No. 15-960

In the Supreme Court of the United States

INTERNATIONAL CUSTOM PRODUCTS, INC., 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 the court of appeals correctly rejected petitioner's Due Process Clause challenge to 28 U.S.C. 2637(a)'s longstanding requirement that an importer pay any duties assessed by United States Customs and Border Protection before challenging those duties in court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 791 F.3d 1329. The opinions of the United States Court of International Trade (Pet. App. 21a-28a, 29a-43a) are reported at 991 F. Supp. 2d 1335 and 931 F. Supp. 2d 1338.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. A petition for rehearing was denied on October 21, 2015 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on January 19, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Entries of products imported into the United States are assessed customs duties pursuant to the Harmonized Tariff Schedule of the United States

(HTSUS). See *United States* v. *Mead Corp.*, 533 U.S. 218, 221-222 (2001). An importer that wishes to know how a product it proposes to import would be classified under the HTSUS may provide United States Customs and Border Protection (Customs) with all relevant information and seek an advance interpretive ruling letter. See 19 C.F.R. 177.0 *et seq.* Once issued, an interpretive ruling remains in force until modified or revoked, and it governs future entries of the product at issue. 19 C.F.R. 177.9. Customs generally must provide notice and allow interested parties to comment before modifying or revoking an interpretive ruling. 19 U.S.C. 1625(c); see *Mead*, 533 U.S. at 223 & n.3.

The process by which Customs classifies a particular entry of a product and assesses the applicable duties is called "liquidation." 19 U.S.C. 1500. If an importer believes that an entry has been liquidated in a manner that is contrary to an applicable interpretive ruling or is otherwise erroneous, it may protest the liquidation. 19 U.S.C. 1514(c). If Customs denies the protest, the importer may seek further administrative review.[1] Alternatively, the importer may immediately file a complaint in the United States Court of International Trade (CIT), which has exclusive jurisdiction to hear a challenge to the denial of a protest under 28 U.S.C. 1581(a). If the importer fails to file a timely challenge to the denial of the protest under Section

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[1] See 19 U.S.C. 1515(a) (allowing an importer to seek further review of its protest by another Customs officer); 19 U.S.C. 1515(d) (allowing an importer to ask the port director to void the denial of a protest if the denial was "contrary to proper instructions"); see also 19 U.S.C. 1501 (describing Customs' authority to voluntarily reliquidate an entry).

1581(a), liquidation of the entry becomes "final and conclusive upon all persons (including the United States and any officer thereof)." 19 U.S.C. 1514(a).

Section 1581(a) constitutes a waiver of the sovereign immunity of the United States. Pet. App. 9a-10a. A separate statute, 28 U.S.C. 2637(a), provides as a condition on that waiver that the importer must pay the disputed duties before filing suit under Section 1581(a). Subject to an exception not relevant here, Section 2637(a) specifies that a civil action "contesting the denial of a protest under [19 U.S.C. 1515] may be commenced in the [CIT] only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced."

2. In 1998, petitioner sought a tariff classification ruling for the proposed importation of a food product it called "white sauce." In January 1999, Customs issued an advance interpretive ruling based on petitioner's factual representations about the composition and intended use of that product. The ruling described white sauce as a product that would be used for the production of sauces and dressings and classified it under an HTSUS subheading covering sauce preparations. Over the next six years, petitioner imported substantial quantities of white sauce under that classification. Pet. App. 3a; see *International Custom Prods., Inc.* v. *United States*, 748 F.3d 1182, 1183 (Fed. Cir. 2014) (*ICP IV*).

In April 2005, after discovering that petitioner's white sauce was being used to make cheese rather than to produce sauces, Customs issued a Notice of Action advising petitioner that its pending and future entries would be classified under a different HTSUS subheading covering dairy spreads. Pet. App. 4a; see

ICP IV, 748 F.3d at 1184. That new classification significantly increased the applicable duties.[2]

3. Customs' 2005 reclassification of petitioner's white sauce product has given rise to several prior lawsuits, three of which are relevant here.

a. In May 2005, petitioner filed suit in the CIT, asserting that Customs had violated 19 U.S.C. 1625(c) by revoking the 1998 interpretive ruling without notice and comment. Petitioner did not protest the liquidation of any entry of white sauce or pay the assessed duties, as required to seek review under 28 U.S.C. 1581(a). The CIT nonetheless held that it had jurisdiction under 28 U.S.C. 1581(i), a residual grant of jurisdiction over civil actions against the United States arising out of the customs laws. Pet. App. 4a.

The court of appeals reversed, relying on longstanding circuit precedent establishing that Section 1581(i) "may not be invoked when jurisdiction under another subsection of [Section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *International Custom Prods., Inc.* v. *United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (*ICP I*) (citation omitted). The court held that petitioner could not invoke Section 1581(i) because it was free to protest the liquidation of its entries at the higher rate and, if that protest was denied, to pay the required duties and bring an action challenging the denial under Section 1581(a). *Id.* at 1326-1327.

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[2] Products classified under the HTSUS subheading for sauces are subject to an *ad valorem* rate of duty, whereas products classified as dairy spreads are subject to a fixed per kilogram rate of duty. *ICP IV*, 748 F.3d at 1183-1184 & nn.2-3.

b. In November 2005, before the court of appeals issued its decision in *ICP I*, petitioner filed another suit seeking to invoke the CIT's residual jurisdiction under Section 1581(i). The CIT dismissed that suit for lack of jurisdiction, and the court of appeals affirmed, again holding that petitioner could not sue under Section 1581(i) because review was available under Section 1581(a). *International Custom Prods., Inc.* v. *United States*, 214 Fed. Appx. 993, 994-996 (Fed. Cir. 2007) (*ICP III*).[3]

c. In 2007, Customs began liquidating all unliquidated entries of petitioner's white sauce product at the new, higher duty rate. Petitioner filed a protest concerning the liquidation of a single entry. Customs denied the protest, and petitioner then complied with 28 U.S.C. 2637(a) by paying the assessed duties on that entry and filing suit in the CIT. Pet. App. 5a.

The CIT exercised jurisdiction under 28 U.S.C. 1581(a) and agreed with petitioner that, in reclassifying petitioner's white sauce product in 2005, Customs had impermissibly revoked the 1998 interpretive ruling without following the notice-and-comment procedure required by 19 U.S.C. 1625(c). *International Custom Prods., Inc.* v. *United States*, 878 F. Supp. 2d 1329, 1349 (2012). The court ordered Customs to reliquidate the entry at issue at the lower rate reflected in the 1998 interpretive ruling. *Id.* at 1349-1350. The court of appeals affirmed. *ICP IV*, 748 F.3d at 1189.

Following the court of appeals' decision, Customs reliquidated the entry at issue in *ICP IV*. Pet. App. 6a. It also reliquidated 84 other entries of petitioner's

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[3] Petitioner had also filed a separate action in the CIT raising unrelated issues, which the parties have referred to as *ICP II*.

white sauce product made between 2003 and 2005. Petitioner had protested the original liquidation of those entries, and Customs had suspended those protests pending the outcome of *ICP IV*. *Id.* at 5a-6a.

4. This case concerns 13 other entries of petitioner's white sauce product that occurred between 2003 and 2004. Pet. App. 6a. Customs liquidated those entries in 2007, before petitioner filed the suit that culminated in *ICP IV*. *Id.* at 6a, 31a. Petitioner protested the liquidation of those entries, and its protest was denied. *Id.* at 6a. But because petitioner had allowed that denial to become administratively final, that protest "could not be suspended pending [the court of appeals'] resolution of *ICP IV*." *Ibid.*; see *id.* at 31a. Accordingly, unlike the 84 entries subject to suspended protests, the 13 entries at issue here could not be reliquidated after petitioner prevailed in *ICP IV* because Customs had no authority to modify the administratively final liquidations. *Id.* at 6a; see 19 U.S.C. 1514(a).

In 2008, petitioner commenced this suit seeking relief as to those 13 entries. Pet. App. 6a. Petitioner did not pay the assessed duties, as 28 U.S.C. 2637(a) requires as a precondition to any challenge to the denial of a protest. Instead, petitioner brought an as-applied constitutional challenge to that prepayment requirement, asserting that the requirement to pay assessed duties before bringing suit violates the Due Process Clause of the Fifth Amendment. Pet. App. 32a.[4]

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[4] Petitioner also brought eight other claims challenging the classification of its white sauce product at the higher duty rate. Pet. App. 31a-32a. The CIT dismissed those claims for lack of jurisdiction. The court held that it could not exercise jurisdiction under Section 1581(a) because petitioner had not paid the duties on the

The CIT dismissed petitioner's due process challenge for failure to state a claim. Pet. App. 37a-42a. The court observed that "[t]he requirement to pay all outstanding duties prior to commencing litigation on an import transaction has been a fixture of the customs laws" since 1845, and that even before its statutory codification that requirement had been "a fixture of common law since at least 1774." *Id.* at 37a-38a. The court could find "no case from the last two and a quarter centuries where any court has found that the requirement to pay customs duties prior to litigating some aspect of an import transaction contravened the Constitution." *Id.* at 38a.

The CIT acknowledged that the application of the prepayment requirement may seem "harsh and unfair" where, as here, the required payment is large. Pet. App. 39a; see *ibid.* (noting that the duties on the 13 entries at issue here total $28 million). In light of the unbroken line of precedent upholding prepayment requirements in the tax and customs contexts, however, the court found no violation of the Due Process Clause in Congress's decision to condition Section 1581(a)'s waiver of sovereign immunity on the payment of the disputed duties before suit is filed. *Id.* at 39a-42a; see *id.* at 21a-28a (denying petitioner's motion for reconsideration).

5. The court of appeals affirmed. Pet. App. 1a-20a. Like the CIT, the court emphasized that the prepayment requirement has been a feature of customs law for centuries, and it emphasized that this Court and others have upheld similar prepayment requirements

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entries at issue, and that it could not exercise jurisdiction under Section 1581(i) because petitioner could have availed itself of the procedure set forth in Section 1581(a). *Id.* at 33a-35a.

in both the tax and customs contexts. *Id.* at 9a-12a. The court declined to disturb the "well-settled understanding that the government may condition its involvement in a litigation on the pre-payment of * * * duties owed." *Id.* at 12a.

The court of appeals gave two additional reasons for rejecting petitioner's due process claim. First, the court disagreed with petitioner's contention that petitioner "has a property interest 'in having Customs classify its entries of white sauce under the sauces heading'" in the HTSUS. Pet. App. 13a (quoting Pet. C.A. Br. 22). The court relied on precedent establishing that "the Constitution does not provide a right to import merchandise under a particular classification or rate of duty." *Id.* at 13a-14a (quoting *A Classic Time* v. *United States*, 123 F.3d 1475, 1476 (Fed. Cir. 1997)).

Second, the court of appeals held that, "to the extent process is due," the statutory scheme afforded petitioner ample procedural options. Pet. App. 14a. The court explained that an importer facing financial difficulties "can pay the duties on a single entry and request that liquidation of the remaining entries be suspended, if it does so on a timely basis." *Id.* at 14a-15a. In this case, moreover, petitioner could have requested that the liquidation of the 13 entries at issue be suspended pending the outcome of *ICP IV* or challenged the denial of its protest concerning the liquidation of those entries as being contrary to proper instructions under 19 U.S.C. 1515(d). Pet. App. 15a. The court of appeals concluded that "[t]he statutory scheme and pre-payment requirement are not unconstitutional simply because [petitioner] failed to timely avail itself of the provided procedures." *Ibid.*

6. The court of appeals denied petitioner's request for rehearing and rehearing en banc without recorded dissent. Pet. App. 44a-45a.

ARGUMENT

Petitioner contends (Pet. 17-35) that the prepayment requirement in 28 U.S.C. 2637(a) violates the Due Process Clause of the Fifth Amendment, and that it has a property interest in Customs' adherence to the 1998 interpretive ruling. The court of appeals correctly rejected petitioner's due process challenge. Neither that ultimate conclusion nor the court's subsidiary, alternative holding that petitioner lacks a protected property interest conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that, even assuming that petitioner has a protected property interest, Section 2637(a)'s prepayment requirement is a constitutionally valid condition on the United States' waiver of sovereign immunity.

a. As both the CIT and the court of appeals emphasized, the prepayment requirement now codified in Section 2637(a) "has been 'a fixture of the customs laws' since the founding of the republic." Pet. App. 11a (quoting *id.* at 38a); see *United States* v. *Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1552 (Fed. Cir. 1997). The courts with jurisdiction over customs litigation have long held that the prepayment requirement is a valid condition on the United States' waiver of sovereign immunity. See, *e.g.*, *Champion Coated Paper Co.* v. *United States*, 24 C.C.P.A. 83, 89-90 (1936); *Peking Herbs Trading Co.* v. *Department of the Treasury*, 17 Ct. Int'l Trade 1182, 1183-1185 (1993).

This Court likewise has repeatedly recognized that requirements to pay monies owed to the government before challenging the assessment of those monies are valid limitations on the United States' consent to suit. In *United States* v. *Sherman & Sons Co.*, 237 U.S. 146 (1915), for example, the Court noted that the right to seek review of the assessment of customs duties "can be exercised only in the statutory method, on statutory conditions," including the requirement to pay the disputed duties before bringing suit. *Id.* at 152. The Court explained that the "summary method of collection, and the requirement that duties be paid as assessed before the right to litigate arises, is an incident of the fact that the assessment and collection of duties is an administrative matter—no notice or hearing being necessary since the assessment is *in rem* and against the foreign goods which are sought to be entered." *Id.* at 153.

More broadly, in *Cheatham* v. *United States*, 92 U.S. 85 (1876), the Court observed that "the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues," and emphasized that "the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts." *Id.* at 89; see *ibid.* ("[T]he rule prescribed in this class of cases is neither arbitrary nor unreasonable."); see also, *e.g.*, *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11 (2008) (finding "no constitutional problem at all" with "a detailed refund scheme that subjects complaining taxpayers to various requirements before they can bring suit"); *McKesson Corp.* v. *Division of Alcoholic Beverages &*

Tobacco, 496 U.S. 18, 37 (1990) (explaining, in the context of a due process challenge to a state taxation scheme, that "a State need not provide predeprivation process for the exaction of taxes"); *id.* at 45.[5]

b. Petitioner does not identify any judicial decision holding that the Due Process Clause (or any other constitutional provision) precludes enforcement of the longstanding requirement to pay a disputed duty before bringing suit. Petitioner nonetheless contends (Pet. 24-34) that the prepayment requirement is unconstitutional as applied here because petitioner allegedly lacks the financial resources to pay the duties assessed on the 13 entries at issue. This Court rejected an analogous argument in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974). In that case, the Internal Revenue Service (IRS) revoked a letter ruling declaring that a private religious university qualified for tax-exempt status, and the university argued that it had a due process right to challenge the revocation immediately because the school would suffer "irreparable injury" if it were required to follow the statutory procedure for postenforcement review. *Id.* at 746; see *id.* at 726-727, 746-748. This Court rejected that argument, observing that it had "dismissed out of hand similar contentions nearly 60 years ago" and that it found "such arguments no more compelling now than then." *Id.* at 746 & n.20 (citing *Dodge* v. *Osborn*, 240 U.S. 118, 122 (1916)). The Court adhered to that holding even though "the congressional re-

[5] Other courts of appeals have likewise upheld the requirement that taxes be paid before the commencement of any suit challenging the validity of those taxes. See, *e.g.*, *Boynton* v. *United States*, 566 F.2d 50, 53 & n.2 (9th Cir. 1977); *Kalb* v. *United States*, 505 F.2d 506, 510 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975).

striction to postenforcement review may place an organization claiming tax-exempt status in a precarious financial position." *Id.* at 747.

Here, moreover, the court of appeals correctly held that the statutory scheme provided petitioner with ample procedural options. Indeed, petitioner availed itself of those procedures to secure relief as to 85 other entries of the same product. Petitioner paid the assessed duties on one of those entries and sued for a refund, and Customs suspended petitioner's protests on the other 84 entries pending the outcome of the litigation. Pet. App. 5a-6a, 30a-31a. Petitioner was unable to secure the same relief as to the 13 entries at issue here only because it allowed its protest of the liquidation of those entries to become administratively final. *Id.* at 6a, 31a. Petitioner could have avoided that result by seeking further review of its protest by another Customs officer, see 19 U.S.C. 1515(a), or by filing a request with the appropriate port director challenging the denial of its protest as "contrary to proper instructions," 19 U.S.C. 1515(d). But petitioner failed to take either of those steps.

As the court of appeals explained, "[t]he statutory scheme and pre-payment requirement are not unconstitutional simply because [petitioner] failed to timely avail itself of the provided procedures." Pet. App. 15a. Petitioner's due process challenge is particularly ill-conceived because petitioner was simultaneously availing itself of those same procedures to secure relief as to other entries of the same product. Here, as in *Clintwood Elkhorn Mining Co.*, petitioner's "claim that the [available] procedures are themselves excessively burdensome is belied by [petitioner's] own

invocation of those procedures" to secure relief as to materially identical transactions. 553 U.S. at 12.[6]

2. Petitioner separately contends (Pet. 18-24) that this Court should grant review to decide whether petitioner had a constitutionally protected property interest in the continued application of the 1998 interpretive ruling letter. That contention does not warrant review for at least four reasons.

First, the court of appeals' holding that petitioner failed to allege a protected property interest did not affect the result below. The primary basis for the court's decision was its holding that Section 2637(a)'s prepayment requirement is a valid condition on the United States' consent to suit. Pet. App. 9a-12a. The court also held, in the alternative, that the statutory scheme provided petitioner with constitutionally ade-

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[6] Rather than urging the Court to invalidate Section 2637(a)'s longstanding prepayment requirement as a violation of due process, petitioner's amici contend that the Court should broadly interpret the CIT's residual jurisdiction under Section 1581(i) to permit direct review of the modification or revocation of an advance classification letter. Am. Ass'n Exps. & Imps. Amicus Br. 13-26. The CIT raised the same possibility in dicta. Pet. App. 26a-27a. The government disagrees with those contentions, which are contrary to long-settled Federal Circuit precedent and would disrupt the careful jurisdictional scheme established in Section 1581. See *International Custom Prods., Inc.* v. *United States*, 467 F.3d 1324, 1327 (2006) (collecting cases). But in any event, amici's arguments are not properly before the Court because petitioner has not sought this Court's review of the scope of the jurisdictional grant in Section 1581(i). And construing Section 1581(i) in the manner amici advocate would not strengthen petitioner's due process claim. To the contrary, petitioner's due process challenge to Section 2637(a)'s prepayment requirement would be even weaker if Section 1581(i) were construed to provide yet another alternative avenue of relief.

quate process. *Id.* at 14a-15a. Petitioner's due process claim thus could not succeed even if petitioner had a protected property interest.

Second, the court of appeals did not address the argument that petitioner now seeks to raise. The court construed petitioner's argument as a contention that it "has a property interest 'in having Customs classify its entries of white sauce under the sauces heading'" of the HTSUS. Pet. App. 13a (quoting Pet. C.A. Br. 22). The court rejected that argument based on the well-settled rule that "the Constitution does not provide a right to import merchandise under a particular classification or rate of duty." *Id.* at 13a-14a (quoting *A Classic Time* v. *United States*, 123 F.3d 1475, 1476 (Fed. Cir. 1997)); see, *e.g.*, *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 318 (1933) ("No one has a legal right to the maintenance of an existing rate or duty.").

Petitioner does not appear to challenge that holding. Instead, petitioner contends that the court of appeals misconstrued its argument, which petitioner characterizes as a claim that "importers have a valid property interest *in advance classification rulings*." Pet. 20. Petitioner acknowledges (*ibid.*), however, that the court of appeals did not pass on that argument, and neither did the CIT. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the absence of a ruling from the courts below makes this case a poor vehicle in which to address the issue.

Third, the issue petitioner seeks to raise does not implicate any disagreement among the courts of appeals. Petitioner acknowledges (Pet. 20 & n.4) that "neither this Court nor any [c]ourt of [a]ppeals, prior

to this case, has ever squarely addressed whether an advance classification ruling * * * gives rise to a property interest cognizable" under the Due Process Clause. Petitioner instead relies (Pet. 20-22) on a district court decision involving tax letter rulings issued by the IRS. See *International Tel. & Tel. Corp.* v. *Alexander*, 396 F. Supp. 1150, 1164-1165 (D. Del. 1975). But a single district court decision, issued more than 40 years ago and involving a different statutory scheme, does not establish a division of authority warranting this Court's review. See Sup. Ct. R. 10.

Fourth, petitioner's contention lacks merit. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). Petitioner does not appear to challenge the court of appeals' holding that, as a general matter, importers have no claim of entitlement to, and therefore no protected property interest in, the maintenance of a particular customs classification or rate of duty. Pet. App. 13a-14a. Instead, petitioner contends (Pet. 22-24) that an advance classification ruling creates a protected property interest because 19 U.S.C. 1625(c) requires Customs to provide notice and an opportunity for comment before revoking or modifying such a ruling. But Section 1625(c) does not constrain Customs' substantive authority to modify or revoke an advance classification ruling; it merely requires the agency to observe specified procedures before doing so. This Court has recognized that "an entitlement to nothing but procedure" cannot "be the basis for a property interest." *Town of Castle Rock* v.

Gonzales, 545 U.S. 748, 764 (2005); see *id.* at 771 (Souter, J., concurring) ("Just as a State cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation, neither does a State create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee.") (internal citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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