No. 05-1037

In the Supreme Court of the United States

XEROX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an importer may "protest" the Bureau of Customs and Border Protection's liquidation of the importer's goods as entered, rather than at the preferential rate under the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Pub. L. No. 103-182, 107 Stat. 2057, when those goods were ineligible for such preferential treatment at the time of entry into the United States (as well as at the time of liquidation) because of the importer's failure to supply the necessary documentation, and when the statutory period for making a claim under the NAFTA Implementation Act had expired by the time the importer filed its protest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 423 F.3d 1356. The opinion of the Court of International Trade (Pet. App. 22a-28a) is not published in the Federal Supplement, but is reprinted in 38 Cust. B. & Dec. 54, and is available at 2004 WL 2272221.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2005. A petition for rehearing was denied on December 27, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the period from January 19 to March 2, 1998, petitioner Xerox Corporation made 22 entries of imported merchandise. Pet. App. 5a. At the time of entry, petitioner declared that the merchandise was subject to duty at the Harmonized Tariff Schedule of the United States (HTSUS) Column 1 Normal Trade Relations rate for photocopiers (HTSUS 9009.12) and wire harnesses (HTSUS 8544.41). *Ibid*. Petitioner made no claim at that time that the merchandise was eligible for duty-free treatment under the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Pub. L. No. 103-182, 107 Stat. 2057. In order to claim duty-free status under the NAFTA Implementation Act, an importer must have in its possession "a complete and properly executed original Certificate of Origin, or copy thereof" that covers the good, 19 C.F.R. 181.21(a), and must submit, based on that certificate, a "written declaration that the good qualifies for such treatment," *ibid*. Petitioner did not possess the necessary certificates of origin at the time the merchandise entered the United States. Pet. App. 5a.

On December 4, 11, 18, and 28, 1998, and January 4, 8, and 15, 1999, the United States Customs Service (Customs)[1] liquidated the entries in accordance with the rates declared at entry by petitioner. Pet. App. 5a. At the time of liquidation, petitioner still had not filed the declarations that are required in order for goods to be entitled to duty-free status under the NAFTA Implementation Act. *Ibid*. It is undisputed that the rates at which Customs liquidated the merchandise were correct,

[1] The Customs Service is now the Bureau of Customs and Border Protection.

in the absence of a properly substantiated claim under the NAFTA Implementation Act. *Id.* at 28a.

At the time Customs liquidated petitioner's entries, less than a year had passed from the time when the goods entered, and petitioner therefore still had a statutory right to make a claim for preferential treatment under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 289. Pursuant to NAFTA's implementing legislation, an importer that does not have the requisite documentation to support a claim for duty-free treatment at the time of entry has up to a year from the date of importation to make that claim, even though the merchandise may already have been liquidated. Article 502(3) of NAFTA provides:

> [e]ach Party shall provide that, where a good would have qualified as an originating good when it was imported into the territory of the Party but no claim for preferential tariff treatment was made at that time, the importer of the good may, *no later than one year after the date on which the good was imported*, apply for a refund of any excess duties paid as the result of the good not having been accorded preferential tariff treatment.

32 I.L.M. at 358 (emphasis added). Congress implemented NAFTA Article 502(3) by adopting 19 U.S.C. 1520(d), which provides that an importer who failed to claim preferential status under NAFTA at the time of entry may obtain a refund "if the importer, within 1 year after the date of importation, files, in accordance with [Customs'] regulations, a claim that includes * * * copies of all applicable NAFTA Certificates of Origin" and other required documentation.

On March 2, 1999, petitioner filed, pursuant to 19 U.S.C. 1514(a), an administrative "protest" of the duty rates at which its merchandise had been liquidated. Pet. App. 5a. In its protest, petitioner asserted for the first time that the merchandise was entitled to a NAFTA preference, and petitioner attached to its protest the documentation that would be required to establish a claim for preferential treatment under 19 U.S.C. 1520(d) and 19 C.F.R. 181.21(a). Pet. App. 5a.

Because petitioner's submission was made within one year of importation with respect to only one of the 22 entries, Customs granted petitioner's NAFTA claim as to that entry only and denied, as untimely under 19 U.S.C. 1520(d), the claim for a NAFTA preference with respect to the other 21 entries. Pet. App. 5a-6a.

2. Petitioner filed an action in the United States Court of International Trade (CIT) seeking a judicial determination that the denial of its protest was improper and that its merchandise was entitled to duty-free entry under NAFTA. The CIT dismissed for lack of subject matter jurisdiction under 28 U.S.C. 1581(a). Pet. App. 22a-28a.

The CIT reasoned that, under the applicable statutory and regulatory scheme, the "burden is on the importer to claim and substantiate its entitlement to the NAFTA preference." Pet. App. 27a. The court quoted 19 C.F.R. 181.21(a), which requires an importer to "make a written declaration that the good qualifies for [preferential NAFTA] treatment * * * based on a complete and properly executed original Certificate of Origin * * * in the possession of the importer." Pet. App. 27a. The CIT found that, because petitioner had not made and substantiated a timely NAFTA claim, "the issue of whether the subject merchandise was eligible

for the NAFTA preference was simply never before Customs." *Id.* at 28a. Because petitioner had not disputed "that a protest under § 1514(a) is predicated on a decision by Customs," the court held that petitioner's protest was invalid in light of the absence of a decision by Customs on the NAFTA issue. The court therefore lacked jurisdiction under 28 U.S.C. 1581(a). Pet. App. 27a-28a.

3. The court of appeals affirmed. Pet. App. 3a-21a. The court of appeals explained that "[a]n importer's right to preferential tariff treatment for goods qualifying under the NAFTA rules of origin does not automatically vest upon entry." *Id.* at 11a. Rather, "[a]n importer seeking preferential treatment is instead required to make a written declaration that the goods qualify for NAFTA treatment." *Ibid.* After reviewing the text of NAFTA Article 502(3), the statutory provision that implements it (19 U.S.C. 1520(d)), and the implementing regulation (19 C.F.R. 181.31), the court of appeals concluded that the "mandate of Article 502(3) of NAFTA and of the implementing regulations is clear; the time period provided by law for raising in the first instance a claim for preferential treatment under NAFTA expires one year from entry of the subject goods." Pet. App. 15a.

The court of appeals rejected petitioner's contention that Customs' decision to liquidate petitioner's merchandise under the Normal Trade Relations rate claimed at entry necessarily encompassed an implied decision to deny preferential NAFTA treatment, and therefore gave rise to a "decision" that could be the subject of a protest by petitioner under 19 U.S.C. 1514(a). The court of appeals noted that "Customs at no time expressly considered the merits of NAFTA eligibility, nor could it

without a valid claim by [petitioner] for such eligibility." Pet. App. 16a. As the court explained: "[t]here simply is no plausible basis for attributing to Customs a decision denying [petitioner] a claim that did not exist" at the time Customs liquidated the entries and "could not exist at the time [petitioner] purported to raise it, *i.e.*, more than one year after entry." *Ibid.*

The court rejected petitioner's argument that the CIT's ruling had impermissibly transformed 19 U.S.C. 1520(d) into a limitation on the court's jurisdiction under 28 U.S.C. 1581(a). The court of appeals explained that its "interpretation of 19 U.S.C. § 1520(d) * * * does not lessen an importer's right to protest a decision by Customs to deny the importer NAFTA treatment, so long as the importer was entitled to that treatment in the first place." Pet. App. 19a. Petitioner, however, had "relinquished its entitlement when it failed to make a claim within one year of entry." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals properly concluded (Pet. App. 11a-12a) that imported goods are entitled to preferential tariff treatment under NAFTA only if the importer makes an affirmative claim to a NAFTA preference. The applicable statutory and regulatory provisions permit an importer either to make a claim for NAFTA treatment at the time of entry or to assert a post-importation claim. See 19 U.S.C. 1520(d); 19 C.F.R. 181.21 (NAFTA claim at entry); 19 C.F.R. 181.31, 181.32(b), and 181.33(c) (post-importation NAFTA claim).

The claim must be supported by the required documentation, 19 C.F.R. 181.21 and 181.32, and, if made post-importation, must be made "within 1 year of the date of importation." 19 U.S.C. 1520(d); 19 C.F.R. 181.31.

Petitioner contends (Pet. 22) that 19 U.S.C. 1520(d) merely provides an importer with a "*minimum*" of one year to assert a NAFTA claim, and that it does not limit an importer's right to make a NAFTA claim in the context of a timely filed protest under 19 U.S.C. 1514(a). Notably, however, the provision of NAFTA that Section 1520(d) implements states the one-year period as an outer deadline for submitting a claim in the first instance. Article 502(3) provides that, if no claim for preferential tariff treatment was made at the time of importation, "the importer of the good may, *no later than one year after the date on which the good was imported*, apply for a refund of any excess duties paid as the result of the good not having been accorded preferential tariff treatment." 32 I.L.M. at 358 (emphasis added). Section 1520(d) similarly specifies that an importer who failed to make a NAFTA claim at entry may subsequently file the documentation required to make such a claim, but only "within 1 year after the date of importation." 19 U.S.C. 1520(d).

Petitioner construes the introductory language of Section 1520(d), which provides that the required documentation may be provided post-liquidation "[n]otwithstanding the fact that a valid protest was not filed," as reflecting Congress's intent that importers be permitted to assert a NAFTA preference claim in the first instance in a Section 1514(a) protest, even beyond the one-year mark established by Section 1520(d). Pet. 20. Contrary to petitioner's interpretation, by expressly exempting claims under Section 1520(d) from the finality noted in

Section 1514, Congress simply ensured that an importer could make a NAFTA claim up to one year after importation, even if its entries were liquidated quickly and would, under normal operation of Section 1514(a), become "final" less than a year after importation.

Petitioner maintains (Pet. 20, 22-23) that Section 1520(d) provides *only* a post-liquidation remedy and that an importer who is unable to supply the necessary documentation at entry, but whose merchandise is liquidated more than a year after entry, will never have an opportunity to avail itself of Section 1520(d). Petitioner ignores the applicable regulations, however, which specifically permit an importer to assert a claim for preferential NAFTA treatment subsequent to entry, but before liquidation. See 19 U.S.C. 181.33(c)(1) (if "the entry covering the good" for which a post-importation NAFTA claim is submitted "has not been liquidated, the port director shall take into account the claim for refund * * * in connection with the liquidation of the entry"). Thus, it is clear that an importer may assert its claim for preferential NAFTA treatment (1) at entry, 19 C.F.R. 181.21, (2) post-entry, but before liquidation, 19 C.F.R. 181.33(c)(1), or (3) post-liquidation, 19 C.F.R. 181.33(c)(2), but, in any event, the claim must be made before the one-year anniversary date from importation, 19 U.S.C. 1520(d); 19 C.F.R. 181.31.

The conclusion that Congress intended there to be a one-year limit on initial claims for preferential NAFTA treatment is further supported by the legislative history accompanying the 1999 amendment to 19 U.S.C. 1514(a)(7). In 1999, Congress added to the list of protestable decisions appearing in Section 1514(a) "the refusal to reliquidate an entry under subsection * * * (d)

of section 1520 of this title." 19 U.S.C. 1514(a)(7).[2] Although that amendment post-dates the entries in issue here, it is significant that, in the course of providing for protest of a decision not to reliquidate under Section 1520(d), Congress noted both that the ability to claim a NAFTA preference expires one year after importation and Customs' position that liquidation of an entry made without a NAFTA claim is not subject to protest under Section 1514(a) without a timely request for reliquidation under Section 1520(d). See S. Rep. No. 2, 106th Cong., 1st Sess. 61-62 (1999).[3] That amendment, and its

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[2] Section 1514(a)(7) had, both before and after the 1999 amendment, allowed protest of the refusal to reliquidate under 19 U.S.C. 1520(c). Section 1520(c) was repealed on December 3, 2004, and 19 U.S.C. 1514(a)(7) was correspondingly amended. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, §§ 2103(1)(c), 2105, 118 Stat. 2598.

[3] The Senate report noted that "19 U.S.C. 1520(d)[] outlines the statutory authority for making a claim for a NAFTA preference * * * after the liquidation of the entry within one year of the date of importation." S. Rep. No. 2, *supra*, at 61. The report also summarized the "*[p]resent law*" regarding Section 1520(d) as follows:

> If the entry is liquidated "as entered" before receiving a certificate of origin, importers generally request reliquidation of the entry under section [1520(d)] in order to make the NAFTA claim. However, if the request to reliquidate is refused by Customs, there is no mechanism to receive further review of this claim. Section [1514] currently does not allow a protest of Customs [sic] refusal to liquidate an entry under section [1520(d)]. In addition, Customs has taken the position that a Customs liquidation "as entered" of an entry that is made by an importer without a NAFTA claim is not protestable under section [1514] and that such NAFTA claims must be filed under section [1520(d)] * * * within one year from the date of entry.

Ibid. Having recognized Customs' position that an "as entered" liquidation is not protestable, and that the importer must seek

legislative history, reinforces the conclusion that Congress intended an importer to be able to "protest" the fact that its merchandise was not afforded the benefit of treatment under NAFTA only if a claim for such treatment had been made before liquidation or subsequent to liquidation in conformity with 19 U.S.C. 1520(d).

It is undisputed that petitioner did not raise the NAFTA eligibility issue either at entry or within one year following entry. As the court of appeals correctly determined, therefore, any NAFTA preference to which petitioner might otherwise have been entitled simply ceased to exist by operation of law, and there was no NAFTA decision by Customs that could be challenged by means of a protest.

2. In its attempt to evade the one-year filing requirement of Section 1520(d), petitioner maintains (Pet. 20-22) that an importer has an independent right to file a "protest" under 19 U.S.C. 1514(a) to challenge the fact that Customs did not afford the importer a preference for which it never submitted the required claim. That contention stretches the term "protest" beyond any reasonable interpretation.

Petitioner could not "protest" the fact that Customs did not grant preferential NAFTA treatment because petitioner never asked Customs to grant such treatment

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reliquidation under Section 1520(d), the denial of which was also not protestable under Section 1514(a), the only change that Congress made was to provide statutory authority to protest the denial of a request to reliquidate under Section 1520(d). See *id.* at 62 (stating that the amendment "would amend section [1514(a)] * * * to ensure that if an importer is denied a request to reliquidate an entry under section [1520(d)] in order to make a NAFTA claim, there is a method for obtaining further review of Customs action on that claim").

at a time when Customs could have considered the request. As noted above, see p. 2, *supra*, merchandise is entitled to preferential treatment under NAFTA only if the importer makes a claim for such treatment and supplies the requisite documentation. Petitioner had not made any NAFTA claim at the time of liquidation, nor had it provided the necessary documentation. Because no NAFTA claim had been submitted to Customs, it could not have denied such a claim, and the court of appeals correctly held that there was no denial "decision" for petitioner to "protest" under Section 1514(a). Pet. App. 16a.

Petitioner attempts to avoid the plain logic of the court of appeals' decision by contending (Pet. 12-14) that Customs was necessarily required to "fix the final classification and rate of duty applicable" to its merchandise, 19 U.S.C. 1500(b), and that petitioner was entitled, under 19 U.S.C. 1514(a)(2), to protest "the classification and rate and amount of duties chargeable." According to petitioner (Pet. 14-17), the liquidation of its entries at the entered rate implicitly incorporated a "preliminary finding[] that the goods did not qualify for NAFTA preferential rates" and, because all preliminary decisions or findings "merge" into the liquidation, the decision not to grant a NAFTA preference was protestable.[4]

[4] Petitioner cites (Pet. 14-15), but does not discuss in any substantive way, several judicial decisions that it alleges were contravened by the decision of the court of appeals. *Ibid*. (citing *United States* v. *Utex Int'l, Inc.*, 857 F.2d 1408 (Fed. Cir. 1988); *Bob Stone Cordage Co.* v. *United States*, 51 C.C.P.A. 60 (1964); *United States* v. *B. Holman, Inc.*, 29 C.C.P.A. 3 (1941)). While each of those cases does state that decisions and findings by Customs that occur prior to liquidation merge into the liquidation decision, to the extent that those cases refer to any particular preliminary decisions or findings, they involved decisions or findings that actually did or

To the extent petitioner suggests that Customs makes a determination, in connection with every liquidation, whether the goods would be entitled to a NAFTA preference if one had been claimed, there is nothing in the record to support such a claim, and the court of appeals properly rejected it. Pet. App. 16a. If, on the other hand, petitioner is simply arguing that a Customs officer, in the process of liquidating, determines whether a NAFTA claim has been asserted, such a fact (even if accurate) would be of no assistance to petitioner, because petitioner does not dispute that, at the time of liquidation, it had *not* asserted a NAFTA claim. Plainly, petitioner cannot "protest" a finding that it does not dispute.

Contrary to petitioner's suggestion (Pet. 17-18), this case does not present the question whether the Court of International Trade can ever assert subject matter jurisdiction under 28 U.S.C. 1581(a) over protest cases raising claims that were not asserted prior to the liquidation of a customs entry. Indeed, the court of appeals specifically disclaimed so broad a holding, stating that its decision did "not suggest that liquidation by Customs of goods 'as entered' can never give rise to a protestable

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could exist prior to fixing the rate and amount of duties chargeable at liquidation. See *Utex Int'l*, 857 F.2d at 1409-1412 (liquidation that had become final pursuant to 19 U.S.C. 1514(a) was final as to admissibility and as to surety's liability on bond as well); *Bob Stone Cordage*, 51 C.C.P.A. at 66 (claims that the rate and amount of duties charged at liquidation were incorrect because Customs had misclassified the imported merchandise); *B. Holman*, 29 C.C.P.A. at 6-7 (protests should have been dismissed as premature because the entries had not yet been liquidated). The cited cases do not support the proposition that decisions or findings that Customs did not and could not have made prior to liquidation merge into the liquidation.

decision." Pet. App. 16a. Rather, this case concerns a particular context in which, by statute, the right at issue arises *only* if the importer first makes an *affirmative* claim for the preferential treatment. In that context, if the importer fails to make the claim, the importer cannot "protest" the fact that Customs did not afford the importer a treatment that it has not requested and to which it is therefore not entitled. Here, petitioner made no NAFTA claim at entry, nor post-importation before liquidation, nor post-liquidation before expiration of the one-year period. Because there was no timely claim for NAFTA treatment, there was no decision by Customs whether to grant such treatment. Accordingly, there is no decision to "protest."

Contrary to petitioner's dire prediction (Pet. 18), the court of appeals' decision will not "have a major impact on importers' access to the CIT," as the decision merely confirms that potential NAFTA claims expire one year after importation. Petitioner points to one other case in which the court of appeals applied its decision below to bar another importer's untimely NAFTA claim. Pet. 7 (citing *Corrpro Cos.* v. *United States*, 433 F.3d 1360 (Fed. Cir. 2006)). As petitioner concedes (Pet. 7 n.6), however, and as the court of appeals itself recognized (Pet. App. 17a-18a), the facts of this case are distinguishable from those in *Corrpro*. In any event, petitioner greatly overstates the impact of the decision below, which is limited to the particular contest of NAFTA claims subject to the one-year filing requirement of Section 1520(d), and has no obvious application in the typical "protest" case involving other statutory provisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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