International Trade, even as the volume of import trade has grown exponentially. If, as the courts below determined, 19 U.S.C. § 1515(a) permits Customs to not merely "allow or deny" a protest within two-years, but to also postpone or abdicate the processing of protests indefinitely, the Congressionally-mandated system of administrative and judicial review can be virtually shut down at the agency's whim.

Because the continued vitality of Congress' mandated system of administrative and judicial review of Customs decisions is imperiled by the decision below, AAEI urges that Hitachi's petition for *certiorari* be granted.

a. Congress Intended Administrative Remedies to Protect Importers From Inefficient and Incorrect Customs Actions

In the 19th Century, importers who tendered customs duties could sue Customs Collectors personally in a common law *assumpsit* action to recover excess duties paid and protested. *See Elliot v. Swartwout*, 35 U.S. 137, 160 (U.S. 1836) ("[T]he collector is responsible as a principal, when he compels the payment of duties; and he must answer to an injured individual for his actions. This is a responsibility he cannot escape."); *Bend v. Hoyt*, 38 U.S. 263, 267 (U.S. 1839). The Secretary of the Treasury employed "special agents" to examine the accounts of the Collectors of Customs, and to report all collections and explain any financial irregularities. *See* 21 Cong. Rec. 820 (1890) (Rep. Bayne); *see also, Cary v. Curtis*, 44 U.S. 236, 253 (U.S. 1845) (Story J., dissenting); *see also,* Act of March 3, 1839, ch. 82, § 2, 5 Stat. 339, 348-49 (requiring "all money paid to any collector of customs . . . for unascertained duties or for duties paid under protest" be paid by the Collector to the U.S. Treasury).

When this Court's decision in *Cary,* 44 U.S. at 252, terminated the Collectors' rights to retain duties collected, effectively negating the *assumpsit* remedy, Congress took immediate action to preserve the system of administrative and judicial protest review. The Act of February 26, 1845, ch. 22, 5 Stat. 727 (the "1845 Act") provided a statutory protest remedy for importers against Collectors but required importers to pay duties prior to filing suit against the agency, and thus, "[p]aying the duty and filing a protest constituted the prerequisite to judicial review of exhausting administrative remedies." *See* Patrick C. Reed, *The Role of Federal Courts in U.S. Customs and International Trade Law*, 59 (Oceana Publ. 1997) (*quoted in United States v. Haggar Apparel Co.,* 526 U.S. 380, 393 (1999)).

Congress regularly updated the protest system to ensure its efficacy. The Act of March 3, 1857, ch. 98, § 5, 11 Stat. 192, 195, required importers to file Protests within ten days, and to appeal to the Secretary of the Treasury if they disagreed with the Collector's protest determination. On appeal to the Secretary, the Collector was required to justify his position "with sufficient clearness to enable the Secretary of the Treasury to act understandingly as between the collector and the importer." *See Webster* Elmes, *A Treatise on the Law of the Customs*, 317 (Little Brown and Company, 1887) (citing Act of June 30, 1864, ch. 171, §§ 14-16, 13 Stat. 214-15 (the "1864 Act")). Importers were required to communicate clearly their disagreements, and

protests were required to be faithfully examined by Collectors.[2]

The requirement that protests sufficiently explain the dispute was considered in *Mason v. Kane*, 16 F. Cas. 1044 (C.C.D. Md. 1851), where the Court held that protests must contain sufficient detail to enable the Collector to evaluate the merits of the dispute. The Court held—

> The object of this provision ["setting forth distinctly and specifically the grounds of objection to the payment thereof"] is obvious; in the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties; and the object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. Then the correction could

[2] While the 1857 Act imposed no time limitation on the Collector's protest determination, the Collector had ample incentive to decide protests promptly, since he remained personally liable for repayment of duties if he acted without probable cause. So long as the Collector acted on probable cause, the payment and interest derived from an appropriation of the Treasury. *See e.g.,* Elmes, supra, at 322-23.

> be made without the expense of litigation, if the objections had been tenable, by the administrative department.

Id. at 1045 (*bracketing cites* the 1845 Act, *supra*). Thus, protests were viewed as a mechanism for either avoiding litigation, or narrowing the issues to be litigated. *See also*, *Thompson v. Maxwell*, 23 F. Cas. 1100, 1103 (C.C.S.D.N.Y. 1852) (noting the bilateral, participatory nature of the protest procedure, which was designed to provide Customs an opportunity to "rectify [errors] at once, and thus save all the delay and expense of a judicial investigation in to the matter."); *see also, Davies v. Arthur*, 96 U.S. 148, 151 (U.S. 1878) ("Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show . . . that [the protest] was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.") (citations omitted); s*ee also, Arthur v. Dodge,* 101 U.S. 34, 37 (U.S. 1880).

That administrative protest review was meant to be prompt, and a conduit to potential judicial review, was made clear by the 1864 Act, *supra*, which limited the time for the Secretary of the Treasury to consider protests to as little as ninety days, providing—

> And no suit shall be maintained in any court for the recovery of any such fees, costs, and charges, alleged to have been erroneously or illegally exacted, until

> the decision of the Secretary of the Treasury shall have been first had on such appeal, unless such decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, nor more than five months in case of an entry west of those mountains.

Id. If the Secretary failed to reach a determination within the specified time limits, the importer could bring suit "if such decision [on the protest] was delayed more than ninety days after the date of his appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter." *Arnson v. Murphy*, 109 U.S. 238, 242 (U.S. 1883). When a determination had not issued, the protestant "shall not be required to wait longer than ninety days after his appeal for an adjudication. There is nothing to forbid his waiting, without suit, as long as he has reason to expect a favorable decision upon his appeal." *Id.* at 242-43. This Court's decision in *Arnson* emphasizes the anticipation and expectation that Customs will faithfully participate in the review and adjudication of protests.

When Court dockets became choked with Protest litigation, *See Report of the Tariff Commission Appointed Under Act of Congress*, *approved* May 15, 1882, H.R. Misc. Doc. No. 6, 47th Cong., 2d. Sess. (1882), the *ad hoc* Tariff Commission recommended "the establishment of a customs tribunal for the determination of disputed questions arising under

our Tariff laws as to the classification [and rate] of duty on imported merchandise." *Id.* at 10.

Congress recognized that "crowded docket[s] of United States courts, mak[es] it impossible to reach a decision of [Customs] questions **within a reasonable time**[,]" 21 Cong. Rec. 833 (1890) (Rep. Bayne) (emphasis added), and enacted legislation establishing the Board of General Appraisers, Act of June 10, 1890, ch. 407, §§ 12-18, 26 Stat. 131, 136-39, a specialized tribunal to "add to the ordinary judicial administration the sifting process of an administrative board specially suited to deal with the technical problems of classification of commodities and their valuation." *See* Felix Frankfurter, James M. Landis, *The Business of the Supreme Court: A Study In the Federal Judicial System*, 149 (Macmillan, 1928). Initially an administrative tribunal, Congress expanded the Board of General Appraisers' powers and established it as a judicial tribunal. *See United States v. Kurtz, Stuboeck & Co.*, 5 Ct. Cust. 144, 146 (Ct. Cust. App. 1914) (citations omitted); *see also,* the Act of May 27, 1908, ch. 205, § 31, 35 Stat. 403, 406 (granting the Board of General Appraisers "all the powers of a circuit court of the United States . . ."); *see also,* the Act of Sept. 21, 1922, ch. 356, § 518, 42 Stat. 858, 972 (granting the Board of General Appraisers "all the powers of a district court").

Decisions of the Board of General Appraisers were appealed to the Circuit Courts, which reviewed cases *de novo*, adding to the time needed to resolve Customs issues. See *United States v. Hempstead & Son*, 159 F. 290, 291 (C.C.D. Pa. 1908). Justice Frankfurter opined that the Board of General

Appraisers did not, as hoped, provide importers with "relief through economical and expert disposition of technical litigation, but [brought] new delays, waste, and confusion. Under this system four and a half years were consumed while litigation travelled at a snail's pace towards a final decision." Frankfurter, *supra*, at 150.

In 1926, therefore, the Board of General Appraisers was removed from the control of the Treasury Department and reconstituted as the United States Customs Court (the "Customs Court"). *See* Act of May 28, 1926, ch. 411, §§ 1-2, 44 Stat. 669. For nearly nine decades, the administrative Protest review period remained statutorily limited to ninety days, and unresolved disputes were automatically transferred to the jurisdiction of the Customs Court as an action at law. *See Slazengers, Inc. v. United States*, 158 F. Supp. 726, 735 (Customs Ct. 1957) (Mollison, J., dissenting on another issue) ("[A]t the expiration of 90 days from the date of filing a protest, if the collector has not acted to modify his decision in whole or in part, jurisdiction over the protest and the subject matter is automatically divested from the collector and vested in the Customs Court." (citations omitted)).

Congress has thus always provided importers with a robust system of time-limited administrative review, and judicial review of contested Customs actions. The court below held, in effect, that this policy ended with the Customs Courts Act of 1970, Pub. L. 91-271, Title II, § 208, 84 Stat. 274 (June 2, 1970). It did not, and this Court should grant *certiorari* in this case to so state.

b. Section 1515(a) of the Tariff Act Was Not Intended to Eliminate Time Limits on Customs' Review of Protests

By 1970, Congress saw the need to again adapt the system of protest review to insure a robust, efficient system. The ninety day statutory period for Customs to review protests proved insufficient in certain cases, and the automatic referral of unresolved protests to the Customs Court was clogging that tribunal with cases which had not benefited from meaningful administrative review. By 1969, the Customs Court had more than 431,000 cases on its docket—more than all other Federal courts combined.[3] The Customs Courts Act of 1970, *supra*, was enacted "to modernize procedures in the Customs Court and related administrative procedures in the Bureau of Customs so that the Court and the Bureau will be better able to cope effectively and expeditiously with their rapidly expanding workload[,]" *See* S. Rep. No. 576, 91st Cong., 1st Sess. 4 (1969), and introduced three major reforms to the protest review system. First, it extended, from ninety days to two-years, the maximum period in which Customs could act on a protest. Both the importing community and Customs

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[3] *See* Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee On the Judiciary United States Senate, 91st Cong., 1st Sess. On S. 2624 (1969) testimony of Hon. Justice Tom C. Clark, Director, Federal Judicial Center, at 64, and testimony of William D. Ruckelshaus, Assistant Attorney General, Civil Division, at 83. *See also, Petition* at 3, fn. 1.

itself understood this change to be an extension of the maximum time for considering a protest, rather than an abolition of the time limit. *See* Government's Proposal to Amend 19 U.S.C. § 1515, in the Customs Courts Act of 1970, S. 2624, *Petition*, App. 75a; *see also* 19 C.F.R. § 174.21 ("shall review and act on a protest . . . within 2 years . . .") (emphasis added) and 19 C.F.R. § 174.29 ("shall allow or deny . . . within two years . . . "). Indeed, Section 1515(a) commands Customs, within two-years, to review protests and take either of two mutually exclusive actions, i.e., to "allow or deny" the protest.

Second, the Customs Courts Act of 1970 ended the automatic referral of denied or unresolved protests to the Customs Court. Importers wishing to challenge the denial of a protest were required to initiate suit in the Customs Court within a specified period after receiving notice of protest denial. To effectuate this change, 19 U.S.C. § 1515(a) required that Customs notify importers of the denial of their protests, and advise them of their right to contest the denial in the courts. No notice was required for allowance of protests, since the reliquidation of protested entries, and the issuance of duty refunds, would effectively alert that importer that its protest was allowed.

Third, Congress recognized that in some cases, an importer might not be able to wait two-years for its protest to be reviewed administratively. This might occur, for example, in cases where perishable merchandise was excluded from entry, or a protest issue affected administration of a time-delimited quota. Section1515(b) of the Tariff Act, 19 U.S.C. § 1515(b), as added by the Customs Courts Act of

1970, created a mechanism whereby an importer might request "accelerated disposition" of a protest. If Customs does not act on a protest within thirty days after receiving a request for accelerated disposition, the protest is deemed denied, and the importer may present his action in the Customs Court (now in the Court of International Trade).[4]

The Federal Circuit suggested that the accelerated disposition mechanism of §1515(b) represents the importer's remedy in cases where Customs disregards the two-year limit on protest review set out in §1515(a). However, this conclusion not only ignores Congressional intent (and Customs understanding), as expressed in the legislative history of the Customs Courts Act of 1970,[5] that the two-year period is an outside limit for action, it produces an absurd and anomalous result.

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[4] In 1970, the Customs Court was a statutory court having only jurisdiction over denied protests, and lacking equitable powers. Today, in the Court of International Trade—an Article III court with expanded jurisdiction and full equity powers—there are rare cases where an exporter may bypass protest review altogether, where such review would be considered "futile" or "manifestly inadequate", and proceed under another basis of the jurisdiction of the Court of International Trade. See e.g., *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1571 (Fed. Cir. 1997), *aff'd by United States v. United States Shoe Corp.*, 523 U.S. 360 (U.S. 1998). This was not the case in 1970, however, when the "accelerated disposition" mechanism was created.

[5] *See* S. Rep. at 11-12; H. Rep. at 11; 34 Cong. Rec. S16134 (1960) (Sen. Hruska); and 35 Cong. Rec. E4501 (1970) (Rep. Kastenmeier); *see also, e.g., Petition* at 18-22.

First, protest disposition compelled beyond the two-year limit set out in § 1515(a) can hardly be described as "accelerated." Second, as noted in the Judge Reyna and Newman's dissent (reflecting concerns raised by AAEI before that court), construing the two-year limit in § 1515(a) as directory creates the possibility that Customs could elect to shut down the processing of protests altogether, forcing importers to submit requests for "accelerated" disposition as their only means of advancing an action to court—

> As aptly explained by the AAEI, "[i]f processing protests is a discretionary duty that may be discontinued without consequence, [Customs] will logically concentrate its resources on revenue-collecting and law-enforcement activities, rather than protest-processing activities, which can only result in the flow of monies out of the treasury."

Hitachi Home Elecs. (America), Inc., 676 F.3d at 1044 (Reyna and Newman, JJ., dissenting) (citation omitted); *see Petition* at App. 8a. Congress could hardly have anticipated that actions will advance to the courts only by means of an extraordinary application, filed in frustration at government inaction—particularly in light of more than a century of consistent legislation and legislative history, evidencing Congressional desire that protests be meaningfully considered by Customs, and resolved without the expense of litigation wherever possible. Indeed, the Customs Courts Act of 1970 sought to expand meaningful Customs review of

protests (by expanding the time limit for such review) and stanching the flow of protests which had not been reviewed to the court. The Federal Circuit's interpretation of the statute frustrates both goals.

2. The Issue Presented in the *Certiorari* Petition is of Major Importance to the Importing Community

In his dissenting opinion from the Federal Circuit's denial of *en banc* rehearing, Federal Circuit Judge Reyna noted that this case " presents an issue of paramount importance to the U.S. trade community . . ." *Hitachi Home Elecs. (America), Inc.,* 676 F.3d at 1044 (Reyna and Newman, JJ., dissenting); *see Petition,* App. 3a. And as the most established representative of the United States trade community, AAEI can attest that this is indeed the case.

Protest cases typically present issues concerning the tariff classification and appraisement of imported merchandise—issues of utmost significance to importers. Since enactment of the Customs Informed Compliance and Modernization Act of 1993, Pub. L. 103-182, Title VI, §§ 601-692, 107 Stat. 2057 (December 8, 1993), importers have borne a legal duty to use "reasonable care" to ensure that classifications and appraised values reported in entry documents are not only factually accurate, but also legally correct. *See* 19 U.S.C. § 1484(a)(1). It has been estimated that United States importers seek and obtain between 10,000 to 15,000 classification and appraisement rulings each year.

United States v. Mead Corp., 533 U.S. 218, 233 (U.S. 2001) (citations omitted). Presently, the Customs Rulings Online Search System ("CROSS")[6] contains some 173,742 such rulings, issued from 1989 to the present, and by no means includes all rulings issued during that period. It is hardly the case that importers are always satisfied with the rulings they receive, or with Customs' treatment of their goods. Judge Reyna and Newman noted in dissent that the government itself indicated to the courts below that, in calendar year 2009 alone, "36,040 protests were filed . . . [and] [o]f that number, 32,908 protests (approximately 91.3%) were decided . . . within two years)". *Hitachi Home Elecs. (America), Inc.,* 676 F.3d at 1044 (Reyna and Newman, JJ., dissenting); *see Petition* at App. 7a. This left "3,132 undecided protests in 2009 alone. Over time, the undecided protests represent a very large number of imports and a massive sum of contested duties." *Id.* Since deciding a protest can only cost the government money—if allowed—or expose it to suit—if denied—Customs has every incentive to leave protests unresolved, particularly in difficult cases, or cases involving large sums of money.

Despite the obvious interest of the importing community in the clarification and resolution of classification and appraisement issues, the former torrent of protest cases in the customs courts has slowed to a trickle. From the more than 431,000 cases pending on the Customs Court's docket in

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[6] Customs Rulings Online Search System, http://www.rulings.cbp.gov (last visited August 29, 2012).

1969, the number of protest cases filed in the Court of International Trade has fallen to just 149 in 2012 to date.[7] Moreover, given the very short statutes of limitations applicable to Customs actions,[8] many of these cases involve identical plaintiffs and issues, meaning that far fewer than 100 substantive Customs issues have been presented to the court thus far in 2012.

While various environmental factors (e.g., lower duty rates, Free Trade Agreements) may contribute to a reduced protest caseload in the Court of International Trade, the very low number of protest cases submitted to the court—compared with the number of protests filed each year (over 36,000) and protests pending more than two-years (more than 3,000 per calendar year)[9]—provide strong evidence that Customs' election not to decide protests is starving the Court of International Trade of protest cases.[10]

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[7] Of these, some 25 protests were filed by Customs bond sureties, rather than importers. *See e.g.,* U.S. Court of International Trade CM/ECF, http://www.cit.uscourts.gov/CMECF/index.html (last visited August 29, 2012).

[8] *See e.g.,* 28 U.S.C. § 2636.

[9] S*ee Petition* at 4-5, fn. 2.

[10] Protest Cases filed in the Court of International Trade (successor of the Customs Court) have plummeted from over 40,000 per year in 1969, to just 227 in FY 2010—a very low figure, given the size of the American economy. Customs estimates that $2.4 billion and $2.2 billion in assessments were in the protest process for FY 2009 and 2010. *See* U.S. Cust. & Border Prot., *Fiscal Year 2010 Annual Financial Report* (2011),

It is evident that Congress intended Customs to be a way-station, and active participant, in the scheme of protest review, rather than an unresponsive gatekeeper. Yet the decision of the court below allows Customs to act passively as a gatekeeper, preventing importers access to the Court of International Trade in virtually all protest cases, should the agency elect to do so. This cannot be the Congressional intent of Section 1515.

This Court has not previously been called upon to interpret the requirements of § 1515(a). It is of vital importance to the importing community that this Court accept the Petition of Hitachi for *certiorari*, and provide definitive guidance regarding Customs' protest obligations. Not only is the issue of paramount importance to the business community, it has major implications for the continued viability of the Court of International Trade as a final arbiter of Customs protest decisions.

3. There is Substantial Merit to the Position Advocated in Hitachi's Petition for *Certiorari*

Finally, AAEI submits that there is substantial merit to the position advocated in Hitachi's Petition for *certiorari*.

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available at http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/fy2010_report.ctt/fy2010_report.pdf (last visited August 29, 2012).

Section 1515(a) of the Tariff Act, as added by the Customs Courts Act of 1970, *supra*, requires Customs, within two-years, to make one of two mutually exclusive decisions—Customs "shall allow or deny" the protest. Denial must be evidenced by notice to the protestant, advising of the right to challenge the denial in Court. No notice of protest allowance is required, as the reliquidation of entries, and issuance of duty refunds would be the natural consequence of allowance.

What Congress never intended—but which is the effect of the decision in the courts below—is that the two-year limitation in 19 U.S.C. § 1515(a) be construed as advisory or aspirational. While the Federal Circuit majority relied on the well-established rule of statutory construction that, absent a specified consequence, a time limit against the government is to be construed as directory,[11] it failed to discern Congressional intent from the clear language of § 1515(a), which should be the touchstone of statutory construction. Section 1515(a) is not a statute which contains an open-ended command to action (e.g., "the agency shall act on a petition within 90 days . . ."). It rather establishes a two-year time limit within which Customs must "allow or deny" the protest. These two mutually exclusive statutory options command Customs to act within a specified time, and provide only two options—the agency "shall allow or deny." Clearly, the statute calls for action, and does not contemplate

[11] AAEI agrees with Petitioner Hitachi that the Federal Circuit's reliance on *Brock v. Pierce County*, 476 U.S. 253 (1986) is erroneous. *See Petition* at 22-25.

the outcome permitted by the court below—ceaseless inaction, unconstrained by time considerations of any sort.

Hitachi's position that, in the absence of a denial—evidenced by notice of denial with an advisory concerning the right to sue—Section 1515(a) contemplates that the protest be allowed, is solidly grounded in the language of the statute itself and in the undergirding legislative history. When the purpose of a statute is clear, it should not be construed so narrowly and technically as to prevent the effect Congress intended it to have, *United States v. Menasche*, 348 U.S. 528, 538-39 (U.S. 1955) ("It is our duty to give effect, if possible, to every clause and word of a statute."); *Duncan v. Walker*, 533 U.S. 167, 174 (U.S. 2001); nor is resort to general maxims of statutory construction appropriate.

The Federal Circuit majority simply ignored the plain language of § 1515(a) and granted Customs unlimited time to allow, deny, or ignore protests, effectively interpreting the statutory language in § 1515(a) to be superfluous. However, the language is essential in that it continues the longstanding history of limiting the agency's jurisdiction to render such decisions to a two-year period, and commands that one of two mutually exclusive actions be taken within that time. The Federal Circuit's decision also has the effect of establishing Customs as the gatekeeper for access to the specialized Customs court system in protest matters, a holding which turns the agency's traditional role as a conscientious way-station on its head.

The statute contains binding language ("shall allow or deny") which replaced directory language ("may allow or deny"), and the accompanying Senate Committee Report made clear that the provisions were intended to impose "an *obligation* on the Bureau of Customs to act on the merits of all protests within 2 years[.]" *Hitachi Home Elecs., Inc.,* 661 F.3d at 1356; *see Petition,* App. 37a. (emphasis in original) (citing S. Rep. No. 91-576, at 30). As Judge Reyna's dissent aptly notes—

> As this is a case of first impression, the majority opinion in essence rewrites the statute by changing the word "shall" to "may" and eliminating any reference to a two-year deadline.
>
> * * *
>
> Congress provided for a two-year maximum review period, and this court cannot rewrite the statute because Customs' circumstances may have changed since 1970.

Hitachi Home Elecs., Inc., 661 F.3d at 1360-61; *see* Petition, App. 47a.

CONCLUSION

Given that this is a case of first impression, which is of enormous importance to the importing community, and because the issue presented has important implications for the continuing viability of the specialized system of Customs protest review devised by Congress, and refined over nearly a century and a half, this Court should grant the petition for *certiorari*.

New York, New York
August 31, 2012

Respectfully submitted,

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