No. 12-148

In The
Supreme Court of the United States

HITACHI HOME ELECTRONICS (AMERICA), INC.,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* OF THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae*, the Customs and International Trade Bar Association ("CITBA"), was founded in 1917 and incorporated in 1926. Its members represent importers, exporters, and domestic producers in matters involving U.S. customs laws, antidumping and countervailing duty laws, safeguards, export licensing, and other federal laws and regulations that affect imported or exported merchandise or international commerce.

This brief reflects the view of the *amicus curiae* that this Court should grant *certiorari* to address the administrative uncertainty created by the Federal Circuit's decision and its inconsistency with Supreme Court precedent. It is CITBA's intent to address the practical consequences of the decision and bring to the Court's attention the legislative context in which 19 U.S.C. § 1515(a) was passed. The government has consented to CITBA filing an *amicus curiae* brief in this case.[1]

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[1] Pursuant to Supreme Court Rule 37.2, Petitioner and Respondent have consented to the filing of this brief. The consent letters 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit's decision below strikes at the heart of the historical administrative practice and case law regarding an importer's challenge to a decision of U.S. Customs and Border Protection ("CBP" or "Customs"). CITBA agrees with Hitachi Home Electronics (America), Inc. ("Hitachi") and with the dissenting opinion by Circuit Judge Reyna (in which Circuit Judge Newman joined), and fully supports Hitachi's petition for certiorari.

Specifically, the Federal Circuit erroneously determined that mandatory language in the administrative protest statute, 19 U.S.C. § 1515(a), was merely permissive because a consequence was not specified. This, as Circuit Judge Reyna indicated in his dissent, is at odds with Supreme Court decisions, such as *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661, 669 (2007) (explaining when "shall approve" is mandatory) and *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (discussing "shall" versus "may" clauses in a statute).

The legislative history of the Customs Courts Act of 1970, which is the basis for the protest statute, indicates an intent to provide a limit of two years. The appellate court relied on inapposite Supreme Court cases in its interpretation of mandatory statutory language while ignoring the legislative history of the statute in reaching its decision. The proper interpretation of 19 U.S.C. § 1515(a) is that protests not decided by Customs

within the two-year statutory period are legally deemed approved.

Amicus curiae urge this Court to grant *certiorari* to resolve the inconsistencies between the Federal Circuit's decision and the case law and the historical interpretation of the protest statute.

ARGUMENT

(a) The Administrative Protest Deadline Is Mandatory

The questions presented by petitioner arise from a conflict in Supreme Court precedent interpreting mandatory statutory language (i.e., shall) versus precatory language, and the historical administrative practice and case law regarding an importer's challenge to a decision by Customs. The statute at issue, 19 U.S.C. § 1515(a), currently provides in relevant part as follows:

> 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**....

(emphasis added). The majority opinion and the dissent in the appellate court's decision disagreed as to the proper application of Supreme Court decisions regarding mandatory statutory language. In addition, the appellate court's decision is firmly at odds with its predecessor court, the Court of Customs Appeals, which held that the proper consequence of Customs' failure to timely act on an importer's protest was that the protest would be treated as if it had been denied by Customs. This

prior interpretation is consistent with the language and legislative history of the current statute.

The Court of Customs Appeals held that the collector of customs was required to decide a protest within 30 days after its filing by either approving it or transmitting the protest to the Board of General Appraisers. *See United States v. Straus & Sons*, 5 Ct. Cust. App. 147, 149-50, T.D. 34193 (1914). The court stated that

> [a]ny other holding in this matter would simply mean that the collector of customs, by violating his duty and retaining the protest, could deprive the importer of a speedy adjudication of his appeal and impede the Board of General Appraisers in the exercise of the jurisdiction with which it is vested once the collector has failed to recognize the protest as just.

Id. Therefore, according to the Court of Customs Appeals, if the 30 days provided for in the regulation lapsed, without action by the collector, further action by the collector was precluded and the protest fell to the jurisdiction of the Board of General Appraisers. This holding was made despite the lack of a statutory consequence for inaction and in the face of a regulation that did not at the time specify a consequence. By the time Congress was considering what would ultimately become the Customs Courts Act of 1970, which is the basis for 19 U.S.C. § 1515(a), it was well established that the deadline

for Customs action was mandatory rather than directory.

The Federal Circuit's interpretation, however, subverts this administrative precedent, prior case law, the plain meaning of the statute, and the Supreme Court's directive regarding the effect of mandatory statutory language. *See Miller v. French*, 530 U.S. 327, 337 (2000). In essence, the Federal Circuit's new statutory interpretation makes mandatory statutory language merely aspirational.

(b) The Consequence Of A Protest Pending in Excess of Two Years is Automatic Approval

CITBA agrees with Hitachi that, given the context discussed above and the plain language of the current law, a protest not decided within two years is deemed to have been approved. The current law permits only two alternative results. First, within two years from the date the protest was filed, Customs may allow the protest.[2] The only alternative permitted by the statute is that, within the same two years, Customs may deny the protest in whole or in part.[3] Superficially, it appears that Congress did not express either of these alternatives as the default consequence of Customs' failure to timely act on a protest. However, two factors indicate that Congress intended and Customs and the trade bar understood the law to result in the approval of protests by operation of law.

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[2] 19 U.S.C. § 1515(a).

[3] *Id.*

First, it is clear from the discussion during passage of the bill, *infra,* that all the relevant parties understood that Customs had a limited time in which to act on a protest. Testimony before the United States Senate discussed that a protest could only be pending before the agency for two years.[4] Similarly, Customs described the proposed two year period as a maximum time during which the agency could act on the protest. Second, Congress specifically provided that Customs must provided in 19 U.S.C. § 1515(a) that "[n]otice of the denial of any protest shall be mailed in the form and written notice of the denial of a protest while not requiring any action for the allowance of a protest.[5]

The natural consequence of this is that the allowance of a protest happens on the expiration of the mandatory two-year period and that denial of a protest only happens upon the mailing of notice to the protestant.

(c) The Supreme Court Should Resolve the Conflict Between this Case and the Existing Law and Practice in Protest Review Cases.

This Court has long and often held that "shall," creates a mandatory obligation. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26,

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[4] 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.

[5] *Id.*

35 (1998); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (discussing "shall" clauses in a statute); *Nat'l Ass'n of Home Builders*, 551 U.S. at 661, 669 (explaining when "shall approve" is mandatory). These cases were cited by the dissenting opinion. However, the Appellate court's majority opinion determined that the courts should not assume that Congress intended there to be a consequence when the statute does not expressly so state. *Hitachi Home Electronics. v. United* States, 661 F.3d 1343, 1346 (Fed. Cir. 2011). The Federal Circuit cited to *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 63 (1993) and *Brock v. Pierce County*, 476 U.S. 253, 266 (1986), among other decisions for this proposition. However, as discussed below, reliance on this rule of statutory construction is unnecessary given the clear legislative history establishing that the deadline was intended as mandatory.

(d) The Legislative History Is Clear That The Statutory Language Is Mandatory

Many statements made in the hearings before the Senate during consideration of the bill evidence an understanding that the review period, although expanded to two years, would continue as mandatory.[6] For example, on page 84 of the reported hearings, William Ruskelshaus, then Assistant Attorney General, Civil Division, United States Department of Justice stated that "[t]here will be a two year period in which the Bureau of Customs

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[6] *See generally*, 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.

itself has a chance to act on any protest that is filed . . . ."[7] Later, 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."[8] Importantly, Mr. Lehman described the then current state of the law as divesting Customs of jurisdiction to act on the protest after the deadline.[9] Thus, it is apparent that Customs understood the existing law to impose a mandatory deadline and that both Customs and the Department of Justice anticipated that the mandatory deadline would continue under the new law.

Consistent with that understanding, J. Bradley Colburn, President of the Association of the Customs Bar (the predecessor to CITBA), noted in his testimony that the only options available under the pre-1970 law governing the review of protests on tariff classification was for Customs to either approve the protest or to deny it in whole or in part and transmit the record to the Customs Court.[10] There was no option for Customs to hold the protest for additional internal consideration.

Mr. Colburn made further comments on behalf of the Association of the Customs Bar to the Committee on the Judiciary in relation to the

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[7] *Id.* at 84.

[8] *Id.* at 106.

[9] *Id.*

[10] *Id.* at 124.

proposed legislation. Mr. Colburn argued against the expansion of the review period to two years as permitting undue delay in the administrative review process. He testified that "[a]ny review, however, should, it is believed, be made within the earliest possible time in order to apprise the importer of his ultimate duty liability, and bring the controversy to a close."[11] Mr. Colburn further stated that "[t]he 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."[12] Despite his concern over the length of the review period, it is clear that Mr. Colburn (and by extension the Association of the Customs Bar) understood the law to be imposing a mandatory two-year period for protest review. He stated that the proposal created a two-year period "within which the matter may pend before the administrative tribunal."[13] The only context in which the statements make logical sense is one in which the deadline is mandatory. If, as the Federal Circuit held in *Hitachi,* the deadline is directory, there would be no reason to argue for a shorter period because unless the time allotted is mandatory, there is no legal difference between the statutory two-year period, the Association's preferred 180-day period, and the prior 90-day period. Thus, Congress,

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[11] *Id.* at 120.

[12] *Id.* at 121. A similar statement was also made on page 125.

[13] *Id.* at 124.

Customs, the Department of Justice, and the private bar all understood the pre-1970 law to impose a mandatory deadline on Customs. There is no indication in the legislative history that Congress intended the amended law to eliminate a mandatory deadline.

(e) The Correct Resolution of this Matter is Important to the Importing Community of the United States.

The importing community includes the clients represented by members of CITBA. The same policy considerations that motivated Mr. Colburn's statements on behalf of the Association of the Customs Bar in 1969 are applicable today. Specifically, importers require timely certainty as to their liability for duties on imported goods. As the dissenting Federal Circuit judges recognized by quoting CITBA's brief, "[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. Further, the normal liquidation period having now been extended to 314 days[14] means that even the two-year period of uncertainty is actually as much as two years and 10 months of uncertainty.

The appellate court's holding effectively eliminates that limitation and creates an unlimited period of uncertainty. Given that the typical commercial importer will have many similar

[14] 314-Day Liquidation Cycle-Trade Notice, CSMS 97-000727 (Aug. 3, 1997)

transactions and, therefore, repetitive protests, there is the likelihood that this decision may prompt Customs, out of necessity or expediency, to withhold decision. CITBA believes this is an unfair result that is not consistent with the law as written. Additionally, the Federal Circuit's recent decision in *Jensen v. United States*, Ct. No. 11-1319 (Fed. Cir. Aug. 10, 2012), indicates that this is a recurring problem that should be finally resolved by the Supreme Court.

Moreover, the current interpretation of the law is inconsistent with the unremarkable proposition that all words in the statute—including the "shall" in 19 U.S.C. § 1515(a)—must be given meaning whenever possible.[15] While this proposition is at odds with the notion that a court will not impose a consequence where Congress chose not to do so,[16] both rules are merely tools the Court may use to interpret ambiguous text when necessary. As cannons of construction, these rules are not mandatory and must give way where other circumstances evidencing congressional intent overcome their force,[17] which is the case here.

CITBA believes, as did the Association of the Customs Bar, the Department of Justice, and Customs in 1969, that Congress intended to impose

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[15] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

[16] This is the principal basis for the decision in *Hitachi* for which the Federal Circuit relied on *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

[17] *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

a meaningful two-year period of review for protests. There is no reason to doubt that Congress also believed it was creating a meaningful and limited period for the review of a protest. This Court should, therefore, grant Hitachi's petition for certiorari, and correct the appellate court's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AFFIDAVIT OF COMPLIANCE

This Brief of Amicus Curiae of the Customs and International Trade Bar Association in Support of Petitioner has been prepared using:

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12 Point Type Space.

As required by Supreme Court Rule 33.1(h), I certify that the Brief of Amicus Curiae The Ethics Bureau at Yale in Support of Petitioner contains 2,630 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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I am duly authorized under the laws of the District of Columbia to administer oaths.

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AFFIDAVIT OF SERVICE

I, Wanda Cao, of lawful age, being duly sworn, upon my oath state that I did, on the 30th day of August, 2012, hand file with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Brief of Amicus Curiae of the Customs and International Trade Bar Association in Support of Petitioner, and further sent, via UPS Ground Transportation, three (3) copies of said Brief to::

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