No. 03-1280

In the Supreme Court of the United States

GEORGE E. WARREN CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 19 U.S.C. 1313(j)(2), which provides for the refund of "any duty, tax, or fee imposed under Federal law because of [an item's] importation," applies to the Harbor Maintenance Tax, 26 U.S.C. 4461, and the Environmental Tax, 26 U.S.C. 4611, both of which are general taxes that are not applied discriminatorily to imported products.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 341 F.3d 1348. The opinion of the Court of International Trade (Pet. App. 19a-34a) is reported at 201 F. Supp. 2d 1366.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2003. The petition for rehearing (Pet. App. 35a) was denied on November 6, 2003. On January 21, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 5, 2004, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Harbor Maintenance Revenue Act of 1986, Pub. L. No. 99-662, Tit. XIV, 100 Stat. 4266, to help fund various harbor improvement programs. Under the Act, a Harbor Maintenance Tax (HMT) is imposed on all uses of certain ports in an amount equal to "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b).[1] Congress also imposes an Environmental Tax (ET), 26 U.S.C. 4611, on all imported petroleum products and domestic crude oil to finance the cleanup costs associated with hazardous waste sites and oil spills. This case concerns whether importers can receive a refund or "drawback" of the HMT and ET under 19 U.S.C. 1313(j)(2), which allows a drawback for any "duty, tax, or fee imposed under Federal law because of [an imported item's] importation" if the importer subsequently exports or destroys the imported item or merchandise that "is commercially interchangeable with such imported merchandise." 19 U.S.C. 1313(j)(2)(A); Pet. App. 2a.

2. Petitioner imported finished petroleum products on three different occasions from December 1995 to January 1996, paying regular customs duties and HMT on each occasion, and paying ET on two occasions. Pet. App. 2a. Subsequently, petitioner exported petroleum products that were "commercially interchangeable" with the imports and sought a drawback under Section

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[1] In *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 369 (1998), this Court held that the HMT violated the Export Clause, U.S. Const. Art. I, § 9, Cl. 5, as applied to exports, but the HMT continues to apply to all other port uses. See, *e.g.*, *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361 (Fed. Cir. 2000); *Florida Sugar Mktg. & Terminal Ass'n* v. *United States*, 220 F.3d 1331 (Fed. Cir. 2000).

1313(j)(2). *Ibid.* On October 4, 1996, the United States Customs Service (Customs) allowed a drawback of the duties, but not the HMT or ET. *Ibid.*

3. Petitioner sought review in the Court of International Trade, which agreed with Customs' decision. Pet. App. 19a-34a. The court observed that the Federal Circuit had already ruled in *Texport* v. *United States*, 185 F.3d 1291, 1296 (1999), that Section 1313(j)(2) does not apply to the HMT, because that tax is not imposed as a result of importation. Pet. App. 26a-27a. Rather, the HMT "is a generalized Federal charge for the use of certain harbors" and thus "does not have the necessary nexus to the importation of goods to qualify it for drawback under section 1313(j)(2)." *Ibid.* (quoting *Texport*, 185 F.3d at 1297). The ET, the court reasoned, was similarly "a generalized charge assessed against all petroleum products, which is imposed on domestic products prior to refinement and imported petroleum products regardless of their level of refinement at the time they are entered." *Id.* at 34a. "Since the ET is imposed in a nondiscriminatory manner on both imported and domestic petroleum products alike," the court concluded that the ET lacked the "necessary nexus to importation" to qualify for a drawback. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-18a. It noted that "[w]ithout doubt" the Court of International Trade had correctly ruled "HMTs ineligible for drawback under 19 U.S.C. 1313(j)(2)" as that was the "express holding" of *Texport*. *Id.* at 7a. The court declined petitioner's request that it overrule *Texport* as inconsistent with the legislative history of Section 1313(j)(2), concluding that the provision's language so plainly allowed a drawback only for fees imposed as part of the importation process that any contrary legislative history was "[not] dispositive." *Id.* at 10a.

In its view, "[b]ecause the phrase 'because of . . . importation' modifies the words 'any duty, tax, or fee imposed under Federal law,' all duties, taxes or fees *not* assessed because of importation fall outside of that provision." *Id.* at 9a.

Applying its interpretation of Section 1313(j)(2), the court concluded that the HMT, "a generalized federal charge for *all* uses of certain harbors," did not have "the necessary nexus to importation of goods to qualify for drawback refunds." Pet. App. 10a. In addition, the ET was not subject to drawback because Section "4611(a) as a whole clearly covers *all* petroleum products, whether imported or created domestically." *Id.* at 13a. The court agreed that if the ET were structured such that "higher rates applied to imported products" it might be eligible for drawback, but the "rate of taxation for both the domestic crude oil and the imported petroleum products is the same." *Id.* at 15a. Thus, the court of appeals concluded, the ET read as a whole "does not discriminate against imports in the way *Texport* requires in order for a tax to be eligible for drawback." *Id.* at 17a.[2]

ARGUMENT

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

1. As the court of appeals correctly concluded, the plain language of Section 1313(j)(2) demonstrates that

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[2] Petitioner does not seek review of the court of appeals' conclusion that the HMT and the ET are general taxes that are not imposed because of importation. Petitioner challenges only the holding that the drawback allowed in Section 1313(j)(2) does not extend to general taxes.

the drawback applies only to taxes imposed as part of the importation process, not to general, non-discriminatory taxes. Section 1313(j)(2) provides in relevant part that:

> [I]f there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic), that—
>
> (A) is commercially interchangeable with such imported merchandise;
>
> (B) is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision; * * *
>
> * * * * *
>
> then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback * * * exceed 99 percent of that duty, tax, or fee.

19 U.S.C. 1313(j)(2)(A) and (B).

By its terms, Section 1313(j)(2) limits the kinds of duties, taxes and fees eligible for drawback to those imposed specifically as a result of the importation process. The phrase "because of . . . importation" modifies the words "any duty, tax, or fee imposed under Federal law" and accordingly serves to limit the taxes eligible for drawback to those imposed due to "importation." Indeed, reading Section 1313(j)(2) to apply to

any fee assessed against an imported good, as petitioner suggests (Pet. 8-9), would deprive the "because of . . . importation" clause of meaning, contrary to the Court's directive "to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 173 (2001). Absent that clause, the drawback would extend to "any" tax "imposed" on "imported merchandise." Thus, under petitioner's reading (Pet. 8), the "because of . . . importation" clause serves no function whatsoever.

Petitioner fails, moreover, to explain why its interpretation of Section 1313(j)(2) is reasonable given the ease with which Congress could have omitted the "because of . . . importation" clause if it had intended to achieve the result that petitioner suggests. Because the language of Section 1313(j)(2) is clear and petitioner has identified no textual ambiguity, no further analysis is required to ascertain the provision's meaning. See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotations and citations omitted).[3]

2. Despite the plain language of Section 1313(j)(2), petitioner argues that the meaning of Section 1313(j)(2)

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[3] The House of Representatives has passed a bill that would, in part, alter the "because of . . . importation" language in Section 1313(j)(2), and the Senate has passed an amended version of the bill, which the House rejected. See Miscellaneous Trade and Technical Corrections Act of 2004, H.R. 1047, 108th Cong., 2d Sess. (2004). As of the filing of this brief, conference is pending to consider the amended version of the House bill. The possibility that Congress may substantially alter Section 1313(j)(2) in the near term further counsels against this Court's review.

is unclear because it has been inconsistently interpreted by the Federal Circuit. According to petitioner, the decision below purports to interpret the plain language of the provision, but *Texport* holds that Section 1313(j)(2) is ambiguous, "susceptible to more than one reading." Pet. 7. This argument is wrong.

Contrary to petitioner's contention, the *Texport* court expressly relied on the plain "language" of Section 1313(j)(2) in concluding that the provision's terms require a nexus with importation. *Texport*, 185 F.3d at 1296. Moreover, the Federal Circuit stated in the proceeding below that the holding in *Texport* was premised on "the plain meaning of the text of § 1313(j)(2)" (Pet. App. 10a), and the full Federal Circuit declined to review this case when presented with petitioner's argument that the Federal Circuit was inconsistently applying *Texport*. *Id.* at 35a. In any event, a purported conflict among decisions of the same court of appeals is a matter properly resolved by that court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

3. Petitioner also errs in contending that the legislative history of Section 1313(j)(2) demonstrates that Congress intended the drawback to apply to all taxes imposed "while goods are in Customs' custody." Pet. 8-9. Legislative history is irrelevant to the interpretation of an unambiguous statute like Section 1313(j)(2). See *Davis* v. *Michigan Dep't of Treas.*, 489 U.S. 803, 809 n.3 (1989).

Nothing in the legislative history of Section 1313(j), moreover, states that the drawback applies to *every* tax or duty imposed on an imported good. The Senate Report accompanying Section 1313(j)(1), a companion provision that contains the same "because of . . . importation" language as Section 1313(j)(2) (Pet. 9),

does not describe the scope of that clause but merely purports to describe the pre-enactment state of the law:

> *Under present law*, unless provision is expressly made for drawback (refund) of duties, taxes, or fees paid on imported articles released from Government custody, a refund of the payment to the Government is not allowed on the destruction or exportation of imported goods.

S. Rep. No. 999, 96th Cong., 2d Sess. 23 (1980) (emphasis added). This passage says nothing about the impact of the enactment of the "because of . . . importation" language.

The remaining statements from the legislative history that petitioner cites (Pet. 10-11), are similarly unhelpful. The Senate Report accompanying Section 1313(j)(2) (Pet. 10) provides that the drawback is allowed only on "duties, taxes, or fees which had been paid upon the importation of" items. S. Rep. No. 308, 98th Cong., 1st Sess. 29 (1983). The quoted language from the House Report (Pet. 11) similarly does not state that Section 1313(j)(2) applies to every tax but to the "duty, tax or fee paid on certain imported merchandise." H.R. Rep. No. 1015, 98th Cong., 2d Sess. 64 (1984). Thus, far from demonstrating Congress' intent to fashion a broad drawback, the legislative history is consistent with the lower court's interpretation of the provision's language.

4. Finally, the court of appeals' interpretation of Section 1313(j)(2) does not undermine congressional policy. To be sure, Congress intended Section 1313(j)(2) to diminish some of the costs associated with importing materials. But Congress nowhere suggested that a complete refund of all taxes imposed upon imported goods, including generalized taxes that are

imposed on imported goods and domestic products, was necessary to accomplish that goal. See *Texport*, 185 F.3d at 1296-1297. Petitioner overstates (Pet. 15), moreover, the alleged importance of a drawback for general fees to exporters. The drawback allowed under Section 1313(j)(1) and (2) applies only where unused imported merchandise (or its equivalent) is later exported or destroyed and thus covers few domestic exporters. Drawbacks for articles manufactured in the United States with imported materials, the more commonly-applied drawback, are governed by 19 U.S.C. 1313(a) and (b), and those provisions authorize drawbacks only of duties, not taxes or fees.

Petitioner is similarly wrong to claim (Pet. 15) that Section 1313(j)(2) cannot be limited to taxes and fees imposed discriminatorily on imports because no such taxes or fees existed when Section 1313(j) was enacted. Discriminatory taxes on imported goods have long been imposed by the Federal Government. See, *e.g.*, *In re Kollock*, 165 U.S. 526, 528 (1897) (discussing federal tax on butter and oleomargarine that imposed additional, higher tax on imported oleomargarine). In any event, this argument is irrelevant, as Section 1313(j)(2) was drafted to encompass future taxes, as well as then-enacted taxes and duties.

Thus, Section 1313(j)(2)'s terms, legislative history, and underlying policy are all consistent with the decision below. Further review of this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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