No. 12-148

# In the Supreme Court of the United States

HITACHI HOME ELECTRONICS (AMERICA), INC.,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*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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## QUESTIONS PRESENTED

Before filing suit in the Court of International Trade (CIT) to challenge a duty assessment, an importer must file an administrative protest with U.S. Customs and Border Protection (Customs). By statute, Customs is directed to allow or deny a protest within two years. 19 U.S.C. 1515(a). If an importer files a petition for accelerated disposition, the protest will be "deemed denied" if it is not allowed or denied within 30 days. 19 U.S.C. 1515(b). Petitioner filed a protest but did not request accelerated disposition, and Customs did not issue a decision within two years. Petitioner then filed suit in the CIT, alleging that its protest should be deemed to have been allowed because of Customs' failure to act on the protest within the prescribed two-year period. The questions presented are as follows:

1. Whether the court of appeals correctly held that the CIT lacked jurisdiction under Section 1581's residual provision, 28 U.S.C. 1581(i).

2. Whether the court of appeals correctly held that an administrative protest will not be deemed allowed if Customs has neither allowed nor denied the protest within the two-year period set forth in 19 U.S.C. 1515(a).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-48a) is reported at 661 F.3d 1343. The order of the court of appeals denying panel rehearing and rehearing en banc and an opinion dissenting from the denial of rehearing en banc (Pet. App. 1a-8a) are reported at 676 F.3d 1041. The opinion of the United States Court of International Trade (Pet. App. 49a-65a) is reported at 704 F. Supp. 2d 1315.

## JURISDICTION

The judgment of the court of appeals was entered on October 31, 2011. Petitions for rehearing were denied on March 30, 2012. On June 20, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 30, 2012, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. To challenge a duty assessment, an importer must first file an administrative protest with U.S. Customs and Border Protection (Customs). See 19 U.S.C. 1514(a). Once a protest has been filed, "the appropriate customs officer, within two years * * * , shall review the protest and shall allow or deny such protest in whole or in part." 19 U.S.C. 1515(a). If the protest is allowed, "any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid." *Ibid.* If the protest is denied, "[n]otice of the denial * * * shall be mailed" in the manner set forth by the Secretary of the Treasury (Secretary), and any "[s]uch notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial." *Ibid.* If the protesting party makes a timely request, "a protest may be subject to further review by another appropriate customs officer" as set forth in the Secretary's regulations, "but subject to the two-year limitation." *Ibid.*

An importer may request "accelerated disposition" of its protest at "any time concurrent with or following the filing of such protest." 19 U.S.C. 1515(b). If the protest has not been "allowed or denied" within 30 days of such request, it "shall be deemed denied." *Ibid.* An importer may also file a request with the Commissioner of Customs (Commissioner) urging that the denial of an application for further review be set aside as erroneous or improper. 19 U.S.C. 1515(c). If the Commissioner fails

to act within 60 days, "the request shall be considered denied." *Ibid.*

The United States Court of International Trade (CIT) has exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." 28 U.S.C. 1581(a). The CIT also has "residual" jurisdiction under 28 U.S.C. 1581(i), but only if jurisdiction is unavailable or "manifestly inadequate" under all of the other subsections of Section 1581. *Hartford Fire Ins. Co.* v. *United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008).

2. Between June 2003 and December 2005, petitioner imported plasma flat-panel televisions made or assembled in Mexico. Petitioner filed numerous protests with Customs, requesting refunds for approximately 1600 entries that, in petitioner's view, were duty-exempt under the North American Free Trade Agreement (NAFTA). Petitioner filed the lead protest in May 2005, along with an application for further review. The other protests (including the one at issue here) were suspended pending issuance of a ruling on that application. Shortly after petitioner filed its application for further review, Samsung International, Inc. (Samsung) filed protests and an application for further review asserting a similar challenge. Customs did not take action on petitioner's lead protest within the two-year period prescribed in 19 U.S.C. 1515(a). See Pet. App. 10a, 50a-51a; Gov't C.A. Br. 6 n.3.

In November 2007, petitioner filed suit in the CIT. Pet. App. 51a-52a. At that time, Customs had prepared a draft response to petitioner's application, but it never issued a ruling because of the then-pending suit. *Id.* at 52a; see 19 C.F.R. 177.7(b) (precluding issuance of a "ruling letter" on "any issue which is pending before the United States Court of International Trade"); see also

19 C.F.R. 174.25(b)(2)(ii); cf. 19 U.S.C. 1515(c) ("If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void."). Petitioner alleged that jurisdiction was proper under 28 U.S.C. 1581(a), because the protests were denied "by operation of law" two years after they were filed. Pet. App. 53a.[1]

This case was filed in May 2009, and relates to one of petitioner's suspended administrative protests filed in March 2007. Petitioner again asserted jurisdiction under 28 U.S.C. 1581(a), alleging that the protest was "deemed denied" two years after it was filed. Pet. App. 54a. In the alternative, petitioner invoked the court's residual jurisdiction under 28 U.S.C. 1581(i). Pet. App. 54a. Customs moved to dismiss for lack of jurisdiction, and petitioner moved to consolidate the case with the other pending cases and for summary judgment. *Ibid.* In its cross-motion, petitioner advanced a "slightly different" argument in support of jurisdiction, alleging that jurisdiction was proper under 28 U.S.C. 1581(i) because its protest was *allowed* "by operation of law" when the two-year period expired. Pet. App. 54a-55a. In the alternative, petitioner continued to argue that jurisdiction

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[1] Samsung also filed suit but, in November 2009, it voluntarily dismissed the actions without prejudice. See Pet. App. 53a n.6. On November 16, 2009, Samsung requested accelerated disposition of its protests and, 31 days later, the protests were "deemed denied" pursuant to 19 U.S.C. 1515(b). See Pet. App. 53a n.6. In January 2010, Samsung returned to court, contesting the denials under 28 U.S.C. 1581(a). See Pet. App. 53a n.6.

was proper under 28 U.S.C. 1581(a) because its protest was denied "by operation of law." Pet. App. 55a.

The CIT dismissed for lack of jurisdiction. Pet. App. 49a-65a. The court concluded that a protest that has not been acted on within the two-year period is neither "deemed allowed" nor "deemed denied" under Section 1515(a). The court explained that petitioner could have filed a request for accelerated disposition under 19 U.S.C. 1515(b); that its protest would have been "deemed denied" if Customs had failed to act within 30 days after such a request; and that petitioner could then have filed suit under 28 U.S.C. 1581(a). Pet. App. 59a-60a. The court concluded, however, that it lacked jurisdiction under 28 U.S.C. 1581(a) because petitioner had not requested accelerated disposition and Customs had never denied the protest. Pet. App. 61a-64a. The court further explained that it lacked residual jurisdiction under 28 U.S.C. 1581(i) because petitioner had an adequate means of invoking the court's jurisdiction under the accelerated-disposition provision. Pet. App. 60a-61a.

3. The court of appeals affirmed. Pet. App. 9a-48a.

a. The court of appeals explained that petitioner's appeal "turns on the question of whether, if Customs fails to allow or deny a protest within the two-year period provided by 19 U.S.C. § 1515(a), the protest is deemed allowed by operation of law" and "whether § 1581(i) therefore provides jurisdiction for [petitioner] to recover the duties subject to the protest." Pet. App. 12a-13a. The court concluded that the protest is not "deemed allowed" by the expiration of time; that petitioner has adequate access to judicial review through the accelerated-disposition process; and that Section 1581(i)'s catchall provision therefore does not confer jurisdiction.

Relying on "the great weight of precedent" (Pet. App. 17a) from this Court and from the Federal Circuit, the court of appeals explained that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Id.* at 13a (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). Turning to the plain terms of 19 U.S.C. 1515(a), the court found "no statement of any consequence in the event that Customs does not act." Pet. App. 19a. In rejecting petitioner's argument that the term "allow" includes "do[ing] nothing," the court noted that the "allow" and the "deny" requirements are "*equally* predicated on Customs having affirmatively done something." *Ibid.* If Customs allows a protest, the court explained, it must "give back excess money" "*found* to have been assessed or collected in excess." *Id.* at 19a, 20a. If Customs denies the protest, the court continued, it must "explain its reasons" for the denial. *Id.* at 19a. The court declined to adopt a judicially-crafted rule whereby Customs is deemed to have both "allow[ed]" a protest and "found" excessive payment "by operation of law." *Id.* at 20a.

The court of appeals further observed that Congress's failure to specify a consequence for noncompliance with the two-year deadline in 19 U.S.C. 1515(a) stands in contrast to the express (and opposite) "deemed denied" consequence set forth in "the very next subsection," 19 U.S.C. 1515(b). Pet. App. 20a-21a. The court also rejected petitioner's reliance on legislative history and, in particular, Congress's failure to enact a proposal that would have deemed denied a protest not acted on within two years. *Id.* at 22a-23a. The court explained that "[i]f Congress intended, in abandoning one auto-

matic provision, to adopt another *opposite* automatic provision, it would presumably have mentioned its intent somewhere in the legislative history, to say nothing of the statute itself." *Id.* at 23a. The court declined "to ignore the weight of precedent, the plain language of the statute, and the conspicuous absence of any expression of Congressional intent to create an implied automatic allowance provision." *Id.* at 24a.

Finally, the court of appeals explained that Section 1515(b) provides a fully adequate means of seeking judicial redress in the face of any perceived inaction by Customs. In order to obtain a reviewable agency determination without significant further delay, petitioner "could have sought accelerated disposition at any time, waited thirty days, and established jurisdiction under § 1581(a)." Pet. App. 24a-25a. The court therefore concluded that because "jurisdiction under § 1581(a) is not 'manifestly inadequate' * * * , jurisdiction under § 1581(i) is improper." *Id.* at 24a.

b. Judge Reyna dissented. Pet. App. 26a-48a. He concluded that the two-year statutory deadline is "mandatory," and that the statutory consequence for inaction is that petitioner's "protests have been allowed and the protested duties must be refunded." *Id.* at 39a.

4. The court of appeals denied rehearing en banc, with Judges Reyna and Newman dissenting. Pet. App. 1a-8a.

## ARGUMENT

Petitioner contends (Pet. 10-29) that a protest not acted on by Customs within the two-year period set forth in 19 U.S.C. 1515(a) is "deemed allowed" by operation of law, and that the CIT possessed jurisdiction under 28 U.S.C. 1581(i). The court of appeals' decision is correct; it does not conflict with any decision of this

Court; and it decides an issue of first impression about the meaning of a 1970 statute. Petitioner and other importers have fully adequate means of obtaining judicial redress. Further review is not warranted.

1. The United States Code is replete with "mandatory" statutory deadlines requiring agencies to act within a specified time frame. But "the failure to act on schedule merely raises the real question, which is what the consequence of tardiness should be." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157 (2003). On that question, this Court has held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-721 (1990); *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 259-262 (1986). Instead, Congress's failure "to specify a consequence for noncompliance * * * implies that Congress intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory duties." *James Daniel Good Real Prop.*, 510 U.S. at 64-65.

Applying that established framework, the court of appeals correctly held that 19 U.S.C. 1515(a) does not specify what consequence noncompliance with the two-year deadline will have. The court also correctly declined to impose the "coercive" sanction of deeming the protest "allowed," which would have required the protested duties to be refunded without any administrative or judicial determination of petitioner's entitlement to such a refund. Section 1515(a) provides that "[u]nless a request for an accelerated disposition of a protest is

filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed * * * , shall review the protest and shall allow or deny such protest in whole or in part." 19 U.S.C. 1515(a); see 19 C.F.R. 174.21(a), 174.29. Nothing in that provision specifies what should happen if, after two years, Customs has neither "allow[ed]" nor "den[ied]" the protest. As the court of appeals explained, "the statute says 'allow or deny' with no indication that either result is caused by inaction." Pet. App. 19a.

Section 1515(a)'s silence on that question stands in stark contrast to its neighboring provisions. Subsection (b), which provides for accelerated disposition of a protest, specifies that "a protest which has not been allowed or denied in whole or in part within thirty days * * * *shall be deemed denied*." 19 U.S.C. 1515(b) (emphasis added). Similarly, Subsection (c), which provides for additional review after the denial of an application for further review, specifies that "[i]f the Commissioner of Customs fails to act within 60 days after the date of the request, the request *shall be considered denied*." 19 U.S.C. 1515(c) (emphasis added). Those provisions indicate that, when Congress wishes a particular consequence to follow from Customs' failure to decide a matter within a given period of time, it so specifies in the governing statute. Petitioner's contention that an unresolved protest should be "deemed allowed" is particularly misconceived, moreover, because the consequence petitioner would attach to Customs' inaction is the precise *opposite* of the consequence specified in Section 1515(b) and (c). See Pet. App. 21a; cf. 19 U.S.C. 1504(a) (providing that "an entry of merchandise for consumption not liquidated within 1 year from [specified dates] shall be

deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record"); 19 U.S.C. 1504(b) and (d) (providing for similar liquidation treatment in other circumstances where a time limit has expired).

Petitioner's contrary arguments lack merit. Petitioner repeatedly contends (*e.g.*, Pet. 11-15, 23-25) that the statutory time limit in Section 1515(a) is "mandatory"; that Customs has no discretion to depart from it; and that any other interpretation would render the time limit meaningless. Petitioner asserts that Congress chose the word "shall" rather than "may," Pet. 12; repeated the word "shall" several times, Pet. 13 & n.6; "carefully distinguished between 'shall' and 'may' in the statute," Pet. 14-15; and prohibited Customs from extending the two-year period, even in cases where further review is requested, Pet. 12-13. As this Court has explained, however, "[i]t misses the point simply to argue that [a statutory time limit] was 'mandatory,' 'imperative,' or a 'deadline.'" *Peabody Coal Co.*, 537 U.S. at 157. Even if Customs had "no discretion" to fail to "allow or deny" the protest within the two-year period, and therefore "default[ed] on a statutory duty," that "merely raises the real question, which is what the consequence of tardiness should be." *Ibid.*; see Pet. App. 18a-19a (explaining that "[w]hile the statute contains the word 'shall,' all of [this Court's precedents] make clear that this is not enough to impose a specific penalty for noncompliance"). The answer, as "summed up" by this Court, is that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Peabody Coal Co.*,

537 U.S. at 159 (quoting *James Daniel Good Real Prop.*, 510 U.S. at 63).

The relevant question, then, is not whether the two-year period is "mandatory," but whether Congress has prescribed a consequence for Customs' failure to act within the specified time frame. Petitioner asserts that Section 1515(a) does contain such "a consequence for Customs' failure to act: Customs has allowed the protest." Pet. 16.[2] Petitioner advances three primary arguments in support of that contention, but they all lack merit.

First, petitioner contends that Section 1515(a) provides only two possible outcomes at the end of two years: allowance or denial. Petitioner argues that, because denial "requires express action by Customs," inaction must amount to allowance. Pet. 16. But, as the court of appeals explained, Section 1515(a) "actually contains two distinct and parallel statements of what Customs is required to do in the event that it allows or denies a protest respectively." Pet. App. 19a. If Customs allows a protest, the agency is required to "give back excess money" "*found* to have been assessed or collected in excess." *Id.* at 19a, 20a. If Customs denies a protest, it must "explain its reasons" for the denial. *Id.* at 19a. "Both of these requirements are *equally* predicated on Customs having affirmatively done something: to wit, allow or deny a protest." *Ibid.* Accordingly, the

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[2] In earlier complaints filed in related cases, petitioner alleged that the consequence of Customs' failure to act within the specified two-year period was precisely the opposite: a deemed denial. See Pet. App. 53a. At the very least, that prior argument calls into question petitioner's current contention that the statute is "abundantly clear" or "unambiguous." Pet. 11, 12.

court correctly declined to read "allow or deny" as "implicitly or expressly allow or expressly deny."

Second, petitioner relies on legislative history. Pet. 18-22. As a threshold matter, the plain language of the statute obviates the need to resort to legislative history. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002). In any event, nothing in the legislative history suggests that Congress intended courts to treat Customs' failure to act within two years as the legal equivalent of an allowance of the protest. Much of the quoted legislative history (Pet. 18-22) simply confirms that Congress imposed a two-year deadline, without suggesting that the consequence of failing to comply with that deadline would be an allowance by operation of law. Petitioner notes (Pet. 18) that Congress rejected a proposal to treat Customs' failure to act within two years as a deemed denial. That does not suggest, however, that Congress *sub silentio* adopted the opposite approach. As the court of appeals explained, "[i]f Congress intended, in abandoning one automatic provision, to adopt another *opposite* automatic provision, it would presumably have mentioned its intent somewhere in the legislative history, to say nothing of the statute itself." Pet. App. 23a.

Third, petitioner contends (Pet. 22-25) that even if Section 1515(a) does not itself specify a consequence for noncompliance with the two-year deadline, a statutory consequence is not required by this Court's precedents. Petitioner argues that the Court's cases holding otherwise involved different statutes, as well as shorter and "unrealistic[]" time limits. Pet. 23. As the court of appeals recognized, however, the case law does not rest on the relative length of the statutory deadline; it establishes that courts should not ordinarily undertake to de-

vise sanctions for an agency's noncompliance with a statutory deadline when no sanction is provided by statute. See Pet. App. 17a n.1.

2. Petitioner further contends (Pet. 25-29) that the court of appeals erred in concluding that the CIT lacked jurisdiction under 28 U.S.C. 1581(i).[3] As the dissenting judge below acknowledged, that jurisdictional holding follows directly from the court's antecedent determination that petitioner's protest was not "deemed allowed" upon expiration of the two-year period. See Pet. App. 27a. The Federal Circuit has long held that jurisdiction under Section 1581's residual provision, 28 U.S.C. 1581(i), is available only if there is no other adequate basis for jurisdiction under the other subsections. See Pet. App. 24a ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.") (quoting *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988)).[4] Petitioner could have sought accelerated

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[3] The question presented by petitioner does not appear to fairly encompass the court of appeals' jurisdictional ruling. See Pet. i.

[4] Petitioner suggests that jurisdiction under Section 1581(i) "is not precluded when another subsection of § 1581 *could have been available.*" Pet. 26 n.12. Petitioner cites no authority for that contention, and it is contrary to longstanding Federal Circuit precedent. See, *e.g.*, *Hartford Fire Ins. Co.* v. *United States*, 544 F.3d 1289, 1292 (2008) (explaining that the limitation on the CIT's residual jurisdiction under Section 1581(i) serves "to prevent circumvention of the administrative processes crafted by Congress," and that residual jurisdiction may not be invoked "if jurisdiction under another subsection of section 1581 is or could have been available"). In any event, even today, petitioner could file a request for accelerated disposition

disposition under Section 1515(b), waited 30 days, and (if Customs took no action) invoked the CIT's jurisdiction under 28 U.S.C. 1581(a) to challenge the "deemed denial" of its protest. Because petitioner could easily have obtained a Customs' decision reviewable under Section 1581(a), the court of appeals correctly held that jurisdiction under the catchall provision was unavailable.

Petitioner argues (Pet. 25-29) that accelerated disposition under Section 1515(b) is unavailable after the two-year period has expired. But that is not what the statute says. Section 1515(b) provides that accelerated disposition may be sought at "*any time* concurrent with or following the filing of [a] protest." 19 U.S.C. 1515(b) (emphasis added); see Pet. App. 21a-22a. Contrary to petitioner's contention (Pet. 27), reading Subsection (b) to allow an importer to seek accelerated disposition at "any time" does not "nullify" the time deadline in Subsection (a). Rather, it gives importers the option to continue to engage in the administrative review process, or to forgo that process and seek immediate judicial redress.

3. The practical consequences of the court of appeals' decision are not sufficient to warrant this Court's review.

As the dissenting judge in the court of appeals observed, the question presented in this case was "an issue of first impression" for the Federal Circuit. Pet. App. 29a. The two-year statutory time limit was first adopted in 1970. Although petitioner contends that "[t]he problems raised by the Federal Circuit's decision recur daily," Pet. 32, the fact that this issue remained undecided

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and could invoke the CIT's jurisdiction under Subsection (a) if Customs denied its protest or failed to act within 30 days.

by the Federal Circuit for more than four decades suggests otherwise.

There are good reasons why petitioner's arguments are relatively novel. Customs resolves the overwhelming majority of administrative protests within two years. See Gov't C.A. Resp. to Pet. for Reh'g 11 (noting that, in 2009, approximately 91.3% of protests filed were decided (*i.e.*, denied in whole or in part, allowed in whole or in part, or withdrawn) within two years of their filing); see also Pet. 30. Indeed, internal policies require that "the vast majority of the protests should be resolved within one year" and that only certain applications for further review and "suspensions pending the outcome of court cases would be likely exceptions to the one-year processing requirement." Office of International Trade, *Protest/Petition Processing Handbook*, Pt. IX, at 37 (Dec. 2007), http://foiarr.cbp.gov/streamingWord.asp?i=182 (redacted version). And procedures are in place to ensure and monitor timely processing of protests. See *ibid.* (providing procedures for open protests "over 2 months old" and for "suspended protests," and requiring "[s]emi-annual[]" review of "[a]ll protests over 120 days old," as well as "annual[]" review focusing specifically on "[a]ll files over 1 year old").

Of the small subset of protests that are not decided within two years, some are suspended because the same issues are concurrently pending before Customs (in a lead protest, for example) or the courts. See 19 C.F.R. 174.25(b)(2)(ii), 177.7(b); cf. 19 U.S.C. 1515(c). The protest-suspension practice streamlines dispute resolution and conserves resources by avoiding simultaneous litigation of the same issue in different fora. Indeed, the protest at issue in this case remains undecided *because* it was suspended pending resolution of the lead protest,

which was itself suspended when petitioner first filed suit in November 2007. See p. 3, *supra*.[5] Whatever the reason, the question presented has not been a recurring issue of any consequence. Cf. *Norman G. Jensen, Inc.* v. *United States*, 687 F.3d 1325, 1330-1331 (Fed. Cir. 2012) (relying, in part, on the decision in this case to conclude that the CIT lacks jurisdiction under 28 U.S.C. 1581(i) over a mandamus petition seeking to compel Customs to decide a protest after the two-year period had expired).

The practical significance of the court of appeals' decision is further limited by the fact that importers themselves have the means to prevent agency delay that they consider untoward. As the court below explained, petitioner and other similarly situated importers have ready access to a judicial remedy by requesting an accelerated disposition under 19 U.S.C. 1515(b), as Samsung did with its related protests. See note 1, *supra*. If Customs does not act within 30 days after such a request is filed, the protest is "deemed denied" and the importer can file suit in the CIT under 28 U.S.C. 1581(a).

The decision below therefore creates no danger that Customs can, through inaction, effectively prevent (or indefinitely delay) importers from obtaining a judicial determination of their entitlement to refunds. Rather, the decision simply ensures that a protest will not be "deemed allowed" when neither the agency nor any court has found that it has merit. See Pet. App. 57a (CIT recognizes that a judicially imposed sanction of the

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[5] At that time, the lead protest had been pending for two years and six months (since May 2005). As the dissenting judge below recognized, petitioner's and Samsung's "many" protests were "complex" and required "a careful and thorough analysis of the operation of the NAFTA rules of origin." Pet. App. 45a.

sort petitioner seeks would be a "windfall" to the importer). Absent clear statutory language compelling that result, a court cannot properly require the government to pay potentially unjustified refunds as a sanction for agency noncompliance with a statutory deadline. Cf. *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990) (holding that there can be no estoppel against the government in a suit seeking public funds).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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