No. 20-1094

IN THE

Supreme Court of the United States

HYUNDAI HEAVY INDUSTRIES CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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Hyundai's petition for certiorari raises a simple and timely issue, which "goes to the heart of administrative agencies' power"; that is, "[i]ndividuals and entities subject to administrative agency decisions should reasonably expect consistent treatment, irrespective of the reviewing court." Pet. at 4.

Yet, because of the circuit split between the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit") highlighted in the petition, such a reasonable expectation cannot exist today. That is because the split permits agencies like the Department of Commerce (the "Department"), subject to the Federal Circuit's review, to revise a methodology central to their administrative proceedings and then penalize the subject of a given proceeding for a failure to conform with the revised methodology. *See id.* at 3-4 (citations omitted). The D.C. Circuit, conversely, abides by the rule that an agency may ***not*** revise such a methodology and apply it retroactively. *See id.* at 4 (citation omitted).

This issue is particularly timely given the "explosive growth of the administrative state over the last half century[.]" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring). The Government's response fails to address both the substance and the urgency of these concerns. It would have the Court believe that there is no circuit split, and that the Department made no such change to its methodology.

Both assertions are incorrect. As explained below, the Court should grant Hyundai's petition for

certiorari because of the pressing need to resolve the circuit split at issue. In attempting to respond to Hyundai's argument, the Government mischaracterizes both the argument itself as well as the precedent underlying it. Additionally, and in the alternative, the Court can grant the petition for the purpose of vacating the Federal Circuit's decision and remanding it thereto for further explanation.

I. The Government Mischaracterizes Relevant Precedent, Failing to Undermine the Circuit Split Highlighted in the Petition

The Government seeks to convince the Court that a circuit split does not exist because *Oxy USA v. FERC*, the D.C. Circuit case that conflicts with the Federal Circuit decision below, involved the "filed rate doctrine." U.S. Resp. at 13 (citing 64 F.3d 679, 699 (D.C. Cir. 1995)). Thus, the Government suggests that for a *bona fide* circuit split to exist, the filed rate doctrine would have to apply to antidumping proceedings, which it of course does not. *Cf. id.* ("Petitioner does not suggest that the filed rate doctrine applies to antidumping reviews; indeed, petitioner acknowledges that the doctrine is rooted in FERC's specific subject matter.") (citation and internal quotation marks omitted).

This response both misses the point and mischaracterizes the relevance of *Oxy USA*. As the language of that case makes clear, and as Hyundai explained in its petition, the "***corollary***" to the filed rate doctrine "is the rule that agencies may not alter rates" – and their underlying methodologies – "retroactively." 64 F.3d at 699; *see* Pet. at 17. Though

related to the filed rate doctrine, this corollary is separate and distinct from it. *See Oxy USA*, 64 F.3d at 699 (referring to the filed rate doctrine and the rule against revision and retroactive application, respectively, as "these principles").

This corollary serves as the basis for the circuit split. *See* Pet. at 14-20. And, as Hyundai explained, both this Court and the D.C. Circuit recognize it as necessary to "prevent unjust discrimination" and protect "equity and predictability" – particularly in the context of the wide-ranging and far-reaching work of administrative agencies. *See id.* at 17-20 (citing *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013); (Roberts, J., dissenting) *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012); *Oxy USA*, 64 F.3d at 699; *Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1126-28 (D.C. Cir. 1994)). Such recognition underlies this Court's warning in *Christopher* against cases where an agency can "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *See Christopher*, 567 U.S. at 158-59.

Contrary to the Government's argument, the dangers of such revision and retroactive application are not limited to the filed rate doctrine. The Federal Circuit's summary affirmance, which refutes this rule in the antidumping context, is exactly why the Court should grant Hyundai's petition for certiorari here.

Beyond claiming that there is no circuit split, the Government otherwise argues that the Department

did not retroactively apply the revised methodology in question. *See* U.S. Resp. at 11-12. The basis for this contention is flawed.

Specifically, the Government cites to the fact that the Court of International Trade ("CIT") "did not find that Commerce had modified its methodology for classifying service-related revenue, much less that it had applied any revised methodology retroactively." *Id.* at 11. The Government relies on the CIT's reasoning because, as discussed in Hyundai's petition and further below, the Federal Circuit summarily affirmed the CIT's decision, providing no explanation for its own decision. *See infra* Section II; Pet. at 14.

In any event, Hyundai has demonstrated to this Court how the Department revised, and then retroactively applied, the methodology for determining when Hyundai was required to report its service-related revenue ("SRR"). *See* Pet. at 9-13; *id.* at 15-16 ("the Department changed this methodology, after having notified Hyundai late in the administrative review, that it would require Hyundai to report SRR in accordance with ABB's definition . . . . It then applied this methodology retroactively, penalizing Hyundai with AFA for both relying on its prior methodology, and for reporting SRR in accordance with the new methodology. . . .").

That the CIT took a different view of the Department's action does not alter the nature of the action itself. This Court owes the CIT no deference, and that court's conclusion does not, as the Government suggests, bar review here.

The Government further accuses Hyundai of "overread[ing] the Federal Circuit's judgment" because the Federal Circuit issued a Rule 36 summary affirmance of the CIT's decision. *See* U.S. Resp. at 11. As explained below, this further supports granting Hyundai's petition, and in the alternative, to vacate and remand to the Federal Circuit for further explanation.

II. In the Alternative, the Court Should Grant Certiorari, Vacate, and Remand to the Federal Circuit

Both Hyundai and the Government recognize the Federal Circuit's practice that a Rule 36 judgment "simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court's reasoning." Pet. at 14; U.S. Resp. at 11 (both quoting *Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012)). Hyundai and the Government disagree, however, on the implications of such summary affirmance. As explained below, the Federal Circuit's summary affirmance further supports granting Hyundai's petition.

The Federal Circuit reviews decisions of the CIT *de novo*, "stepping into its shoes and applying the same standard of review." *JTEKT Corp. v. United States*, 642 F.3d 1378, 1381 (Fed. Cir. 2011) (citation omitted). This is similar to an appellate court's review of a trial court's decision granting or denying summary judgment. *Compare id. with, e.g.*, *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 497 (Fed.

Cir. 1992) ("The first question is the propriety of summary judgment which we decide for ourselves. We are not bound by the district court's ruling that there was no genuine issue of material fact") (citation omitted).

Given the Federal Circuit's numerous pronouncements affirming retroactive application in the antidumping context, it is clear that its decision to issue a Rule 36 affirmance here is consistent with those cases. That is, the Federal Circuit considered Hyundai's arguments *de novo*, and ruled the way that it did, thereby reinforcing its "permissive approach toward an agency's retroactive application of a revised methodology." *See* Pet. at 14; *see id.* at 16-17 (citing *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009); *Koyo Seiko, Co. Ltd. v. United States*, 551 F.3d 1286, 1290 (Fed. Cir. 2008); *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1380-81 (Fed. Cir. 2008)). Indeed, Rule 36 even provides that one of the conditions justifying a summary affirmance exists where the judgment below "has been entered without an error of law." Fed. Cir. R. 36(a)(5).

Nor does the Government challenge Hyundai's argument that the Federal Circuit endorses retroactive application of methodologies in antidumping duty proceedings. Rather, it states that the Federal Circuit "did not discuss or even cite" any of the cases in which it did so. *See* U.S. Resp. at 13. This, of course, is unsurprising given the fact that the Federal Circuit issued a summary affirmance.

Nevertheless, if the Court agrees with the Government's contention, and finds that the Federal

Circuit's Rule 36 disposition "signifies only that the court approved of the CIT's judgment," *see* U.S. Resp. at 11, then there is an alternative path. Specifically, and given the wide-reaching consequences of the circuit split at issue, this Court can seek clarity by granting certiorari, vacating the decision, and remanding to the Federal Circuit for further explanation, also known as issuing a "GVR" order.

The prevalence of appellate courts' use of summary disposition has served as an explicit basis for this Court's issuance of a GVR order. As it explained in *Lawrence v. Chater*—

> In this context, it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below "*might* . . . have relied on." And we are well aware . . . that while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review.

516 U.S. 163, 170 (1996) (emphasis original). Here too, the Court should not have to second-guess the Federal Circuit's reasoning. It can avoid doing so by issuing a GVR.

Thus, in the event that the Court does not find a basis for granting Hyundai's petition on the merits, it should find that the circumstances justify granting the petition, vacating the Federal Circuit's decision, and remanding it thereto for further clarification, consistent with the test set out in *Lawrence*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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