No. ______

In the Supreme Court of the United States

WELL LUCK COMPANY, INC.,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Robert T. Givens
Counsel of Record
Givens & Johnston, PLLC
950 Echo Ln., Suite 360
Houston, TX 77024
(713) 932-1540
rgivens@givensjohnston.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Federal Circuit panel's initial unqualified finding was that the sunflower seeds at issue (roasted, salted, and/or flavored sunflower seeds; a.k.a. "snacking sunflower seeds") were prima facie classifiable under both HTS Heading 1206 – covering "Sunflower seeds, whether or not broken"; as well as under 2) HTS Heading 2008, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing sugar or other sweetening matter or spirit, *not elsewhere specified or included*" (NESOI) (Emphasis added). The snacking sunflower seeds cannot be classified under both HTS Heading 1206 and HTS Heading 2008. The question presented is:

Whether the panel disregarded legislative intent and prior statutory construction to improperly use the General Rules of Interpretation and the Explanatory Notes to justify its classification of the sunflower seeds under HTS Heading 2008, despite its NESOI language.

RULES 14.1 AND 29.6 STATEMENTS

All parties are identified in the caption of this petition. Petitioner was the plaintiff in the United States Court of International Trade and was the appellant in the Court of Appeals for the Federal Circuit. Well Luck Co. does not have a parent company and no publicly held corporation owns 10% or more of Well Luck Co.'s stock.

Respondent United States was the defendant in the United States Court of International Trade. Respondent was listed as defendant-appellee in the decision of the Court of Appeals for the Federal Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Well Luck Co. ("Well Luck") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The order of the Federal Circuit rejecting Well Luck's request for a hearing en banc (Appendix, *infra*, 45-46) ("App.") is not reported. *Well Luck v. United States*, No. 2017-1816 (C.A.F.C, Jul. 20, 2018). The opinion and judgment of the Federal Circuit panel (App. 1-19) is reported at 887 F.3d 1106. The opinion and judgement of the United States Court of International Trade (App. 20a-44a) is reported at 208 F. Supp. 3d 1364. The opinion of U.S. Customs and Border Protection Office of Regulations and Rulings is available online under HQ H196098 (App. 63-74).

JURISDICTION

The judgment of the panel of the Court of Appeals for the Federal Circuit was entered on April 11, 2018. The Court of Appeals rejected Appellants request for an En Banc hearing on July 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, § 1, of the Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III.

2. The Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202) provides, in relevant part:

   1206.00.00 Sunflower seeds, whether or not broken

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   2008 Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing sugar or other sweetening matter or spirit, not elsewhere specified or included:

   2008.19 Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together: Other, including mixtures:

   2008.19.90 Other, including mixtures: Other

3. General Rule of Interpretation 1 of the Harmonized Tarif Schedule of the United States provides in relevant part "[F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions."

INTRODUCTION

In 1824, this Court was asked to determine if certain tea was properly classified as “bohea tea” or other black teas. *Two Hundred Chests of Tea*, 22 U.S. 430 (1824). This Court held that Congress intended tariff terms in their common and commercial meaning, establishing legal precedent that has guided tariff classification for nearly 200 years, i.e, that an *eo nominee* provision prevails over a “basket provision.” The Federal Circuit panel’s decision disregards this guiding legal precedent and turns tariff classification on its head.

The issue presented is one of exceptional gravity on the economy of the United States. While at first glance the Federal Circuit panel’s decision appears to affect only the classification of a single commodity, the panel’s erroneous decision to classify snacking sunflower seeds under HTS Heading 2008 in the face of Congress’ limiting “not elsewhere specified or included” (“NESOI”) language invalidates 52 NESOI headings in the Harmonized Tariff Schedule (“HTS”) covering 493 different products totaling 166.6 Billion U.S. Dollars in annual imports into the United States[1]. (App. 90-96). The panel’s decision also calls into question the 2.1 Trillion U.S. Dollars worth of annual imports presently classified outside of NESOI headings, but which may now be subject to classification under NESOI headings. The panel’s erroneous analysis renders meaningless any NESOI provision set out by Congress in the HTS by creating patent ambiguity in the application of the rules

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[1] Determined using 2017 Census Import Data.

governing the classification of goods, and it throws the whole HTS into disarray.

Given the ever-growing importance of import tariffs, and by association, tariff classification and interpretation of the HTS, the panel's disregard of congressional intent warrants review by this Court because of its severe economic impact on domestic industry and international trade. Furthermore, no other court of appeals can review the issue, which is subject to the exclusive jurisdiction of the Federal Circuit, 28 U.S.C. § 1582(1), and the Court of International Trade. 28 U.S.C. § 1295(a)(5). *See United States v. United States Shoe Corp.*, 523 U.S. 360, 365-366 (1998). Thus, no conflict in the circuits can arise, and the Federal Circuit is unlikely to revisit its own panel decision on this issue in time to avert harsh consequences to the U.S. economy.

The panel decision in this case, App. 1 (Reyna, Wallach, and Hughes, *Cir. J.*) properly held that snacking sunflower seeds are prima facie classifiable in HTS Heading 1206, overruling the Court of International Trade's decision to the contrary. App. 20-44. However, the panel then went on to commit reversible error when it classified sunflower seeds in HTS Heading 2008, plainly disregarding the limiting NESOI language therein. The purpose of a limiting instruction is to demonstrate the intent of Congress and provide importers with guidance on classification issues. If the panel decision is not reversed by this Court, HTS interpretation would be thrown into disarray.

The judicial Power created by Article III, § 1, of the Constitution is not one that allows whatever judges

choose to do to control. Rather, American courts must act "in the manner traditional for English and American courts" with "one of the most obvious limitations imposed by that requirement [being] that judicial action must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2003). Law pronounced by the courts must be "principled, rational, and based upon reasoned distinction." *Id.* By disregarding the limiting NESOI instruction, the panel ruled in a manner inconsistent with the basic standard upon which judicial interpretation is based: application and interpretation of a statutory provision promulgated by Congress.

Furthermore, by disregarding the limiting NESOI instruction, the panel decision in this case is decided in a manner inconsistent with the governing rules of the HTS; the General Rules of Interpretation ("GRI"). GRI 1 states in relevant part:

> "[F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, *provided such headings or notes do not otherwise require*, according to the following provisions." (emphasis added) GRI 1.

When concluding that snacking sunflower seeds are properly classifiable under HTS Heading 2008, the panel ignored the governing rules of the HTS which *should have* held that the "not elsewhere specified or included" instruction in HTS Heading 2008 eliminates sunflower seeds from classification in HTS Heading 2008 because they are elsewhere specified and included within HTS Heading 1206.

As such, the Federal Circuit panel failed to properly apply traditional judicial standards as well as the governing rules of the HTS by disregarding the limiting NESOI language in HTS Heading 2008. The Federal Circuit panel also failed to make a principled, rational, and well-reasoned distinction when the panel concluded that snacking sunflower seeds are classifiable under HTS Heading 2008, despite the limiting language. As a result of this decision, the Federal Circuit panel created a precedent that would throw the HTS and the 2.3 Trillion U.S. Dollar domestic import industry into disarray by creating ambiguity as to the meaning and application of NESOI provisions throughout the HTS. Only this Court can remedy the panel's erroneous application of the law.

STATEMENT

A. Petitioner, Well Luck, Contends that the Proper Classification of Snacking Sunflower Seeds is HTS 1206.00.00.

Petitioner, Well Luck, a New Jersey corporation, was the importer of record for a protested entry of roasted, salted, and/or flavored whole sunflower seeds in their shell. Petitioner contends that the snacking sunflower seeds at issue are prima facie classifiable under HTS Heading 1206 and filed a protest with U.S. Customs and Border Protection ("Customs"). App. 48-62.

B. Customs Rejects Petitioner's Protest of Liquidation of Snacking Sunflower Seeds under HTS 2008.19.90.

On July 16, 2012, Customs issued HQ H196098 ordering the rejection of Petitioner's claims that the

snacking sunflower seeds at issue are prima facie classifiable under HTS Heading 1206 and reaffirms the classification of sunflower seeds under HTS 2008.19.90. App. 63-74.

C. Petitioner Challenges Customs' Protest Denial in the Court of International Trade Claiming Snacking Sunflower Seeds are Prima Facie Classifiable under HTS Heading 1206.

On September 2, 2014, Petitioner challenges Customs' protest denial in the Court of International Trade arguing that snacking sunflower seeds are prima facie classifiable under HTS Heading 1206. Petitioner has jurisdiction under 28 U.S.C. § 1581(a), because this Civil Action was commenced to contest the denial of protest under 19 U.S.C. § 1514. Petitioner contends that HTS Heading 1206 is an unlimited *eo nomine* provision because it describes a commodity by a specific name, and that the common commercial meaning of "sunflower seeds" includes Petitioner's sunflower seeds. App. 75-89.

D. On Summary Judgment, The Court of International Trade Erroneously Held that Snacking Sunflower Seeds Were Not Prima Facie Classifiable Under HTS Heading 1206 but Were Properly Classifiable Under HTS Subheading 2008.19.90.

The Government moved for Summary Judgment in the Court of International Trade, claiming that there is no genuine issue of material fact and that Customs properly classified Petitioner's entry of roasted, salted, and/or flavored whole sunflower seeds in their shell

under HTS 2008.19.90. Petitioner opposed and cross-moved, contending that no genuine issue of material fact exists, however, contends that Customs misclassified the sunflower seeds.

The Court of International Trade granted summary judgment on the Government's claim arguing that the "terms of the HTSUS are construed according to their common commercial meanings." App. 27. In looking at the common commercial meaning, the Court of International Trade consulted "general dictionaries" and found that these dictionaries "define the terms "sunflower" and "seeds" separately, and they also highlight the fertilized or ripened ovule of the plant Helianthus annuus…[and] these general definitions also emphasize the capability of sowing seeds." *Id.* at 30. The Court of International Trade also consulted industry sources provided by Petitioner which reflected that "'sunflower seeds' may be eaten as a snack either raw, roasted, or seasoned." *Id.* at 30-31.

Having found no "common commercial meaning" the Court of International Trade turned to the General Explanatory Notes to Chapter 12 ("EN") to "[clarify] that the definition of the tariff term 'sunflower seeds' refers to sunflower seeds that have been minimally processed such that they are suitable for general use." *Id*. at 31. In applying the EN, the Court of International Trade narrowed the tariff term "sunflower seed" and held that "[s]unflower seeds suitable for general use must be suitable for sowing and oil extraction, not just suitable for snacking" and thus classifiable under HTS Heading 2008. *Id*. at 43.

E. On Appeal, the Federal Circuit Panel Correctly Rejected the Court of International Trade's Rationale and Found That Snacking Sunflower Seeds are Prima Facie Classifiable under HTS Heading 1206.

A panel of the Federal Circuit (Reyna, Wallach, and Hughes, *Cir. J.*) rejected the trial court's reliance on the General Explanatory Notes to Chapter 12 ("EN") to narrow the language of HTS Heading 1206, agreeing with Petitioner. Specifically, the trial court:

> "Ran afoul of [the CAFC's] instruction that a court 'shall not employ the ENs' limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself.'" App. 12.

The panel "decline[d] to repeat the CIT's error" and concluded that Well Luck's merchandise is prima facie classifiable under HTS Heading 1206. *Id*.

F. The Panel Made its Own Error by Disregarding the "Not Elsewhere Specified or Included" Language to Classify the Sunflower Seeds under HTS Heading 2008.

Despite having reached the proper conclusion that snacking sunflower seeds are prima facie classifiable under HTS Heading 1206, the panel erroneously and in complete disregard of clear legislative intent to the contrary applied GRI 3(a)'s relative specificity analysis and, after stating the Explanatory Notes cannot narrow the language of a Heading, it then relied on the Explanatory Notes to determine that HTS Heading 2008 is more specific than HTS Heading 1206 and therefore, the preferred classification. App. 16-19.

G. The Federal Circuit Rejected Petitioner's Request for a Rehearing En Banc.

The Federal Circuit rejected the Petitioner's petition for a rehearing en banc on the issue of the panel's failure to consider the limiting "not elsewhere specified or included" language found in HTS Heading 2008. App. 45-46. Petitioner now appeals under 28 U.S.C. § 1254(1) and Rule 13(1) of this Court.

REASONS FOR GRANTING THE PETITION

The Harmonized Tariff Schedule of the United States "shall be considered…statutory provisions of law for all purposes." 19 U.S.C. § 3004(c)(1) (2012). It is the long-standing tradition of this Court to give full force and effect of the language of a statute, absent legislative intent to the contrary. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 10 U.S. 53, (1810). When the Federal Circuit panel analyzed the classification of snacking sunflower seeds, the panel failed to take into consideration the basic presumption that the legislature intended for the limiting language to hold meaning on the tariff heading[2].

[2] The phrase "not elsewhere specified or included" does not even appear in the panel's decision, except for three instances, all of which merely state the full text of HTS Heading 2008.

I. The Federal Circuit Panel Clearly Disregarded Legislative Intent.

In this case, the Federal Circuit panel failed to consider the clause "not elsewhere specified or included," completely excising the limiting language and paying no heed to Congressional intent; an action that goes against the cardinal principles of statutory construction. "The cardinal principle of statutory construction is to save and not destroy…It is [a court's] duty 'to give effect, if possible, to every clause and word of a statute'." (emphasis added) *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), citing to *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). Here, by failing to adhere to the principles of statutory interpretation and giving full force and effect to every clause and word in the statute (the limiting language in HTS 2008) and improperly applying GRI 1, the panel's decision led to reversible error both in the instant case and in the broader scope of HTS analysis.

A. Under General Rule of Interpretation 1, Well Luck's Merchandise Cannot be Prima Facie Classifiable under Both HTS Heading 1206 and HTS Heading 2008, Because of the Language "Not Elsewhere Specified or Included" in HTS Heading 2008.

Because the panel found that Well Luck's merchandise is prima facie classifiable under HTS Heading 1206, it *cannot* also find it prima facie classifiable under HTS Heading 2008. HTS Heading 2008 is a residual "basket" provision that is expressly limited by the language "not elsewhere specified or included." As such, HTS Heading 2008 is only an applicable classification of goods in the absence of

another applicable heading. Here, the panel determined the merchandise was prima facie classifiable in HTS Heading 1206, and improperly ignored the express limitation imposed on the scope of HTS Heading 2008. The proper classification should be HTS 1206.

The panel contradicts GRI 1 because it ignores the central limiting language clause in HTS Heading 2008, "not elsewhere specified or included." After finding Well Luck's merchandise is prima facie classifiable under both HTS Headings 1206 and 2008, the panel applied GRI 3(a)'s relative specificity analysis to determine that HTS Heading 2008 is more specific than HTS Heading 1206 and therefore, the preferred classification. App. 17. "HTSUS Heading 2008's requirement that the subject merchandise be 'prepared or preserved' renders it more difficult to satisfy than sunflower seeds in HTS Heading 1206 because preparation and preservation 'involve some degree of processing or addition of ingredients.'" *Id*.

However, the panel's analysis should have ended after its determination that Well Luck's sunflower seeds are prima facie classifiable under HTS Heading 1206. The merchandise can *only* be prima facie classifiable in HTS Heading 1206 because HTS Heading 2008's limiting language, "not elsewhere specified or included," excludes it from consideration under that heading.

The panel's decision erases the statutory effect of HTS Heading 2008's limiting clause. In determining the scope of a statute, this Court looks first to its language. *United States v. Turkette*, 452 U.S. 576, 580 (1981) "If the statutory language is unambiguous, in

the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id*. (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The language of HTS Heading 2008 is clear and unambiguously includes a limiting clause. The panel cited no clearly expressed legislative intent to the contrary to support its classification under HTS Heading 2008.

Because Well Luck's merchandise is "specially provided for" elsewhere in HTS Heading 1206, classification under HTS Heading 2008 is inappropriate. *See Int'l Bus. Machs. Corp. v. United States*, 152 F.3d 1332, 1338 (Fed Cir. 1998). Thus, the panel's decision is contrary to clear and well-established precedents of this Court. This Court should hear the important statutory interpretation issues raised in this case and correct this error.

CONCLUSION

Because of the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Robert T. Givens
Counsel of Record
Givens & Johnston, PLLC
950 Echo Ln., Suite 360
Houston, TX 77024
(713) 932-1540
rgivens@givensjohnston.com

Counsel for Petitioner