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

PETITIONER'S REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Hitachi Home Electronics (America), Inc. is entirely owned by Hitachi America, Ltd., which, in turn, is a wholly-owned subsidiary of Hitachi, Ltd., a public company.

The corporate disclosure statement for the Petitioner was set forth at page ii of the Petition for a Writ of Certiorari and there are no changes to that statement.

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INTRODUCTION

Respondents' interpretation of 19 U.S.C. § 1515(a) turns that statute upside down. The statute repeatedly orders Customs to allow or deny protests within two years, and prohibits Customs from making any exceptions. The Government interprets this to mean that Customs may forever refuse to allow or deny protests. According to the Government, if the protesting party is dissatisfied with Customs' violation of § 1515(a)'s time limitation, its exclusive remedy is to invoke 19 U.S.C. § 1515(b). That subsection does not require Customs to do anything and, after 30 days, it discharges Customs from ever acting on the protest. In sum, the Government's interpretation—and the Federal Circuit's—nullifies 19 U.S.C. § 1515(a).

The Government erroneously argues that § 1515(a) has no consequence for Customs' failure to decide a protest within two years. Opp. 8. But § 1515(a) does have a consequence: if Customs does not expressly deny the protest within two years, Customs has allowed it. Even if there were no consequence expressly stated in the statute, this Court's precedents do not permit the nullification of the statute in this case. This Court has held that when there is no express consequence for the Government's failure to honor a time limit, the Court must rely upon the "contextual and historical indications of what Congress meant to accomplish." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159, n.6 (2003). The Government has failed to address that controlling standard. In enacting § 1515(a) Congress intended to encourage disposition of protests by Customs and discourage the disposition in court. Pet.4-5, 9, 18-22. Under the Government's interpretation, the agency may forever withhold disposition of protests,

leaving the CIT as the only forum for disposition—the exact opposite of the Congressional scheme.

I. Customs And The Federal Circuit Have Nullified 19 U.S.C. § 1515(a).

The Government does not dispute that the two-year limitation to allow or deny protests in § 1515(a) is mandatory. See, e.g., Opp. 8. Nevertheless, it maintains that it is never required to comply with that mandate, and that the importer's exclusive remedy for the failure of Customs to comply with the time limitation, is to invoke the provisions of 19 U.S.C. § 1515(b). Under § 1515(b), Customs is not required to do anything, and by doing nothing for 30 days Customs is forever discharged from acting on the protest, thus completely subverting the two-year limitation imposed by Congress. Instead of the two-year limitation, the Government contends that Customs—at its exclusive and non-reviewable discretion—may forever withhold disposition of the protest.

The Federal Circuit adopted the Government's extreme position. Further, in *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. August 10, 2012), decided after the petition in this case, the Federal Circuit held that mandamus is not available to the protesting party when Customs has not decided the protests within two years. The Federal Circuit reiterated its holding in this case (*Hitachi*) that § 1515(b) was the only available remedy, thus nullifying the expressed two-year limitation in § 1515 (a).[1]

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1. The Federal Circuit was acutely aware, in both *Hitachi* and *Jensen,* that its holdings nullified § 1515(a). See, e.g., the recording

This Court has never permitted such a nullification of a statute. Nor has it ever countenanced the abrogation of the rule of law in favor of the Government's limiting principle in this case: the caprice of Customs. Unless this Court intervenes, Customs may take two years, or ten years, or more, to allow or deny a protest—or it may never decide the protest. The choice, according to the Government and the Federal Circuit, is exclusively Customs'.

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of oral argument in *Jensen,* http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2011-1319.mp3, at 14:18-15:33:

> The Court: "Your position seems to be that the two years is unenforceable—if it is something which Customs has to pay any attention to at all—and that instead, the only way to get an expedited disposition is to go through [§1515](b) so that (b) is not an alternative, it's the only remedy for someone who wants to get a disposition at some point before Customs feels it's ready to move, even if Customs goes for five years…
> …
>
> "Your position seems to be that you [Customs] can take ten years. Is that correct?"…
>
> "If we were here ten years after the fact, would you be making the same argument?"
>
> The Government: "Certainly, Your Honor."
>
> The Court: "OK. So Customs can take ten years. So your answer is "yes" to my question, right?"
>
> The Government: "Yes, to the extent that Jensen chooses not to invoke 1515(b)."

II. If Customs Does Not Expressly Deny A Protest within Two Years, It Has Allowed It.

The Government's argument rests on the erroneous proposition that the statute does not contain a consequence for failure to decide a protest within two years. Opp. 6, 8-13. But § 1515(a) plainly provides for such a consequence: the protest is allowed. The text of § 1515(a) expressly requires Customs either to allow or expressly deny the protest within two years. Pursuant to the statute, Customs need not take any express action to "allow" the protest, but must expressly "deny" the protest by three forms of notice (the denial itself, the reasons for the denial, and the right to appeal the denial to the CIT). Congress deliberately created the distinction between expressed actions which are required to deny a protest, and the absence of action which results in an allowance: Congress twice rejected any requirement for express action to "allow" the protest.[2] Indeed, the word Congress chose to utilize for the first time in history for approval of a protest, "allow," means to permit by inaction or negligence. Pet. 16, 6a-7a (Newman and Reyna, JJ., dissenting), and 30a, 39a, n.3, 42a-43a (Reyna, J., dissenting). Customs has only two options with respect to the protest: it must either allow the protest or expressly deny it within two years,[3] and if it has not expressly denied the protest within two years, it has allowed it.

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2. See Sen. Rep. 91-576, 91st Cong., 1st Sess. (1969) ("Sen. Rep.") at 30 and H.R. Rep. 91-1067, 91st Cong., 2nd Sess. (1970) 29-30, and Pet. 16-17.

3. Subsection 1515(a) "requires the Department of the Treasury *to allow a protest or expressly deny it* in whole or part within two years from the date that the protest was filed." Sen. Rep. at 4, emphasis added.

The Government erroneously argues that the statute requires action in order for Customs to "allow" a protest. Opp. 6, 11-12. However, the "action" the Government claims is required—refund of duties—occurs *after* the protest has been allowed.[4] It is the consequence of allowance, not the allowance itself. Even in cases of expressed allowances (which are called "approvals") by Customs, the allowance (or approval) is effected by a check mark on a Customs form, and the amount of duty refunded is never determined or "found" until after the protest is allowed. See *Customs Protest Form CF19*, Box 18. http://forms.cbp.gov/pdf/CBP_Form_19.pdf and J.A. 366. Thus, the Government's position has no basis in fact or law.

The Government also contends that there is no consequence in § 1515(a) because its consequence does not utilize the same language as the "consequence" in § 1515(b). Opp. 6, 9. But "formalistic rules" do not govern this Court's analysis in these cases. *Peabody Coal*, at 159, n.6. The consequence in § 1515(a) is different than the supposed "consequence" in § 1515(b) because subsection 1515(a) is a mandatory provision (Customs "shall review the protest and shall allow or deny such protest"), whereas subsection 1515(b) is not even directory or precatory. Subsection (b) does not require Customs to do anything at all; and if it does nothing for 30 days, Customs is forever discharged from acting on the protest. This is hardly a "consequence" for Customs' failure to comply with a statute. Subsection 1515(a), by contrast, imposes a real consequence: if Customs does not expressly deny

4. "*Thereafter*, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded…" 19 U.S.C. §1515(a), emphasis supplied.

the protest within two years, it has allowed it. It is little wonder that the two "consequences" are phrased differently.[5]

Even if there were no express consequence in the statute, it is mandatory and Customs is compelled to comply. Contrary to the Government's arguments, Opp. 8-13, the standard to be utilized when the statute directs the agency to act within a certain time period is not whether there is a remedy for non-compliance. *Brock v. Pierce County*, 476 U.S. 253, 262, n.9 (1986). ("We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless the consequence is stated explicitly in the statute.") Rather, courts must examine and determine the "contextual and historical indications of what Congress meant to accomplish." *Peabody Coal, supra.*

Under that controlling standard, the Government's argument must fail. The Government claims that the only remedy for non-compliance is for the protesting party to invoke § 1515(b), and forever discharge Customs from any obligation to dispose of the protest. This destroys the

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5. The Government also cites 19 U.S.C. §§ 1515(c) and 1504, as containing the exclusive form of consequence. Neither of those provisions requires Customs to do anything, and thus neither involves a "consequence" for violation of a statutory mandate. (Subsection 1515(c), enacted 23 years after § 1515(a), provides that Customs "may review" the denial of a protest, and "may set aside" the denial; section 1504 does not require any Customs action, but merely states that the importer's duty declarations at entry are finalized ("liquidated") at certain times unless intervening action is taken by Customs.)

structure and purpose of the statute unanimously enacted by Congress. Pet.4-5, 9, 18-22. The Federal Circuit's decision institutionalizes this result for every protest filed and to be filed. Under its holding, there is no legal obligation for Customs ever to allow or deny a protest; and unless this Court intervenes, Customs will continue to be capricious in determining when and whether to dispose of protests.

The Petition demonstrates the many ways in which this case is different than those relied upon by the Government, and which, under *Peabody Coal's* standard, compel a different result. Pet. 22-25, especially 24-25. The decision in *Jensen* highlights two additional differences. First, the cases relied upon by the Government were premised on the proposition that as long as mandamus was available to force the agency to comply with the statute, the Court would ordinarily not impose a sanction. See, *Brock* at 260, n.7. *Jensen* has now established that mandamus is never a remedy for violations of § 1515(a); and that the importer has no choice but to abandon its administrative protest. As construed by the Federal Circuit, § 1515(b) is not a remedy to force Customs to act, but an incentive for Customs never to act.

Second, the Government contends that when there is no consequence in the statute, "Congress intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory duties," quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 64-65 (1993), Opp. 8. Here, it is not employees who fail to discharge their

statutory duties; Customs refuses to enforce the two-year limitation as a matter of "practice" and "policy."[6]

III. No Statute or Regulation Justifies or Excuses Customs' Non-Compliance in this Case.

The Government asserts that 19 C.F.R. §§ 177.7(b) and 174.25(b)(2)(ii) justify its violation of § 1515(a). Opp. 3-4, 15. This argument has no merit for several reasons. First, § 1515(a) explicitly prohibits regulations extending the two-year limitation, so even if the regulations permit extensions of the two-year limitation, they would be invalid. Second, the regulations do not permit extensions. Section 177.7(b) does not apply to protests, but only to "ruling" letters. "Protests" and "Ruling" letters are separate Customs activities occurring at opposite ends of the import process, and are governed by two separate Parts in the Customs regulations (Part 174, Protests; Part 177, Rulings). Customs issues "ruling" letters to prospective importers of merchandise *only before an actual importation* has occurred. By contrast, protests involve completed transactions, and may be filed

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6. See, e.g., the Government's statements in *Recording of Oral Argument* in *Jensen, supra,* at 19:52-20:02 (setting forth the "practice" and "policy"); brief of the Government on appeal at 21 in this case (Congress never "intended to place a burden on Customs to monitor the two-year period for each and every protest filed" and Customs claims that it has never bothered to do so); recording of oral argument on appeal in this case, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2010-1345.mp3 at 19:43-19:55 (Customs does not comply with the time limitation for protests subject to further review); Opp. 15 (protests subject to further review and others are not disposed within two years); and n.1, *supra*.

only after the importation process is completed (i.e., after importation, assessment and payment of duties, and liquidation).[7] Customs may not issue "rulings" to prospective importers if a similar product is subject to suit, but it must allow or deny a protest even if there is pending litigation on the issue.

The Government's reliance upon § 174.25(b)(2)(ii), Opp. 3-4, 15, is similarly misplaced. That provision simply prohibits importers from asking Customs to further review their protests if the issue is in court or has already been decided against the importer. It does not permit Customs to refuse to allow or deny the protest. Likewise 19 U.S.C. § 1515(c) prohibits Customs from taking action on a protest once *that protest* is in Court; it does not prohibit action on other protests (even by the same importer on the same issue) which have not already gone to court.

Finally, the Government claims that Customs prepared a "draft response" to Hitachi's protest that it did not issue because Hitachi filed a prior action in court pursuant to 28 U.S.C. § 1581(a) . Opp. 3. That self-serving assertion is not supported by any declaration in the record and was made only in the Governments' briefs below. In any event, Hitachi filed its first action two years and 177

7. The regulations forbid protests, 19 C.F.R. § 177.0, and "completed transactions," §177.7(a), from being subject to rulings. "Completed transactions" include all liquidated entries, § 177.1(a)(2)(ii). All of Hitachi's ten protests in this case involve only liquidated entries, and no protest was subject to a court action until it was more than two years old. See n.9, *infra*.

days after four of its ten protests in this case were filed.[8] A supposed "draft" prepared 2 years and 177 days after Hitachi filed its protests does not excuse Customs' failure to allow or deny those protest within two years.[9]

IV. The Problems Raised By This Case Will Multiply Unless This Court Intervenes.

The Government suggests that the issue is unimportant because this case is the first time it has been examined by the Federal Circuit. Opp. 14-15. The time it has taken this issue to reach the Federal Circuit is irrelevant. Prior to this case, the Government has never publicly taken the position that it is not bound by the two-year limitation in § 1515(a)[10] or that the pendency of a lawsuit precludes the

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8. There are ten protests subject to this case (See J.A. 25, and *First Am. Com.*, ¶¶3-7, 10-13, 17-18, J.A. 123-128, 147-224), not one, as suggested by the Government, Opp. 4,15.

9. The statute of limitations to bring a suit under 28 U.S.C. § 1581(a)—challenging the *denial* of a protest—is 180 days. 28 U.S.C. § 2636(a), Pet. App. 79a. Hitachi was compelled to file such actions to protect its rights to refunds pursuant to two CIT decisions. *China Diesel Imports, Inc.* v. *United States*, 17 CIT 498, 499 (CIT 1993) (protests not acted on within time-period are deemed denied) (holding) and *Tikal Distrib. Corp. v. United States*, 970 F. Supp. 1056, 1064 (CIT 1997) (dicta). Hitachi was required to plead *denial* in those cases, and the Government's suggestions of Hitachi's inconsistency, Opp. 4, 11, n.2, are therefore misplaced.

10. Contrast the Government's position in *Knickerbocker Liquors Corp. v. United States,* 432 F. Supp. 1347, 1351 (Cust. Ct. 1977). ("The defendant submits that…customs has the affirmative obligation by statute to allow or deny all protests within a period of two years of their filing.")

allowance or denial of a protest. The Government began making these assertions after 2007 in *Hitachi, Jensen*, and the *Samsung* cases cited at Opp. 3-4. With the Federal Circuit's decision in this case, and its exclusive jurisdiction over customs cases, there is no reason that Customs should ever allow or deny a protest. Furthermore, the Government's contention that it has procedures in place to resolve protests within two years, Opp. 15-16, is not supported by fact. Even, if true, it provides no relief to petitioner or any remedy to the damage done by the Federal Circuit, especially when Customs does not utilize those procedures, and the procedures themselves do not require the disposition of protests within two years—or ever.[11]

11. The Government's suggestion, Opp. 13, n.3, that the question presented may not fairly encompass jurisdiction is without merit. The entire Petition challenges the Federal Circuit's holding that there was no subject matter jurisdiction in this case. Consequently, the question presented fairly encompasses jurisdiction. See *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980), *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6, and Gressman, et al., *Supreme Court Practice*, 456 ff., Ch. 6.25(f) (Ninth ed. 2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

New York, New York
November 12, 2012

Respectfully submitted,

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