No. 14-986

IN THE

Supreme Court of the United States

HARISH SHADADPURI,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF PETITIONER

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RULE 37.2 STATEMENT

Pursuant to Supreme Court Rule 37.2(a), all parties received notice at least ten days prior to the March 16, 2015 response deadline called for by this Court. Petitioner Harish Shadadpuri filed a letter of blanket consent with the Court on February 26, 2015. Respondent the United States consented to the filing of this brief by letter dated February 27, 2015.

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Amicus curiae the American Association of Exporters and Importers (AAEI)[1] respectfully submits this brief in support of Petitioner Harish Shadadpuri, who asks that this Court grant a writ of

[1] Pursuant to Supreme Court Rule 37.6, AAEI affirms that no counsel for any party authored this brief in whole or in part, and that no person or entity other than AAEI, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

certiorari to review the decision of the U.S. Court of Appeals for the Federal Circuit in this case.

INTEREST OF *AMICUS CURIAE*

The Petition (at 3) correctly describes the issue presented as "of exceptional importance to the thousands of American-based corporations and their shareholders, officers, and employees who are involved in the importation of merchandise into the United States." As the premier national association representing the interests of importers before the United States, its agencies, Congress, the trade community, foreign governments, and international organizations for more than ninety years, AAEI agrees. The voice of American businesses in support of free and open trade among nations, AAEI represents numerous manufacturers, distributors, and retailers of a wide spectrum of products—including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles, and apparel—as well as international companies, freight forwarders, customs brokers, and banks.

Most of AAEI's members import merchandise into the United States. AAEI works assiduously with its members and the trade community to educate them on the laws and regulations governing importing, and best practices for achieving and sustaining compliance therewith. Since civil customs penalties are among the harshest in Federal law, AAEI and its

members have an abiding interest in ensuring that the law is fairly administered by the government and correctly interpreted by the courts. The Federal Circuit's excessively broad interpretation of the civil customs penalty law has immensely negative consequences for the importing community, and would impede Congress' legislative goal of promoting importer compliance through self-regulation, using "reasonable care" within a regulatory environment of "informed compliance."

AAEI, at the invitation of the Federal Circuit, Pet. App. 29a, filed an *amicus curiae* brief at the rehearing *en banc* in support of Shadadpuri.

SUMMARY OF ARGUMENT

Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592, imposes severe monetary penalties on persons who, by negligence, gross negligence, or fraud "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" by means of false and material acts, as well as on persons who "aid or abet" fraudulent violations of the statute. *Id.* § 1592(a)(1). Trek Leather, Inc. ("Trek"), a corporate importer of record (IOR), was found liable for having negligently violated the statute by making entries of merchandise that failed to disclose the existence of dutiable "assists." Without performing a corporate veil-piercing analysis, or an analysis of aiding-and-abetting liability, the Federal

Circuit *en banc* held Shadadpuri, Trek's president and sole shareholder, directly liable for a violation of § 1592(a) for having "introduced" merchandise into the commerce of the United States by means of false statements.

The opinion defined the term "introduce" to encompass every act relating to imported merchandise preceding the filing of an entry, including steps involved in the preparation of the entry. In so doing, the Federal Circuit stretched the prohibition in § 1592(a) beyond its terms, and beyond Congress' intent. First, under the Federal Circuit's approach, the Government need not charge any person as an aider or abettor of a corporate IOR's fraudulent entry; rather, the Government can charge negligent "introduction" violations even when there is an actual (or attempted) entry by the IOR. Second, the Federal Circuit fails to distinguish adequately between what constitutes "entry" and what constitutes "introduction," holding Shadadpuri liable for an introduction violation even though his actions furthered an entry by the corporation on behalf of which he was acting. Third, the Federal Circuit's decision overlooks the statute's "materiality" requirement. The alleged violation in this case—failure to declare dutiable assists—is only material to the assessment of duty if and when an entry is filed, but not to the introduction of goods, which implies that there has been no attempted entry. This Court should grant certiorari to clarify the scope of § 1592.

ARGUMENT

Trek Leather, Inc. is a New York importer of men's suits, which are the subject of the penalty imposed in this action. Trek provided its foreign manufacturers, free of charge or at reduced cost, with fabrics used to make the imported garments. 19 U.S.C. § 1401a(b)(1)(C) requires the cost or value of these fabric "assists" to be added to the "price actually paid or payable" to the foreign manufacturers in determining the dutiable "transaction value" of goods. The goods were shipped to the United States under cover of invoices showing the "cut, make, and trim" (CMT) charges paid to the foreign manufacturers of the goods. When Trek, the purchaser and corporate IOR, filed a consumption entry for the goods with U.S. Customs and Border Protection (CBP or "Customs"), it understated the dutiable value of the goods by failing to declare the assists' value in addition to the goods' invoice value.

The Government charged both Trek and Shadadpuri, Trek's president and sole shareholder, with entering the suits by means of material false statements, in violation of 19 U.S.C. § 1592(a)(1), which states that "no person, by fraud, gross negligence, or negligence"—

> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

The U.S. Court of International Trade (CIT) held that both Trek and Shadadpuri were grossly negligent under § 1592(a)(1)(A), and held them "jointly and severally liable" for civil penalties under § 1592(c)(2) and for the restoration of duties under § 1592(d).

Shadadpuri appealed, claiming that since he was not the IOR that filed the entry, he could not be held directly liable for the corporate importer's negligence. Moreover, since the Government had abandoned its claim of fraudulent entry, Shadadpuri could not be charged with aiding or abetting the IOR's violation under § 1592(a)(1)(B). A panel of the Federal Circuit held that Shadadpuri could not be held liable for negligent § 1592(a) violations by a corporate importer where there was no corporate veil-piercing. Judge Timothy Dyk dissented.

Thereafter, the Federal Circuit granted rehearing *en banc*, vacated the panel's decision, and solicited briefing without argument "limited to" only three issues: (1) "the meaning of 'person'"; (2) the personal liability of "corporate officers or shareholders" who "provide inaccurate information relating to the entry

or introduction of merchandise into the United States by their corporation"; and (3) "the scope of 'gross negligence' and 'negligence'" and "the relevant duty." Pet App. 28a–29a.

The court *en banc* found Shadadpuri liable for a violation of § 1592(a)(1)(A) on a new theory that had not been argued or briefed by any party—specifically, the court sidestepped the issue of entry entirely, "rely[ing] instead on the 'introduce' language of section 1592(a)(1)(A)," Pet. App. 18a, in holding Shadadpuri liable for negligently "introducing" the apparel into U.S. commerce by means of false statements. Claiming to rely on the definition of "introduce" set out in *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358 (1913), Shadadpuri had negligently introduced the merchandise by means of false statements, the Court reasoned, because, *inter alia*, "[h]imself and through his aides, he sent manufacturers' invoices to the customs broker for the broker's use in completing the entry filings to secure release of the merchandise from CBP custody into United States commerce." Pet. App. 22a.

In so ruling, the Federal Circuit expanded the definition of "introduce" to encompass all activities that necessarily "bring goods to the threshold of the process of entry." *Ibid.* But under this reading of § 1592(a), every negligent *entry* by a corporate importer will always be accompanied by a negligent *introduction* by the importer's employees or agents because a corporation can only act through natural

persons. Moreover, the Federal Circuit held Shadadpuri liable for false introduction even though the defect in the papers provided—the failure to reflect assist value—did not become "material" until the entry was filed.

Corporate importers employ thousands of import managers, customs compliance directors, and logistics professionals to make entry of their merchandise. While acting on behalf of their corporate employers, these individuals routinely perform the type of acts for which Shadadpuri was held personally liable, such as sending invoices to customs brokers for use in completing entry. While this type of activity, if carried out with intent to break the law, could be punishable under § 1592(a)(1)(B) as aiding or abetting a direct § 1592(a)(1)(A) corporate entry violation, the Federal Circuit's decision makes the employee directly and personally liable for simple negligence by the corporate importer. Without accounting for the employee's state of mind, the Federal Circuit grossly distorts the scope of liability that Congress intended to impose under § 1592(a).

I. The Federal Circuit Interprets Direct Liability in a Manner That Makes Aider-and-Abettor Liability Superfluous.

Direct liability for an "entry" (or "attempted entry") violation under 19 U.S.C. § 1592(a)(1)(A) may be imposed on any "person," natural or otherwise, but only if that person is designated as the IOR of the entry. Congress—vested with exclusive "power

to lay and collect … duties," U.S. Const. art. I, § 8, cl. 1—has by law imposed personal liability for duties only upon an IOR, which is limited to the "owner or purchaser" of the goods (or a properly retained broker). 19 U.S.C. § 1484. *See* 19 C.F.R. § 141.1(b)(1) ("liability for duties … constitutes a personal debt due from the importer to the United States"). From this, several statutory obligations extend only to the IOR upon entry.[2] The IOR must include commercial invoices with detailed descriptions of the goods, 19 U.S.C. § 1481(a), use "reasonable care" in providing all information required to enable CBP to assess duties, taxes, and fees properly, collect accurate statistics, and determine other applicable requirements of law, *id.* § 1484(a)(1), and declare under oath upon entry that the documents submitted are true and correct, *id.* § 1485(a). *See, e.g.*, 19 C.F.R. § 142.3 ("Entry documentation required"). The Federal Circuit itself has confirmed that §§ 1484 and 1485 "apply by their terms only to [IORs]." *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1336 (Fed. Cir. 1999). Therefore, when entry documents are false, only the § 1485 declarant (*i.e.,* only the IOR) can be liable under § 1592(a)(1)(A) for a direct entry violation. Moreover, only the IOR can make restoration of law-

[2] "Entry" is a term of art that refers to the formal filing of documentation with CBP to secure the release of "imported" merchandise. 19 C.F.R. § 141.0a(a). "Imported" merchandise becomes subject to an "entry" when the importer files requisite entry documents with CBP.

ful duties under § 1592(d), and the judicial branch cannot recast duty obligations on third parties when Congress has placed them squarely on the IOR where there is an entry.

On the other hand, direct liability for an "introduc[tion]" (or "attempted introduc[tion]") violation under subparagraph (A) may also be imposed on any person who introduces merchandise. For the meaning of "introduce," the Federal Circuit looked back over a century to *Panama Hats*, *supra*, 231 U.S. 358, for a discussion of the legislative history behind the *in rem* forfeiture statute that preceded § 1592. That law had previously covered only a "fraudulent or false invoice" resulting in "entry" by "any owner, importer, consignee, agent or other person." Tariff Act of 1890, ch. 407, § 9, 26 Stat. 131, 135. However, in 1909 Congress expanded the scope of conduct to add "introduce" and the category of persons whose false invoices could trigger forfeiture to add "consignor [and] seller." Tariff Act of 1909, Pub. L. No. 61-5, § 9, 36 Stat. 11, 97. Before the term "introduce" was added to the law, violations involving imported, but not entered, merchandise meant that the government could not seize and forfeit the *res*.

In *Panama Hats*, imported goods, shipped under cover of false invoices prepared by a foreign consignor, were placed in general order warehouse after no entry was filed. 231 U.S. at 359. A claimant-consignee came forward in a forfeiture proceeding, alleging that because the imported merchandise

went into general order, there was no entry and thus no violation. *Id.* at 360. The Court agreed that the goods were "not technically entered" because "they were not called for by the consignee" and there had been no other attempt made to enter. *Id.* at 359. However, because the consignor "ma[de] a false invoice" to accompany the goods destined for U.S. commerce, even though there was no attempted entry, when the goods "arrived at the port of entry there was an attempt to introduce them," and when they "were unloaded and placed in General Order they were actually introduced," the forfeiture stood. *Id.* at 361–62.[3]

The Court explained that in covering only "entry," the former statute contained "loopholes" whereby goods could escape forfeiture if violative acts were committed without an entry being filed. *Id.* at 361.[4]

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[3] The *Panama Hats* definition of "introduce" is indistinguishable from the definition for "import," which refers to the act of "bringing an article into a country from the outside." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923). All entered merchandise will, by definition, also be imported merchandise. The inverse, however, is not true. While imported merchandise can be formally entered and cleared with CBP, it can also be smuggled across the border without any entry.

[4] The Court explained that Congress could not have intended for the foreign status of the consignor "to relieve the goods from the liability to be forfeited." 231 U.S. at 362. The Second Circuit later construed *Panama Hats* to mean that the addition of "introduce" was intended "to extend the forfeiture provisions so that it should no longer be necessary to attempt to make a technical entry of the imported merchandise." *United*

Introduction, according to the Court, must have "necessarily included more than an attempt to enter," as any other interpretation of the amendment would make the law "inoperative against the consignor against whom it was specially aimed, *for he does not*, as such, *make the declaration*, *sign the documents*, or *take any steps in entering or attempting to enter the goods*.", which are duties of the IOR alone. *Ibid.* (emphasis added).

Panama Hats thus confirms that falsified entry documents can only inform the liability of the party declaring that those documents are accurate—the IOR. Liability may be expanded under "introduce" but only where there is no attempt to enter. Congress' 1909 amendment "specially aimed" the "introduce" language at non-IOR parties (like foreign consignors) that cannot enter merchandise themselves or even "take any steps" towards entry, *id.* at 361, but rather can only "introduce" merchandise by means of a false invoice. From this it is clear that non-IORs cannot be liable for direct entry violations under § 1592(a)(1)(A) because they are not authorized to sign the § 1485 declaration affirming the accuracy of the entry package, and do not take any specific action to cause the goods to be entered.

States v. 169 Bales Containing Wool, 56 F.2d 736, 737 (2d Cir. 1932); *see also In re Four Packages Cut Diamonds*, 255 F. 314, 315 (2d Cir. 1918).

Today, unlike in the time of *Panama Hats*, the penalty statute provides for, in addition to direct liability, the imposition of aider-and-abettor liability for a direct fraudulent violation, and as such the *Panama Hats* definition of "introduce" cannot be reconciled with the Federal Circuit's decision. The evidence supports that Shadadpuri delivered invoices to Trek's customs broker and instructed it to declare the entry value according to the invoice's value, which did not include assists that Shadadpuri knew were dutiable. While such actions, if done with requisite intent, might aid or abet the IOR's filing of a false entry, the Federal Circuit defined Shadadpuri's actions to constitute an introduction violation by Shadadpuri himself—a standalone violation of § 1592(a)(1)(A) separate and distinct from the false entry filed by Trek.

This formulation is overbroad, and erases the distinction between direct violations in § 1592(a)(1)(A) and aiding-and-abetting violations in § 1592(b)(1)(B). Shadadpuri's acts were neither necessary to, nor in furtherance of, "introduction" of the goods; rather, they were acts performed as an agent of the corporate IOR, which sought to bring about entry of the goods. Shadadpuri might arguably have been aiding or abetting false *entry*, but he was neither committing nor aiding and abetting the *introduction* of the goods.

The Federal Circuit's expansive definition of "introduce" would make it unnecessary for the govern-

ment ever to bring an aiding-and-abetting charge against any person under § 1592(a)(1)(B), which would require the government to plead the principal's fraud with particularity and to prove that fraud under the stricter clear-and-convincing evidence standard of § 1592(e)(2). Moreover, defining "introduce" in this manner allows the Government to penalize innocent import managers and customs brokers for the negligence of corporate IORs without any showing of intent or knowledge. The Government can decide whom to charge, or not to charge, with false introduction violations, at its whim. Indeed, since the Federal Circuit has elected to define "introduce" as encompassing acts undertaken in furtherance of the entry of goods, then in every case where there is a false entry violation, there will necessarily be one or more "introduction" violations, attached to those individuals who handled the entry documents before their filing.[5] Those individuals will be liable for the corporation's negligence, regardless of their own level of care. Congress cannot have intended to cast the statute's net so broadly.

The statutory scheme provides for aider-and-abettor liability to hold natural persons acting on behalf of the IOR responsible only under § 1592(a)(1)(B), and only in the case of an intentional

[5] *See e.g., United States v. China Tire Warehouse, Inc.*, No. 15-59 (Ct. Int'l Trade filed Mar. 9, 2015), where the Government sued the corporate IOR but reserved the right to sue two corporate officers.

violation. An aider or abettor must always have knowledge that he or she is furthering the fraudulent conduct of the principal violator. This is true because a third party can never possess more intent as an aider and abettor under § 1592(a)(1)(B) than the direct violator has under § 1592(a)(1)(A). There is a "generic requirement to show knowledge or intent to establish aiding or abetting liability," and to hold otherwise "is itself wholly without support and inconsistent with fundamental legal logic." *Hitachi Am.*, 172 F.2d at 1338. Thus, aiding and abetting requires *at a minimum* that the third party know that the IOR's acts or omissions are false or fraudulent. In *Hitachi*, the Federal Circuit held that any third party whom CBP seeks to hold accountable "may not be held *directly liable* for a violation of those provisions and can only be liable under 19 U.S.C. § 1592(a)(1)(B) for aiding and abetting," which requires a state of mind present only in cases of fraud. *Id.* at 1336 (emphasis added). In other words, a third party may be held liable for aiding and abetting a principal violator, but only when the court finds that such principal committed fraud, and that the third party knowingly or intentionally aided such fraud. *Ibid.*

Here, although Shadadpuri might have aided or abetted the IOR's false *entry* under § 1592(a)(1)(B), he was neither committing nor aiding and abetting false *introduction* of the goods, and whether he did aid or abet became irrelevant once the Government

dropped its fraud claim. The evidence indicated that Shadadpuri *knew* that there was a duty on the IOR to declare the value of assists upon entry, and that failure may constitute a material omission under § 1592(a)(1)(A), Pet. App. 8a, but evidence that Shadadpuri knew of a duty does not mean it was his personal duty to discharge. While Shadadpuri's knowledge might have been imputed to support a fraudulent violation by Trek, and might have met the heightened burden to show that Shadadpuri himself aided and abetted the IOR's fraud, the Government's failure to secure a finding of fraud did not justify the Federal Circuit rewriting the law in an effort to hold Shadadpuri liable as a direct violator. The panel majority warned against such an approach—

> While Shadadpuri's conduct was reprehensible, we cannot endorse creating legal shortcuts for the government to impose a penalty in this case because that would free the government to employ that same shortcut in all other cases. We do not want to fall into the trap of letting bad facts make bad law, and, thus, decline the invitation to do so.

Pet. App. 51a n.3. This Court should grant review to eliminate the tortured construction applied by the Federal Circuit *en banc* to hold Shadadpuri liable under § 1592(a)(1)(A), or, at the least, consider remanding the matter to the Federal Circuit with instructions for that court to solicit briefs from the parties and *amici curiae* on the meaning of the term "introduce."

II. There Was No Material, False Act of Introduction in This Case.

Just as importantly, the Federal Circuit failed to identify a nexus between "introduction" of the merchandise, and any material and false act or omission relating thereto. The court limited the scope of the matter before it: "the question before us is simply whether [Shadadpuri] engaged in any conduct respecting any of the suit shipments that constitutes entering, introducing, or attempting to enter or introduce merchandise into United States commerce under section 1592(a)(1)(A). We conclude that he did." Pet. App. 15a. But 19 U.S.C. § 1592(a)(1)(A) distinguishes at least three additional elements of a direct violation by a culpable person: (1) that person must "enter" or "introduce" (or attempt to enter or introduce) merchandise, (2) that person must commit a false act (or omission) which is "material," and (3) the particular entry or introduction must occur by means of the particular act.

In contrast to the statute at issue in *Panama Hats*, current § 1592(a) contains a materiality requirement. The CIT, noting that the purpose of § 1592 is "to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws," has explained that an act "will be material for purposes of Section 592 if it affects, or has the potential to affect, some determination Customs is called on to make with respect to the imported merchandise in

question." *United States v. Active Frontier Int'l, Inc.*, 867 F. Supp. 2d 1312, 1316, 1318 (Ct. Int'l Trade 2012). The failure to declare assists is material only to *entry*, when the obligation to declare them first arises, rather than to introduction. Even under the definition set out in *Panama Hats*, Shadadpuri cannot be liable under § 1592(a) as it exists today, since the *introduction* of the merchandise did not involve any material act or omission.

Here, the specific conduct the court views as contributing to Shadadpuri's introduction violation—the failure to declare dutiable assists—only became "material" when Trek filed an entry. Although Shadadpuri was acting on behalf of Trek, the Federal Circuit describes how Shadadpuri "'introduced' the suits into United States commerce"—that he, "import[ed] men's suits through one or more of his companies," "direct[ed] the customs broker," Vandegrift, to transfer shipments to Trek, and "sen[t] manufacturers' invoices to the customs broker"—in summary, "everything short of the final step of preparing the CBP Form 7501s and submitting them and other required papers to make formal entry." Pet. App. 22a. And the material false act was that "[t]he dutiable value of the men's suits imported by Trek and Mr. Shadadpuri did not include the value of the fabric assists." *Id.* at 7a. But a declaration of dutiable value is an act of *entry*, not of *introduction*. As the court itself recognizes, "the omission of that value violated statutory and regulatory obligations to state a

proper value when filing the *'entry'* documentation required 'to secure the release of imported merchandise from [CBP] custody.'" *Id.* at 7a–8a (emphasis added). The court never identifies an obligation to include the value of an assist when no entry is filed, and when only committing the acts of introduction described. Even if it can be said that Shadadpuri *introduced* the merchandise, a material omission was made only when the merchandise was *entered*—by Trek as IOR.

The manufacturers' invoices, which accompanied the goods to the United States, were invoices showing only the manufacturers' charges for processing the assist materials into the imported suits. They correctly showed the amounts to be paid to the manufacturers, and were therefore not "false" or incorrect.[6] While the manufacturers might have known that assists were provided, they would have known neither the assists' value, nor the amounts to be added to the invoice values in declaring the correct dutiable value of the goods for entry, appraisement, and duty assessment purposes.[7] The obligation to declare

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[6] This distinguishes this case from *Panama Hats*, where the invoices, as rendered by the foreign consignor, were false, and did not accurately reflect the "price actually paid or payable" to the consignor.

[7] *Cf.* 19 C.F.R. § 152.103(a)(3) ("The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components

the assists' value rested with the IOR, Trek, and only arose when the goods were entered for consumption. Only then did it become necessary to calculate a value of the goods for duty assessment purposes, and the first time the omission of the assists could have been "material." It is fair to say that, at any given time, there is a substantial quantity of imported goods manufactured with the benefit of dutiable assists sitting on piers and wharves, awaiting entry. None can be said to have been falsely introduced into the country, although they could be involved in a false entry should the IOR fail to disclose the assists when the entry is filed.

Thus, when the goods arrived at the port of entry, there was an attempt to introduce them, as defined in *Panama Hats*, but not by means of false documents, for the invoices showed the correct amounts to be paid to the consignors. Similarly, had the goods been placed in general order, they would have been "actually introduced," but not by means of any invoice containing a materially false statement or material omission, since goods in general order are not appraised for duty assessment purposes. The obligation to declare the assists would not arise unless and until the garments were entered for consumption; at that time CBP officers would have appraised the

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and required adjustments to form the basis for the transaction value.").

goods under § 1401a, and the assists would have been material to that appraisement.

The acts that the Federal Circuit held to constitute a false introduction by Shadadpuri are not acts of *introduction* of goods into the United States, as defined in *Panama Hats*, but rather a predicate to the act of *entry*, for purposes of §§ 1484 and 1592(a). It is undisputed that Trek, as the "owner or purchaser" of the imported merchandise, was the only party authorized and required to make entry, and it was further Trek's obligation to exercise reasonable care to ensure that the correct value of the merchandise was declared, in accordance with the importer's oath on the entry form.

By styling Shadadpuri's provision of negligently erroneous invoices to the broker—routinely engaged to assist an importer with the entry of merchandise but rarely with introduction—as a direct act of false "introduction," rather than a predicate to, or act in assistance of, Trek's "entry" of the merchandise, the Federal Circuit impermissibly blurs the distinction between the concepts of "enter" and "introduce" as used in § 1592(a)(1)(A).[8]

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[8] In addition to containing a materiality requirement not present in *Panama Hats*, current § 1592 also distinguishes violations as "revenue" violations, for which the maximum penalty is set as multiple of loss revenues, and "non-revenue" violations, for which the maximum penalty is set as a percentage of the value of the goods. Presumably, only "entry" violations will be revenue violations.

III. The Federal Circuit Decision Subjects the Entire Importing Community to Unprecedented Liability for Corporate Acts of Negligence.

In reconciling its decision with "longstanding agency law," the Federal Circuit takes pains to explain that it "do[es] not hold Mr. Shadadpuri liable because of his prominent officer or owner status in a corporation that committed a subparagraph (A) violation" but rather "hold[s] him liable because he personally committed a violation of subparagraph (A)." Pet. App. 23a. The number of individuals whom this logic would capture is boundless, consisting of anyone who contributed in any attenuated way to the commission of the act or entry of the goods.

Under the Federal Circuit's definition of "introduce" as it appears in 19 U.S.C. § 1592(a)(1)(A), any individual handling a document that merges (by commission or omission) into an act of false entry is liable for a false introduction penalty. Whether the individual had intent to violate the law, or to assist a corporate IOR to do so, is irrelevant. Virtually every customs broker, import manager, or customs compliance officer becomes another unprotected pocket to which CBP might look for financial recompense upon a corporate act of negligence. The limitation of aiding-and-abetting liability to intentional violations would no longer apply.

The Federal Circuit states that Shadadpuri "personally committed" acts of introduction, Pet. App. 23a, but the court recognized that Shadadpuri was

not the sole employee of Trek, nor even the sole employee responsible for these activities. In fact, the opinion states, he sent the manufacturers' invoices to the customs broker "[h]imself *and through his aides*." *Id.* at 22a (emphasis added). And the sellers, the broker and their employees were also involved. *E.g.*, *id.* at 8a ("The CBP Form 7501 'entry summary' forms used for entry in this case list Trek as the [IOR], and they were prepared and submitted to CBP by Vandegrift, the customs broker 'hired by Harish Shadadpuri,' and signed by a Vandegrift representative."); *id.* at 9a ("Upon receipt of a manufacturer's invoice, bill of lading and related importation documentation, Mr. Shadadpuri or one of Trek's employees or [the domestic suit seller] or one of its employees would fax a copy to Trek's customhouse broker for the preparation and filing of the required entry."). All of these individuals—Trek's employees, the seller, the seller's employees, the broker, and the broker's employees—were no less agents of Trek than Shadadpuri was. Although the Government did not name any of them as defendants in this particular enforcement action, there is no barrier to holding individuals in their positions in other companies liable for "personally committ[ing] a violation of subparagraph (A)" in the future.

AAEI, which represents businesses ranging from entities with a single shareholder to multinational, publicly-traded corporations, is troubled that as perilous as the Federal Circuit's decision is for the for-

mer, it is just as much so for the latter, where individuals with responsibility for the company's import operations can number in the hundreds. The Federal Circuit's decision places brokers, import managers, and compliance personnel, whose duties regularly include drafting, transmitting, and submitting invoices, entries, and other customs documents in the corporate importer's name, at risk that their personal assets may be held to answer for an act of negligence attributable to a customs entry by their corporate employer. Avoiding liability may be most difficult in cases of simple negligence, where all CBP must do in an action to collect a penalty is to satisfy a relaxed "burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4). If a corporate importer, transmitting a false document without knowledge of its falsity, can be held liable for negligence, the same is presumably true of the agent or employee who actually handled the document on the corporation's behalf.

The Customs Modernization Act, Pub. L. No. 103-182, title VI, 107 Stat. 2170 (1993), significantly enhanced the obligations owed by persons engaged in the entry of merchandise by amending § 1484 to require that entry be made using "reasonable care." Prior to this amendment, importers were obligated only to furnish *factually* truthful descriptions of mer-

chandise they imported. The "reasonable care" requirement added an obligation that entry be made using care to ensure also that entry statements were *legally* correct. In furtherance of that obligation, corporate importers have hired trained import managers, compliance officers, and customs brokers as employees to assist in carrying out the corporation's obligations. *See* Bill Conroy, *Our Changing Industry: Profiles of the Global Trade Professional*, The Global Trade Professional, Summer 2007, at 1. However, if these compliance employees find themselves potentially subject to massive civil penalties of § 1592 for introducing goods that become the subject of claims of negligent entry, they are likely to seek employment in a less dangerous profession. It is conceivable that those individuals would demand risk premiums or indemnification to protect against exposure that had not previously existed, but the companies themselves might find the costs prohibitive, and would be hesitant to comply while the issue remains unsettled before this Court.

Alternatively, American companies could simply elect to let their foreign suppliers act as non-resident importers of record, secure in the knowledge that those firms and their employees, while legally covered by the prohibition of § 1592(a), are outside of Federal jurisdiction, and CBP cannot enforce penalty claims against them. Either of these outcomes would be perverse.

CONCLUSION

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

Respectfully submitted.

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