No.

# In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

*v.*

HAGGAR APPAREL COMPANY

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page



Statutes and regulations:

Miscellaneous—Continued: Page

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 127 F.3d 1460. The opinion of the Court of International Trade (App., *infra*, 7a-24a) is reported at 938 F. Supp. 868.

### JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A petition for rehearing was denied on February 20, 1998 (App., *infra*, 5a-6a). On May 7, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 20,

1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. 2643(b) provides:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

2. General Headnote 11 of the Tariff Schedules of the United States, 19 U.S.C. 1202, provides:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

3. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, provides that, with respect to:

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in con-

dition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States * * * .

4. 19 C.F.R. 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported material;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

**STATEMENT**

1. Haggar Apparel Company brought this suit in the United States Court of International Trade to recover customs duties paid under protest in 1988 and 1989. The duties were paid by Haggar in connection with the importation of slacks that had been assembled in Mexico from components manufactured in the United States. While in Mexico, the garments had also been subjected to a "permapressing" operation that involved the pressing and oven baking of components to which a chemical resin had been applied. This process is designed to make the garment wrinkle-free and thus to eliminate the need for ironing after laundering (App., *infra*, 8a-9a). As the trial court stated, "The most important performance characteristics of [the Haggar] pants are crease retention and seam and surface flatness; the pants are 'wash and wear' garments" (*id.* at 8a).

Under Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202,

an importer is entitled to a partial duty allowance for:[1]

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which * * * (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

Pursuant to authority conferred on the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the schedules" (19 U.S.C. 1202, General Headnote 11), the Treasury has specified by regulation that "[a]ny significant process, operation, or treatment other than assembly whose primary purpose is the * * * physical or chemical improvement of a component * * * shall not be regarded as incidental to the assembly" and therefore does not qualify for the duty exemption. 19 C.F.R. 10.16(c). Under this standard, the duty exemption is specifically not available when any "[c]hemical treatment" has been applied to "articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).

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[1] Pursuant to 19 U.S.C. 3004, the Harmonized Tariff Schedule of the United States (HTSUS) was implemented into law on January 1, 1989. The HTSUS supplanted the former provisions of the Tariff Schedule of the United States (TSUS) on that date. Item 807.00 of TSUS, which applied prior to January 1, 1989, is identical to Subheading 9802.00.80 of HTSUS. References in this petition to Subheading 9802.00.80 of HTSUS thus apply equally to Item 807.00 of TSUS.

The "permapressing" that Haggar applied to the garments in Mexico thus disqualifed them from duty-free reentry under the direct text of the regulations. Haggar paid the required duties and then brought this refund suit in the United States Court of International Trade (App., *infra*, 7a, 9a).

2. The United States Court of International Trade has exclusive jurisdiction to review protests from Customs Service determinations. 28 U.S.C. 1581(a). The court rejected the Customs Service determination in this case and directed that the duties be refunded to Haggar (App., *infra*, 7a-24a, 25a-26a).

a. The Court of International Trade rejected the government's position that 19 C.F.R. 10.16(c)(4) controls this case. The court stated that the regulation is inconsistent with the "plain language" of the statute, which "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly" (App., *infra*, 23a). The court rejected the agency's assertion that its regulatory interpretions of the Tariff Act are entitled to deference under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The court stated that the Federal Circuit has "declin[ed] to apply *Chevron* deference to Customs in routine classification decisions" (App., *infra*, 23a, citing, *e.g.*, *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 (Fed. Cir. 1995)) and has even "ignored the regulation altogether" (App., *infra*, 23a, citing *Chrysler Corp.* v. *United States*, No. 95-1366, 1996 WL 132263, at *2 (Fed. Cir. Mar. 22, 1996); *General Motors*

*Corp.* v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992); *United States* v. *Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981); *United States* v. *Mast*, 668 F.2d 501, 506 (C.C.P.A. 1981)).

The court explained that it would not give deference to the agency's regulations under the Tariff Act because 28 U.S.C. 2643(b) directs the Court of International Trade "to reach the correct decision" (*ibid.*) in the cases that come before it. The court stated that this "statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to the Treasury regulations issued under the Tariff Act (App., *infra*, 23a-24a, quoting *Anval Nyby Powder AB* v. *United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996)).

b. Having thus rejected any role for the agency's regulations in interpreting the highly detailed classifications contained in the Tariff Act, the court found it necessary to apply a set of judicially created factors to determine *de novo* whether Haggar's permapressing operation is "incidental to the assembly process" and therefore within the scope of the duty exemption provided in Subheading 9802.00.80 of the Harmonized Tariff Schedule. As a source for such judicially-created factors, the court looked to the decision of the Federal Circuit in *United States* v. *Mast*, 668 F.2d at 506 & n.7. In *Mast*, the Federal Circuit held that, in determining whether a process is "incidental to assembly" for purposes of the tariff exemption, courts should consider (i) whether the cost and time required by the ostensibly "incidental" operation "may be considered 'minor'" compared to the cost and time "required for assembly of the whole article," (ii) whether the operation is "necessary to the assembly process," (iii) whether the operation

is "so related to assembly that [it was] logically performed during assembly, and (iv) whether "economic or other practical considerations dictate that the operations be performed concurrently with assembly" (App., *infra*, 11a-12a). See also *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992).

Upon reviewing the evidence and "balancing the relevant factors," the Court of International Trade concluded that the permapressing operation is " 'incidental to the assembly process' within the meaning of * * * subheading 9802.00.80, HTUS" (App., *infra*, 21a). The court acknowledged that some of the relevant "factors weigh against granting a duty allowance" because they reflect that permapresssing is not merely a "minor" adjunct to the assembly process (*id*. at 18a). For example, permapressing entails substantial additional capital costs (*ibid*.) and takes up approximately one-third of the total time involved in the foreign processing of the garments (*id*. at 19a). The court also agreed with the agency that permapressing procedures are "not necessary, nor related to assembly" (*ibid*.). The court nonetheless emphasized that, "to minimize damages and economic costs," permapressing "would logically occur" at the time of assembly (*id*. at 21a). Because "economic and practical considerations dictate" that permapressing occur "concurrent with assembly," the court concluded that the permapressing operation was "incidental to the assembly process" within the meaning of the statutory duty exemption (*ibid*.).

3. The Federal Circuit has exclusive jurisdiction to review the final decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit affirmed (App., *infra*, 1a-4a).

The court of appeals held that the Court of International Trade had properly ignored the agency's regulations and had correctly applied the *Mast* factors in determining that the permapressing of the Haggar slacks was "incidental to the assembly process" and therefore within the customs exemption (App., *infra*, 3a). The court of appeals concluded that the Treasury regulations interpreting customs classifications are legally irrelevant and are entitled to no weight (*id.* at 3a-4a):

> [T]he [trial] court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's [*sic*] interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

The court of appeals reasoned that the Treasury regulations are not entitled to the deference required by *Chevron* because "the Court of International Trade is * * * charged with the duty to 'reach the correct decision'" in the cases within its jurisdiction under 28 U.S.C. 2643(b) (App., *infra*, 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the consistent decisions of this Court that accord deference to the formal interpretations of statutes adopted by agencies charged with their implementation. The proffered reason for this holding—that the Court of International Trade is directed to "reach the correct decision" in cases within its jurisdiction (28 U.S.C. 2643(b))—does not provide even a plausible basis for this radical departure from settled principles of administrative law. *Every* court is charged with the duty to "reach the correct decision" in the cases that come before it.

Denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act has serious practical consequences. Both importers and the Customs Service are now left without effective guidance for a wide range of transactions. Under the decision in this case, the ultimate application of customs provisions often cannot be determined or even reliably predicted except upon completion of judicial proceedings that occur well after the relevant transactions have been planned and conducted. The petition for a writ of certiorari should be granted because of the clear departure of the decision below from the standards of deference required by the decisions of this Court and because of the exceptional importance of the questions presented to the planning of commercial transactions and to the administration of the customs laws.

1. a. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering

the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Pugh*, 99 U.S. 265, 269 (1878); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). The deference that this Court has consistently accorded to agency interpretions in decisions such as *Chevron* is fully applicable here.

The regulations involved in this case were issued pursuant to the express delegation by Congress of authority to the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." 19 U.S.C. 1202, General Headnote 11 of TSUS.[2] We "have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursu-

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[2] General Note 20 of HTSUS contains similar language. See note 1, *supra*. Congress has specified that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary," determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). In enacting the HTSUS in 1988 (see note 1, *supra*), the Conference Report emphasized that "[t]he Customs Service will be responsible for interpreting and applying the Harmonized Tariff Schedules of the United States" (H. R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988)).

ant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741).[3] Courts are to defer to the agency's interpretation in this setting "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-741.

This Court has frequently emphasized that substantial deference is owed to the formal Treasury regulations that interpret the highly complex and detailed revenue laws: "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). Accord *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). This high degree of deference to Treasury regulations serves the important function of enhancing predictability in the application of the often intricate and intertwined revenue provisions that shape, and indirectly govern, virtually all forms of economic activity. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

By ignoring the duly promulgated regulations in this case, the decision of the court of appeals erodes

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[3] Treasury Department Order No. 165, T.D. 53160 (Dec. 15, 1952), provides that regulations under the Tariff Act "shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury."

the authority conferred on the agency by Congress to establish rules and regulations "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties" (19 U.S.C. 1502(a)). The decision also undermines the political role of the Executive Branch in the execution of foreign trade policy. As this Court stated in *Chevron*, 467 U.S. at 865-866:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Con- gress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision * * * really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

b. The sole rationale offered by the Federal Circuit for its refusal to give any weight to the applicable Treasury regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). That rationale is unpersuasive for two reasons. First, it does not distinguish

the Court of International Trade from any other court, for *all* courts are obviously charged with the responsibility of "reach[ing] the correct decision" in the cases that come before them. See note 4, *infra*. Second, the provision on which the court of appeals relies, when read in its entirety, does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it. The statute states in its entirety (28 U.S.C. 2643(b)):

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

This statute obviously does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes.[4] Courts that

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[4] The Hobbs Act, which governs judicial review of orders from several independent federal regulatory agencies, contains an analogous provision that details the procedural options available to a reviewing court to supplement the evidentiary record. See 28 U.S.C. 2347. The courts that review agency decisions under the Hobbs Act have consistently followed this Court's mandate in *Chevron* and have deferred to reasonable agency interpretations of ambiguous statutory provisions. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Federal Highway Administration*, 51 F.3d 405, 408 (4th Cir. 1995); *American Mining Congress* v. *Nuclear Regulatory Commission*, 902 F.2d

properly apply the traditional rule of deference *do* "reach the correct decision," and those that fail in that responsibility do not.

The legislative history confirms what the language of the statute unambiguously shows: 28 U.S.C. 2643(b) is concerned only with the procedural remedies available to the Court of International Trade when a factual record is inadequate. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).[5] Nothing in the text or history of this statute provides support for the extraordinary conclusion of the court of appeals

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781, 784 (10th Cir. 1990); *CSX Transportation* v. *United States*, 867 F.2d 1439, 1442 (D.C. Cir. 1989).

The Administrative Procedure Act (APA) applies generally to federal agency practice and procedure. That statute directs the reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions." 5 U.S.C. 706. Under the reasoning applied by the Federal Circuit in this case, that statute would arguably provide an even more authoritative basis than 28 U.S.C. 2643(b) for a reviewing court to disregard an agency's reasonable statutory interpretations. In judicial review under the APA, however, courts have consistently followed *Chevron* and deferred to agency interpretations of statutes. See, *e.g.*, *Seldovia Native Association, Inc.* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Kansas City Southern Industries, Inc.* v. *Interstate Commerce Commission*, 902 F.2d 423, 430 (5th Cir. 1990).

[5] The House Report states (H.R. Rep. No. 1235, *supra*, at 60):

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

(App., *infra*, 4a) that, in customs cases, the Court of International Trade need not adhere to the decision of this Court in *Chevron*. Indeed, prior to the recent Federal Circuit decisions to the contrary, the Chief Judge of the Court of International Trade had acknowledged that that court, like all others, "must defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," even though "the court might have reached a different result on its own" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West. Supp. 1998)).

2. Under the correct standard of deference appropriate for agency interpretations of "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the regulation should have been sustained. The language employed by Congress in the statutory customs exception for "operations incidental to the assembly process" (Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202) is not plain and unambiguous. And, the agency's determination that an operation such as "permapressing" is sufficiently distinct from "assembly" that it is *not* "incidental to the assembly process" is reasonable. The agency's formal regulatory interpretation of the statute should therefore have been upheld under this Court's decision in *Chevron*, 467 U.S. at 842-844.

a. Congress has not "directly spoken to the precise question [of statutory construction] at issue" in this case (*Chevron*, 467 U.S. at 842). The statute provides several specific examples of operations that are "incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202. That list of

concrete examples, however, does not address the myriad of other operations that can be performed abroad and does not indicate whether such other operations should be regarded as "incidental to the assembly process." Because Congress "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

b. The question properly at issue in this case is therefore not whether the Treasury regulation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 744-745.[6] The regulation defines "assembly operations" to "consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners" (19 C.F.R. 10.16(a)). The regulation then defines operations that are *not* incidental to the assembly process as "[a]ny significant process, operation, or treatment other than assembly" that (i) has the "primary purpose" of "the fabrication, completion, physical or chemical improvement of a component" or (ii) "is not related to the assembly process" (19 C.F.R. 10.16(c)). To provide more de-

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[6] Because the courts below applied an incorrect standard of deference in reviewing the regulation involved in this case, this Court may wish to consider summarily reversing the judgment and remanding the case to the court of appeals for that court to consider the validity of the regulation under the proper standard.

tailed guidance to the public, and to formalize the longstanding administrative position on this issue,[7] the agency listed several specific operations that are deemed *not* to be incidental to assembly under the regulation. Included among those specific examples is the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).[8]

That regulation constitutes a reasonable interpretation of the statute. As the courts below recognized, "permapressing" (i) is not necessary or related to the assembly of the garments, (ii) effects a significant improvement of the garments and (iii) consumes a substantial portion of the time and capital required in the foreign operations (App., *infra*, 20a-21a). By specifying that such operations are not "incidental" to assembly, the regulation gives effect to the ordinary meaning of the statutory text. A process can be "incidental" to assembly only if it occurs as "a minor

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[7] In Headquarters Ruling 027763 (Sept. 13, 1973), the Customs Service determined that permapressing is not an operation incidental to assembly for purposes of Item 807.00 of the TSUS. See note 1, *supra*.

[8] In addition to these examples, the regulation further specifies that garment cutting, decorative painting and metalworking operations are *not* incidental to assembly. 19 C.F.R. 10.16(c)(2), (3), and (5). The regulation identifies some operations that *do* qualify as "incidental to assembly," such as cleaning; rust, grease, and paint removal; application of preservative coatings and trimming and folding. 19 C.F.R. 10.16(b). These examples are consistent with the understanding of the statute expressed in its legislative history. See H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

concomitant" of the assembly process (*Webster's Third New International Dictionary* 1142 (1976)).

By "balancing" the factors described by the Federal Circuit in the *Mast* case, however, the courts below concluded that the statutory standard should be deemed satisfied simply because, as a practical or "economic" matter, it is efficient for "permapressing" to be done "concurrent with assembly" (App., *infra*, 21a). The *ad hoc* adjudicative approach required by application of the *Mast* factors in customs cases is inevitably time-consuming, expensive and prone to inconsistency. Even if the result obtained through the "balancing" of various subjective factors could yield *a* reasonable application of the statute, it is plainly not the *only* reasonable method of implementing the statutory phrase "incidental to the assembly process."

Congress authorized the Treasury, not the courts, to "issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." General Headnote 11 of TSUS, 19 U.S.C. 1202. The regulations adopted by the agency should have been sustained because they are not "unreasonable" and are not "plainly inconsistent with the revenue statutes." *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

c. The Court of International Trade erred in concluding (App., *infra*, 23a) that the agency's regulation conflicts with the plain language of the statute. The court based that conclusion on its assumption that the regulation precludes every operation that "*imparts new characteristics*" to an article from being regarded as "incidental to assembly" (*ibid.*). That as-

sumption is based upon a misreading of the plain text of the regulation.

The regulation does not state, as the lower court suggested, that *any* process that "*imparts new characteristics*" to goods cannot be regarded as "incidental to assembly." Instead, the regulation defines "[o]perations not incidental" to the assembly process to include (19 C.F.R. 10.16(c)):

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process.

In general, the regulation thus excludes from the duty exception only those operations that are "not related to the assembly process" or whose "primary purpose" is "improvement of a component" rather than assembly. Neither of the courts below has suggested that there is any flaw in that general regulatory definition of the statutory concept of "incidental to assembly." Indeed, the language criticized by the courts below—concerning operations that "impart new characteristics" to goods—does not even appear in that general definition.

The language criticized by the courts below appears only in the subsection of the regulation that addresses operations that involve the "[c]hemical treatment of components or assembled articles [of clothing] to impart new characteristics, *such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles*" (19 C.F.R. 10.16(c)(4)) (emphasis added). That language specifies only that such "[c]hemical treatment" of clothing as "permapressing" does not qualify as "incidental" to assem-

bly under the statute. *Ibid.* This portion of the regulation is justified by the fact that chemical processes such as "permapressing" (i) are not necessary or related to assembly, (ii) impart new characteristics to clothing and (iii) entail substantial time and capital requirements (App., *infra*, 21a). The narrow, focussed administrative determination that such operations are not "incidental to the assembly process" is neither "unreasonable" nor "plainly inconsistent" with the statute and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. at 169).

3. The Court of International Trade has exclusive jurisdiction over tariff protest cases, and the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. The decision in this case is thus binding throughout the Nation. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

a. The question presented in this case has substantial legal and practical importance. In the past, formal Treasury interpretations of tariff legislation have been accorded substantial deference. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *United States* v. *89 Bottles of "Eau de Joy"*, 797 F.2d 767, 771 (9th Cir. 1986). This was true in the Federal Circuit as well. See *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed Cir. 1990);

*Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989); *DAL-Tile Corp.* v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993). That court, however, has now purportedly discovered in the text of a remote procedural statute a radical legislative departure from the longstanding rule of deference to administrative interpretations.

It is only recently that the Federal Circuit has held that, in enacting 28 U.S.C. 2643(b), Congress directed the courts to give no weight to Treasury interpretations of the Tariff Act. That conclusion first appeared as dicta in *Crystal Clear Indus.* v. *United States*, 44 F.3d at 1003*. It has now been adopted and applied in a number of customs cases. See, *e.g.*, *IKO Industries* v. *United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Electronics, Inc.* v. *United States*, 112 F.3d 488, 491-493 (Fed. Cir. 1997); *Better Home Plastics Corp.* v. *United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Midwest of Cannon Falls, Inc.* v. *United States*, 122 F.3d 1423, 1426 (Fed. Cir. 1997); *Sharp Microelectronics Technology, Inc.* v. *United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997); *Anhydrides & Chemicals, Inc.* v. *United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). In these decisions, the Federal Circuit has repeatedly relied on the implausible theory that the statutory directive that the Court of International Trade is to "reach the correct result" (28 U.S.C. 2643(b)) trumps the traditional deference owed to agency interpretations. See pages 13-16, *supra*. Because the Federal Circuit rejected the government's request for rehearing en banc in this case, the issue now appears to be beyond correction in that circuit.

Paradoxically, the Federal Circuit continues to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs *valuation* cases. *Goodman Mfg., L.P.* v. *United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). In *IKO Industries* v. *United States*, 105 F.3d at 626, the Federal Circuit distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This establishes an artificial and untenable distinction between the two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV). Whatever meaning there is to the statutory directive that the Court of International Trade "reach the correct result" in customs cases (28 U.S.C. 2643(b)), that statute applies equally to *all* types of tariff litigation. Congress did not establish different standards of review for valuation cases than for classification cases, and there is no logical basis to create such a distinction.[9]

If 28 U.S.C. 2643(b) has the meaning adopted by the Federal Circuit in this case, that statute would be the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled. See note 4, *supra*. The unique conclusion reached by the Federal Circuit in interpreting this statute has, moreover, been derived from the most modest of statutory texts. See page 14, *supra*. And, in reaching that unique conclusion, the court of appeals failed even to acknowledge or address the "presumption" that Congress intends statutory ambiguities to be

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[9] Classification cases constitute the most common type of tariff dispute, for they comprise approximately 80 percent of the customs cases that reach the courts.

"resolved, first and foremost, by the agency" charged with the duty of administering the statute, "rather than the courts" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741). Review is warranted in this case because of the extraordinary departure of the Federal Circuit from the consistent decisions of this Court.

b. The decision of the court of appeals has substantial practical importance. By denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. Because the agency's interpretive regulations have been deprived of any effect, the ultimate application of customs provisions cannot now be determined until completion of a cumbersome, case-by-case inquiry to obtain an *ad hoc* judicial "balancing [of] the relevant factors" (App., *infra*, 21a). Moreover, as the Federal Circuit has pointed out, the list of the "relevant factors" to be applied in such judicial proceedings may vary from situation to situation. *General Motors Co.* v. *United States*, 976 F.2d at 720. Since the "balancing" of such "relevant factors" is an inherently subjective inquiry, it is obvious that different triers of fact could reach different results on similar sets of facts. For example, two permapressing operations, even if descriptively similar, could yield different tariff results depending upon whether or not "economics and practicality dictate" that "the curing of the fabric would logically occur * * * concurrent with assembly" (App., *infra*, 21a). The result of the *ad hoc* approach adopted in this case—and of the court's refusal to give any weight to the agency's interpre-

tive regulations—is expensive customs litigation and unpredictable outcomes.

The appropriation by the Federal Circuit of the statutory authority of the Treasury Department to issue binding regulations under the Tariff Act is inherently a matter of substantial public importance. The decision below disables the Customs Service from providing effective, advance guidance to the public concerning the application of the customs laws to discrete transactions. As a result, manufacturers will be unable, at the time they plan their transactions, to predict with reliability their tax obligations. Review of the decision below is appropriate because of the serious, recurring importance of the questions presented both to the administration of the customs laws and to the commercial activities to which those laws apply.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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