No. 22-1102

In the Supreme Court of the United States

ACQUISITION 362, LLC, DBA STRATEGIC IMPORT SUPPLY, 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 determined that the Court of International Trade lacked jurisdiction over petitioner's suit where petitioner had not filed a timely protest as required by statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 59 F.4th 1247. The order and opinions of the United States Court of International Trade (Pet. App. 17a-27a, 28a-38a) are reported at 517 F. Supp. 3d 1318 and 539 F. Supp. 3d 1251.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2023. The petition for a writ of certiorari was filed on May 8, 2023 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns countervailing duties imposed with respect to entries of passenger-vehicle and light-truck tires from the People's Republic of China. Pet.

App. 2a. The Department of Commerce (Commerce) issues a countervailing duty order when it determines that another country is providing "a countervailable subsidy with respect to the manufacture, production, or export" of merchandise imported into the United States. *Id.* at 10a (quoting 19 U.S.C. 1671(a)(1)).

"When merchandise is subject to a countervailing duty order, the liability to pay countervailing duties accrues upon entry into the United States, but the actual amount of liability is determined later." Pet. App. 10a. When Commerce issues a countervailing duty order, it directs U.S. Customs and Border Protection (Customs) to collect estimated countervailing duties, 19 U.S.C. 1671e(a), at what is known as the cash deposit rate, when the goods enter the United States. See Pet. App. 10a-11a (citing 19 C.F.R. 351.212(a)). An interested party may request an administrative review of the countervailing duty order. *Ibid.* Commerce reviews the countervailing duty rate only for merchandise "covered by the request." 19 C.F.R. 351.212(c)(2).

The "final computation or ascertainment of duties on entries" is known as "liquidation." 19 C.F.R. 159.1 (capitalization and emphasis omitted); see 19 U.S.C. 1500. A countervailing duty order suspends the liquidation of entries covered by the order until the time for requesting a review has expired or, if a review is requested, until Commerce issues the final results of the review. See 19 U.S.C. 1671d(c); 19 C.F.R. 351.212(a); Pet. App. 10a. If no review is requested, Commerce instructs Customs to liquidate entries at the cash deposit rate collected at the time of entry. 19 C.F.R. 351.212(c)(1) and (2). But if a review is requested and Commerce sets a final duty rate different from the cash deposit rate, the importer

will be required to pay any shortfall or be entitled to a refund, as appropriate. See Pet. App. 11a.

If an importer believes that Customs has improperly liquidated its entries, the importer may protest the liquidation. See 19 U.S.C. 1514(a)(5); *Carbon Activated Corp.* v. *United States*, 791 F.3d 1312, 1315-1317 (Fed. Cir. 2015). A protest of a liquidation must be filed with Customs within 180 days of the liquidation. 19 U.S.C. 1514(c)(3)(A). Specifically, Section 1514(c)(3) provides:

> A protest of a decision, order, or finding described in subsection (a) shall be filed with the Customs Service within 180 days after but not before—
>
> (A) date of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. 1514(c)(3). If the importer does not file a timely protest, liquidation becomes "final and conclusive upon all persons (including the United States and any officer thereof)." 19 U.S.C. 1514(a); see *Juice Farms, Inc.* v. *United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995) ("[A]ll liquidations, whether legal or not, are subject to the timely protest requirement. Without a timely protest, all liquidations become final and conclusive under 19 U.S.C. § 1514.") (discussing 90-day deadline under prior version of the governing statute).

If Customs denies the protest, the importer may seek further administrative review or file a complaint in the Court of International Trade (CIT), which has exclusive jurisdiction to hear a challenge to the denial of a protest. 28 U.S.C. 1581(a), 2631(a). Jurisdiction under Section 1581(a) "is limited to appeals of valid and timely protests that have been denied by Customs." *Ovan Int'l,*

Ltd. v. *United States*, 49 F. Supp. 3d 1327, 1331 (Ct. Int'l Trade 2015) (citing 28 U.S.C. 1581(a)). The Federal Circuit has long held that the CIT lacks jurisdiction over an importer's challenge to Customs' denial of an untimely protest. See *Juice Farms*, 68 F.3d at 1346.

2. Petitioner is an importer of passenger-vehicle and light-truck tires from China. Pet. App. 2a. In 2016, petitioner imported several entries of tires manufactured by Shandong Zhongyi Rubber Co., Ltd. (Shandong). *Ibid.* At that time, imported tires manufactured by Shandong were subject to a countervailing duty order that Commerce had entered in 2015. *Ibid.*; see *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 Fed. Reg. 47,902 (Aug. 10, 2015). That order automatically suspended the liquidation of petitioner's entries, and petitioner deposited estimated countervailing duties at a rate of 30.61%. Pet. App. 2a-3a.

Various interested parties, including Shandong, requested an administrative review of the countervailing duty order. Pet. App. 3a; see *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 48,051 (Oct. 16, 2017). When it initiated the review, Commerce directed Customs to continue to suspend liquidation of entries associated with Shandong. Pet. App. 4a.

In September 2018, Commerce published a notice that it was rescinding the administrative review with respect to Shandong because the company had timely withdrawn its request for a review. Pet. App. 3a; see *Certain Passenger Vehicle and Light Truck Tires From*

the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission, in Part; 2016, 83 Fed. Reg. 45,611 (Sept. 10, 2018). Commerce therefore informed Customs that entries associated with Shandong were no longer subject to suspension, and Commerce instructed Customs to liquidate those entries and assess countervailing duties at the cash deposit rate required at the time of entry. Pet. App. 4a. In October and November 2018, Customs liquidated petitioner's entries, assessing countervailing duties at the rate deposited at entry (30.61%). *Ibid.* Petitioner "did not protest the liquidation of these entries within 180 days." *Ibid.*

On June 17, 2019, Commerce issued the Amended Final Results of the administrative review. Pet. App. 4a & n.6. The Amended Final Results included individual rates for certain companies, as well as a rate of 15.56% for the remaining "non-selected companies under review." *Id.* at 4a-5a (citation omitted). Commerce directed Customs to liquidate the entries that remained suspended and to assess countervailing duties pursuant to the Amended Final Results. *Id.* at 5a.

"In December 2019, following the publication of the *Amended Final Results*, [petitioner] filed protests to Customs' failure to refund the difference between the 30.61% rate it had deposited and the 15.56% 'non-selected companies under review' rate determined in the *Amended Final Results*." Pet. App. 5a. Petitioner argued that it was entitled to the 15.56% rate on the theory that, although Shandong had withdrawn from the review, it is the same company as Dongying Zhongyi Rubber Co., Ltd., which had remained in the review and is subject to the "non-selected companies" rate. *Id.* at 5a-6a. On April 24, 2020, "Customs denied the protests

as untimely because they were filed more than 180 days after the liquidations of the relevant entries, without deciding whether [Shandong] and Dongying Zhongyi were the same entity." *Id.* at 6a; see *id.* at 31a-32a.

3. Petitioner brought this action in the CIT, reasserting its contention that it was entitled to the lower countervailing duty rate established in the administrative review. See Pet. App. 32a.

a. The CIT dismissed the suit for lack of subject matter jurisdiction. Pet. App. 28a-39a. The CIT explained that "a protest must have been timely filed under 19 U.S.C. § 1514(c)(3) for this Court to obtain jurisdiction [under 28 U.S.C. 1581(a)] over a suit that contests its denial." Pet. App. 37a (citation omitted). Because petitioner had not filed a protest within 180 days after liquidation, the CIT held that its protest seeking a lower duty rate was untimely and that the court therefore lacked jurisdiction. See *id.* at 37a-39a.

b. The CIT denied petitioner's motion for reconsideration. Pet. App. 17a-27a. Petitioner contended that "new evidence"—"a successful protest" of a May 2020 liquidation that petitioner had filed with Customs in August 2020—demonstrated that Customs had erred in denying the protest at issue here. *Id.* at 24a-26a. The CIT explained, however, that the two protests were not equivalent because the second protest had been timely filed within 180 days after the relevant liquidation. See *id.* at 25a-26a.

The CIT also rejected petitioner's request to amend its complaint to assert a new claim under 28 U.S.C. 1581(i) (Supp. II 2020). Pet. App. 26a-27a. The court explained that such an amendment would be futile because Section 1581(i) "embodies a 'residual' grant of jurisdiction and may not be invoked when jurisdiction

under another subsection of § 1581 is or could have been available." *Id.* 26a (citing *Sunpreme Inc.* v. *United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018)). Here, petitioner "had at least one clear route to properly invoke" the CIT's jurisdiction: a timely protest of Customs' liquidation decisions, which would have enabled the CIT to exercise jurisdiction under Section 1581(a). *Id.* at 26a-27a.

4. The court of appeals affirmed. Pet. App. 1a-16a. Like the CIT, the court held that, because petitioner had not filed a timely protest challenging Customs' liquidations of the entries, the CIT lacked jurisdiction under 28 U.S.C. 1581(a). Pet. App. 13a-16a.

Petitioner argued that it was not "protesting the liquidations themselves," but instead was protesting "Customs' decision to deny [its later] refund request," and that the 180-day period for filing protests therefore had not commenced to run until the administrative review concluded. Pet. App. 14a; see *id.* at 16a. Petitioner relied on Section 1514(c)(3)(B), which, as noted above, provides that "[a] protest of a [Customs] decision, order, or finding" shall be filed within 180 days of "the date of the decision as to which protest is made," if "the date of liquidation or reliquidation" is "inapplicable." 19 U.S.C. 1514(c)(3)(A) and (B).

The court of appeals rejected that argument. The court explained that petitioner's "theory can only work if the dates of liquidation are 'inapplicable,' that is, if [petitioner] could not timely challenge the liquidations." Pet. App. 14a-15a; see 19 U.S.C. 1514(c)(3)(B). The court found that petitioner could not satisfy that condition because "duties are finally determined by liquidation," such that the date of liquidation is "the applicable date under § 1514(c)(3) for filing a protest to the rate or

amount of those duties." Pet. App. 14a. Thus, if petitioner thought that Customs' liquidation of its entries was improper because those entries should have remained subject to the administrative review—and thus eligible for any reduced rate the review might ultimately produce—petitioner was required to file a protest within 180 days after liquidation. *Id.* at 14a-15a.

The court of appeals also agreed with the CIT that petitioner's proposed amendment to its complaint would be futile. Pet. App. 16a. The court of appeals explained that "[j]urisdiction under § 1581(i) is appropriate only if there is no jurisdiction under another subsection of § 1581, or if the remedy under another subsection 'would be manifestly inadequate.'" *Ibid.* (quoting *ARP Materials, Inc.* v. *United States*, 47 F.4th 1370, 1377 (Fed. Cir. 2022)). The court concluded that, "[b]ecause [petitioner] could have obtained an adequate remedy under § 1581(a) by timely filing a protest of the allegedly premature liquidations, it cannot resort to § 1581(i)." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-22) that the CIT had subject matter jurisdiction over this case, notwithstanding petitioner's failure to protest the 2018 liquidations within the 180-day period prescribed by 19 U.S.C. 1514(c)(3)(A), because petitioner was entitled to rely on the alternative deadline for filing a protest in 19 U.S.C. 1514(c)(3)(B). Petitioner contends in particular (Pet. 19) that, under Section 1514(c)(3)(B), the 180-day period for filing a protest did not begin to run until June 2019, when Commerce issued the Amended Final Results and ordered Customs to apply the revised rate to other entries. That argument lacks merit. The court of appeals correctly held that, because petitioner's protest was in

substance an untimely challenge to the allegedly premature liquidations that Customs had effected in October and November 2018, the alternative deadline in Section 1514(c)(3)(B) did not apply and the CIT lacked subject matter jurisdiction.

The court of appeals' decision does not conflict with any decision of this Court. And because the Federal Circuit has exclusive jurisdiction over appeals from the CIT, see 28 U.S.C. 1295(a)(5), no inter-circuit conflict is possible. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the CIT lacked subject matter jurisdiction over this case. Petitioner argues that its entries should have received the lower countervailing duty rate that Commerce's administrative review ultimately established in June 2019, several months after petitioner's own entries had been liquidated at the higher cash deposit rate. That assertion, in turn, depends on petitioner's argument that, even after Shandong withdrew from the review, its products remained covered by it because Shandong "is the same company as Dongying Zhongyi Rubber Co., Ltd., which remained in the Annual Review and is named as a company entitled to the 'non-selected companies under review' rate." Pet. App. 5a-6a. Petitioner argues on that basis that its entries should not have been liquidated before the conclusion of the administrative review, but instead should have benefitted from the adjusted final rates. See *id.* at 5a.

The court of appeals correctly held that petitioner's claim was untimely. As the court explained, "the statute is quite clear that liquidation of an entry finally establishes the duties unless a protest to the liquidation is filed." Pet. App. 13a (citing 19 U.S.C. 1514(a)). Thus, if

petitioner believed that its entries should have remained subject to the administrative review even after Shandong's withdrawal—such that the cash deposit rate's application to those entries was potentially incorrect—it should have challenged Customs' liquidation of those entries within the time specified by statute. Section 1514(c)(3)(A) of Title 19 states that such a challenge must be filed within 180 days, but petitioner filed its protests more than a year after its entries had been liquidated. See p. 5, *supra*. And because compliance with the 180-day deadline is a prerequisite to invoking the CIT's subject matter jurisdiction under 28 U.S.C 1581(a), the court of appeals correctly held that the CIT lacked jurisdiction over petitioner's complaint. Pet. App. 2a, 12a; see, *e.g.*, *Juice Farms, Inc.* v. *United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995).

2. Petitioner contends (Pet. 16) that its complaint was timely under the "distinct mechanism[]" for pursuing a protest that is provided in Section 1514(c)(3)(B). Petitioner states that "a protest is also timely" under that provision "when it is made within 180 days of another [Customs] decision that is not a decision involving either liquidation or reliquidation." *Ibid.* In petitioner's view, this case falls within that category because the "date of liquidation was simply not relevant"; rather, Commerce's issuance of the Amended Final Results and its instruction to Customs to assess duties with respect to entries covered by the review were "the relevant events for purposes of calculating when the jurisdictional deadline began to run." Pet. 18-19. Petitioner argues that its protest was timely because it was filed within 180 days after *those* events. That argument lacks merit.

Section 1514(c)(3)(A) states that a "protest of a decision" shall be filed within 180 days after the "date of liquidation." 19 U.S.C. 1514(c)(3)(A). Section 1514(c)(3)(B) then provides that, "in circumstances where subparagraph (A) is inapplicable," a protest must be filed within 180 days after "the date of the decision as to which protest is made." 19 U.S.C. 1514(c)(3)(B). Because Section 1514(c)(3)(B) takes effect only "where subparagraph (A) is inapplicable," *ibid.*, petitioner is correct in describing Section 1514(c)(3)(B)'s alternative deadline as applying only when an importer protests a "decision that is *not a decision involving either liquidation or reliquidation*." Pet. 16 (emphasis added).

Petitioner purports to direct its current challenge, not at Customs' liquidation of its entries in October and November 2018, but instead at Commerce's June 2019 "issuance of the Amended Final Results amending [countervailing duty] rates to 15.56%," and at Commerce's contemporaneous directive ordering "issuance of refunds" to other importers. Pet. 19. But petitioner does not contend that Commerce erred either in setting the countervailing duty rate at 15.56% (a challenge that could not be brought against Customs), or in instructing Customs to apply that rate to other entries that were subject to the administrative review (a challenge that petitioner would not have standing to bring). Rather, its sole complaint is that it was denied a refund with respect to its entries. That result followed directly and necessarily from Customs' prior liquidations of petitioner's entries.

Petitioner's objection thus is, at bottom, that its entries were liquidated too soon, thereby precluding petitioner from obtaining the benefits of the administrative review. Because that challenge goes to Customs'

allegedly improper liquidations, it is governed by Section 1514(c)(3)(A) and was required to be filed within 180 days after those liquidations occurred. When that period elapsed without petitioner filing a timely protest, the liquidations—including the application of the cash deposit rate to petitioner's entries—became "final and conclusive upon all persons (including the United States and any officer thereof)." 19 U.S.C. 1514(a).[1]

Thus, contrary to petitioner's assertion (Pet. 19), the courts below neither "robbed [petitioner] of its rightful remedy under 19 U.S.C. § 1514(c)(3)(B)" nor "collapsed two distinct statutory avenues for jurisdiction into one." Rather, those courts correctly construed Section 1514(c)(3)(B) not to apply because petitioner's claim is in substance a challenge to Customs' decision to liquidate petitioner's entries at a particular time, and petitioner has identified no independently contestable Customs decision. See Pet. App. 14a, 39a; see also, *e.g.*, *Mitsubishi Elecs. Am., Inc.* v. *United States*, 44 F.3d 973, 976-977 (Fed. Cir. 1994) (explaining that, in the analogous context of antidumping duties, Customs'

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[1] Even if petitioner's current claim were viewed as a timely challenge to Customs' refusal to award petitioner a refund of prior duties, that challenge would fail for substantially the same reasons as set forth in the text. As explained above, petitioner's claim of entitlement to a refund depends on the assertion that its entries should not have been liquidated. But once the 180-day periods for challenging the liquidations expired, the liquidations and cash deposit rate became "final and conclusive upon all persons (*including the United States and any officer thereof*)." 19 U.S.C. 1514(a) (emphasis added). Because the applicability of the cash deposit rate to petitioner's entries had become "final and conclusive" before Commerce issued the Amended Final Results, denial of petitioner's refund request was required by law and could not properly have been set aside on judicial review, even if it were subject to challenge in the CIT.

assessment of duties as instructed by Commerce is a ministerial function, because "Commerce, not Customs, calculates antidumping duties," and "Customs merely follows Commerce's instructions in assessing and collecting duties").[2]

Petitioner is likewise wrong in contending (Pet. 19-20) that the court of appeals' decision "encourage[s]" and "perhaps even require[s]" importers "to file premature, incomplete and sham protests in situations where duty rates change after liquidation." As already explained, petitioner's claim that it was entitled to the lower countervailing duty rate established by Commerce's administrative review is in substance a claim that its entries should not have been liquidated while that review was ongoing. To be sure, even if petitioner had protested the liquidations within the prescribed period, Customs could not have issued a "refund" to petitioner within 180 days after liquidation because the review remained ongoing at that time, so that no lower rate had yet been established. See Pet. 20. But a protest filed within that 180-day window "would not have been to the refusal to grant a refund, but to the premature liquidation of the entries." Pet. App. 15a.

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[2] To the extent petitioner suggests (*e.g.*, Pet. 19) that the court of appeals' decision leaves Section 1514(c)(3)(B) with no work to do, that is mistaken. The regulation implementing Section 1514(c)(3)(B) provides the following examples of circumstances in which the 180-day period runs from "[t]he date of decision, involving neither a liquidation nor reliquidation, as to which the protest is made": "The date of an exaction; the date of written notice excluding merchandise from entry, delivery or demanding redelivery to CBP custody under any provision of the customs laws; [or] the date of written notice of a denial of a claim filed under section 520(d), Tariff Act of 1930, as amended (19 U.S.C. 1520(d))." 19 C.F.R. 174.12(e)(2).

A protest of the liquidation decisions, which had already occurred, would not have been "premature" or a "sham." Pet. 19-20. Petitioner suggests (Pet. 17-18, 20) that, until the administrative review culminated in a lower duty rate, petitioner had no legal basis for challenging the liquidations. That is incorrect. Because the propriety of the liquidations depended on whether the ongoing administrative review encompassed the relevant entries, petitioner could have immediately protested the liquidations on the ground that Shandong and Dongying Zhongyi were the same entity, so that "the manufacturer of [petitioner's] goods was participating in" the review. Pet. App. 2a. "If it is true, as [petitioner] contends, that it was entitled to the countervailing duty rate assigned to Dongying Zhongyi because Dongying Zhongyi was the manufacturer of [petitioner's] imports and a party to the Annual Review," then petitioner "would have been equally entitled to the suspension of liquidation of Dongying Zhongyi-manufactured entries during the pendency of the Annual Review." *Id.* at 15a.

3. Petitioner does not suggest (Pet. 15-22) that the decision below conflicts with any decision of this Court. And as the court of appeals explained (Pet. App. 15a), its decision in this case is consistent with its prior decision in *Carbon Activated Corp.* v. *United States*, 791 F.3d 1312 (Fed. Cir. 2015). There, the court held (in the antidumping context) that "[i]f entries are improperly liquidated, importers can challenge the legality of the liquidations by timely filing a protest to the liquidation under § 1514(a)(5) even if the duty on the entries has not yet been finally determined." Pet. App. 15a.[3]

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[3] By declining to protest the 2018 liquidations within 180 days after they occurred, petitioner forfeited the opportunity to obtain refunds if the administrative review produced a duty rate lower than

Petitioner attempts to distinguish *Carbon Activated* on the ground that the importer in that case "had a basis to protest the liquidation of the entries, because that liquidation occurred in direct contravention to a Commerce directive," Pet. 21, whereas no such breach by Customs is alleged in this case, see Pet. 22. But the court in *Carbon Activated* did not limit the requirement to challenge an allegedly improper liquidation to cases in which Customs has "direct[ly] contraven[ed]" instructions from Commerce. *Ibid.* The court of appeals correctly determined that, as in *Carbon Activated*, petitioner could and should have filed timely challenges to the allegedly premature liquidations if it wished to preserve its entitlement to CIT review. Pet. App. 15a.[4]

30.61%, but petitioner also protected itself against any risk that it might be required to pay additional sums if the review produced a *higher* rate. See Pet. App. 11a (noting that "[a]n importer will have to pay any shortfall if the final countervailing duty rate is determined to be higher than the cash deposit rate"); Pet. 4 (similar). Under petitioner's reading of the statute, it could obtain that protection while preserving its potential entitlement to any lower duty rate that the review might produce. The court of appeals' approach appropriately prevents that sort of gamesmanship.

[4] The Questions Presented in the certiorari petition include the question whether the court of appeals erred in holding that petitioner was not entitled to invoke the CIT's subject matter jurisdiction under 28 U.S.C. 1581(i) (Supp. II 2020). See Pet. i. But petitioner has failed to develop any argument regarding Section 1581(i) "in the body of [its] petition," Sup. Ct. R. 14.2; see Pet. 15-22, and has accordingly forfeited that contention. In any event, the court of appeals correctly determined, consistent with its precedent, that petitioner could not invoke Section 1581(i)'s residual grant of jurisdiction because petitioner could have filed suit under Section 1581(a) following a timely protest of the liquidations. See Pet. App. 16a; p. 8, *supra*. Further review of that holding would not be warranted even if petitioner had adequately preserved its challenge in the body of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2023