No. 07-1470

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION AND U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*,

Respondents.

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

PETITIONERS' REPLY BRIEF

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I. The Government's Inconsistent Interpretations of the Statutory Bar Further Demonstrate the Confused State of the Law

As shown in the Petition for a Writ of Certiorari, Section 102(c) of the North American Free Trade Agreement ("NAFTA") Implementation Act bars private rights of action under the Administrative Procedure Act ("APA") to enforce provisions in the NAFTA implementing legislation. *See* 19 U.S.C. § 3312(c) (2000) (App. D at 194a). In finding otherwise, the holding of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in the instant case conflicts with the decision by the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Bronco Wine Co. v. United States*, 168 F.3d 498 (9th Cir. 1999) ("*Bronco Wine*"). Accordingly, this Court should grant the Petition to reconcile the split between the Circuits.

In its Brief for the United States in Opposition ("Government's Brief"), the Government now takes the position that Section 102(c) does *not* bar a private right of action under the APA to enforce the NAFTA implementing legislation. Moreover, the Government argues that this Court should not grant the Petition because the Circuit split between the Federal Circuit's decision here and the Ninth Circuit's decision in *Bronco Wine* could *potentially* be resolved in the future. Specifically, the Government speculates that because *Bronco Wine* was unpublished and because the Government's position

regarding Section 102(c) has changed since that case, "a future panel" of the Ninth Circuit might "align itself with the Federal Circuit's decision in this case" and find that claims under the APA to enforce the implementing legislation are not barred. Government's Brief at 16. However, the Government's arguments in this regard are simply devoid of merit.

The Government's position regarding the statutory bar in Section 102(c) has changed dramatically since it supported the Ninth Circuit's decision in *Bronco Wine* before this very Court. *Compare* Government's Brief at 17 ("the United States no longer interprets {Section 102(c)} as establishing a categorical bar to a private party invoking a federal statutory provision that was enacted as part of the legislation that implemented the NAFTA") *with* Solicitor General, *Brief for the Respondents in Opposition*, No. 99-119 at 10-11 (Sept. 15, 1999) (App. D at 212a-213a) (supporting the Ninth Circuit's determination in *Bronco Wine* that Section 102(c) barred the plaintiff's APA cause of action to enforce the relevant implementing legislation). While the Government concedes that its position regarding Section 102(c) has changed, it offers no justification whatsoever for the change. Rather than diminish the Circuit split regarding Section 102(c), the Government's inconsistent positions and interpretations provide further evidence of the confused state of the law and the corresponding need for guidance from this Court.

In fact, the Government has reversed its position *even in the course of the instant litigation*. Specifically, the Government argued before the lower court here that Section 102(c) "imposes a direct bar upon the power of the Courts to entertain causes of action or defenses based upon NAFTA *or its implementation by Congress*." Defendant's Supplemental Brief in Response to the Court's Questions at 24, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Mar. 7, 2006) (emphasis added) (Reply App. at 6a). Even the Government's brief to this Court expresses reservations regarding the Federal Circuit's interpretation of Section 102(c) and is far from clear as to the Government's current position regarding Section 102(c). Government's Brief at 11 (observing that the Federal Circuit's interpretation "could, depending on how it is applied in future cases, *give too cramped a reading to Section 102(c)*.") (emphasis added); *see also id.* at 12 (noting that "{t}o be sure, there is room for debating the precise question whether {Section 408 of the NAFTA Implementation Act} should be regarded, in light of the policies reflected in Section 102(c), as the type of statutory provision that Congress intended to be invoked by private parties"). In sum, the Government's position regarding Section 102(c) has been a model of inconsistency and, therefore, supports the need for guidance from this Court.

Furthermore, the Government's attempt to minimize the Circuit split because the Ninth Circuit's decision in *Bronco Wine* was unpublished should be rejected for at least two reasons. First, in

Bronco Wine, the lower court found that the virtually identical statutory bar in Section 102(c) of the Uruguay Round Agreements Act ("URAA") "clearly and unambiguously" barred private rights of action to enforce the provisions of the URAA, which implemented the Uruguay Round Agreements. 997 F. Supp. 1318, 1322 (E.D. Cal. 1997). Based on its adoption of the lower court's finding that Section 102(c) "clearly and unambiguously" barred such actions, the Ninth Circuit had no reason to publish its opinion under that Circuit's local rules. *See* Ninth Circuit Local Rule 36-2, *Criteria for Publication* (Reply App. at 9a) (stating that an opinion will only be published if it, *inter alia*, is necessary to establish or clarify a rule of law). In other words, the fact that *Bronco Wine* was unpublished does not mean that it is more likely to be overturned by the Ninth Circuit. To the contrary, the proper interpretation of Section 102(c) is crystal clear in the Ninth Circuit and, therefore, is unlikely to be reversed. Second, to the extent that the Government contends that certiorari may not be granted to resolve a split among the circuits caused by an unpublished decision, that is simply not the case. This Court has frequently granted certiorari to resolve a split among the circuits under these very circumstances. *See, e.g., E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000) (split based on an unpublished decision); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (same); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-54 (1993) (same); *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 460 (1987) (same). The Court should do the same here.

Even assuming, *arguendo*, that the Ninth Circuit would choose to re-examine *Bronco Wine* and align itself with the Federal Circuit, the question remains as to which particular interpretation of Section 102(c) that has been proffered by the Federal Circuit would be followed. The Government speculates that the Ninth Circuit would select the Federal Circuit's decision in the instant case. However, the Ninth Circuit could just as easily choose to follow the Federal Circuit's conflicting decision in *Timken Co. v. United States*, in which the Federal Circuit recognized that Section 102(c) of the URAA "bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the {URAA}." 354 F.3d 1334, 1341 (Fed. Cir. 2004). Thus, even within the Federal Circuit, there is confusion as to the proper interpretation of Section 102(c).

Clearly, there is a Circuit split between the Federal Circuit and the Ninth Circuit as to the meaning and effect of Section 102(c). The Government's inconsistent interpretations of Section 102(c) do not minimize the Circuit split, but rather provide further evidence of the confused state of the law and the need for guidance from this Court. Accordingly, the Petition for a Writ of Certiorari should be granted.

II. The Government's Characterization of Section 408 of the NAFTA Implementation Act as a Canon of Interpretation Is Flatly Wrong

For the reasons set forth in the Petition for a Writ of Certiorari, Section 408 of the NAFTA Implementation Act constitutes an impermissible legislative entrenchment provision that restricts Congress' crucial power of the purse. *See* 19 U.S.C. § 3438 (2000) (App. D at 195a). Specifically, Section 408 is a so-called "magic password" statute in that it forces Congress to utter the words "apply to goods from Canada" and "apply to goods from Mexico" in order for amendments to Title VII of the Tariff Act of 1930, as amended ("Title VII of the Tariff Act"), to apply to such goods. *See id.* While this Court has not directly addressed the validity of magic password statutes, at least one Justice – *i.e.*, Justice Scalia – has expressed the view that they represent impermissible legislative entrenchment provisions. *Lockhart v. United States*, 546 U.S. 142, 147-50 (2005) ("*Lockhart*"); *see also* Larry Alexander, Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment. 97, 105 (2003) (App. D at 204a-205a) ("Congress may not force a future Congress to use particular language to legislate.").

The Government now argues that Section 408 is not an impermissible legislative entrenchment provision but rather a "tool" or canon of interpretation. Government's Brief at 18. According

to the Government, because Section 408 is a canon of interpretation, rather than a magic password provision, the Federal Circuit's decision does not conflict with Justice Scalia's concurrence in *Lockhart*. As shown below, the Government's argument vastly misconstrues both *Lockhart* and Section 408 and, once again, is inconsistent with the Government's prior position in this case.

In his concurring opinion in *Lockhart*, Justice Scalia clearly expressed the view that magic password provisions constitute impermissible legislative entrenchment provisions. However, Justice Scalia recognized that such provisions may not be declared invalid where they "*add little or nothing* to {the Court's} already-powerful presumption against implied repeals." 546 U.S. at 148-49 (Scalia, J. concurring) (emphasis added). Specifically, when a magic password provision states that a statute cannot be repealed absent an express statement, it merely reiterates the pre-existing canon of interpretation against implicit repeals. Such a magic password provision does not place any substantive requirements on a future Congress that are not already imposed by the Court's canon against implicit repeals. In other words, such a provision may be treated as a canon of interpretation consistent with the canon against implicit repeals and, therefore, be upheld on that basis. *See generally id.* at 149-50 ("{i}n the present case, it might seem more respectful of Congress to refrain from declaring the invalidity of the express-reference provision.")

In contrast, Section 408 of the NAFTA Implementation Act places a unique substantive requirement on a future Congress that does not already exist. Section 408 requires Congress to utter certain magic words for amendments to Title VII of the Tariff Act to apply to goods from Canada and Mexico. There are no issues regarding repeals of other statutes, either implicitly or otherwise. Thus, Section 408 does not simply reiterate or operate concurrently with the canon of interpretation against implicit repeals or any other canon of interpretation. It is an invalid magic password provision that cannot be reconciled with Justice Scalia's concurrence in *Lockhart* and this Court's long history of decisions against legislative entrenchment provisions.

As was the case with Section 102(c), the Government's views on Section 408 have changed drastically during the course of the instant litigation. This change in position clearly undermines the Government's current position that Section 408 is simply a canon of interpretation. For example, in the following exchange between the Court of International Trade ("CIT") and counsel for the Government, the Government rejected the argument that Section 408 was a canon of interpretation and not an impermissible magic password provision:

> **Gov't**: In this case, Congress subsequently passed the Byrd Amendment {(*i.e.*, the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"))}. To argue that it is precluded from doing so by a prior

enactment of the NAFTA Implementation Act violates the Supreme Court precedent. ...

CIT: It can certainly subject its self {sic} to clear magic words requirements.

Gov't: *No, it cannot subject itself to magic word requirements.*

CIT: It can't.

Gov't: No and I'll cite Northern Railroad Company v United States 208 U.S. 45 for that provision.

CIT: So repeal by implication, that's fine?

Gov't: Repeal by implication, I believe so, your Honor, but *Congress cannot restrict a future Congress from taking a specific action. It cannot require the magic –*

CIT: It can say that future laws will be interpreted in light of provisions of past instance.

Gov't: *No I believe in Lockhart v. United States the concurrence of Justice Scalia makes it very clear, I realize it's a concurrence, he's relying on Supreme Court precedence, ... makes it very clear that Congress cannot restrict a future Congress.*

CIT Hearing Transcript at 559-563 (Mar. 30, 2006) (emphasis added) (Reply App. 1a-4a); *see also* Defendant's Post-Hearing Supplemental Brief at 5, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Apr. 4, 2006) ("notwithstanding Congress's statement that it would specify when future legislation regarding goods from {NAFTA} countries should apply to those countries, Congress was not legally required to adhere to that intent") (Reply App. 8a). Accordingly, the Government's own statements and arguments in this very case clearly show that it did not interpret Section 408 as a canon of interpretation, but rather as a substantive requirement on Congress to which it was not legally required to adhere.

The bottom line is that Section 408 of the NAFTA Implementation Act is a substantive requirement imposed on future Congresses, rather than a canon of interpretation. As such, it constitutes a magic password provision.

Because this Court has not directly addressed the validity of magic password provisions, there has been a great deal of uncertainty among the Courts of Appeal on this issue. *See United States v. Novak*, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (holding that "it is an open question whether Congress could validly impose such a clear statement rule"); *Robinette v. Commissioner of I.R.S.*, 439 F.3d 455, 460 (8th Cir. 2006) (asking, in light of *Lockhart*, "{w}hether or not the Congress of 1946 may bind the Congress of 1998 to make an 'express statement.'"). The fact that Section 408 is a magic password

provision that does not implicate the canon against implicit repeals, coupled with the infringement of Congress' crucial power of the purse caused by Section 408, make this case the ideal vehicle by which the Court can resolve this uncertainty. The Court should therefore grant the Petition for a Writ of Certiorari on this ground as well.

III. The Government's Attempts to Minimize the Impact of the Federal Circuit's Decision Lack Merit

Notwithstanding the split among the Circuits regarding Section 102(c) and the continued confusion surrounding the validity of magic password provisions, the Government argues that the Petition for a Writ of Certiorari should be denied because the Federal Circuit's "holding on the merits concerns the construction of a statute {(*i.e.*, the CDSOA)} that has been repealed, and the underlying dispute arose in the context of an international trade dispute {(*i.e.*, softwood lumber imports from Canada)} that has been resolved in significant part by Executive Agreement." Government's Brief at 10. However, as demonstrated below, the Government completely underestimates the impact of the Federal Circuit's decision in this case.

While the CDSOA has been repealed, duties collected on merchandise that entered the United States before October 1, 2007 can and will still be distributed under the program for many years to come. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006) (App. D at

201a). Consequently, Customs currently holds tens of millions of dollars in duties that will be directly impacted by the resolution of the instant case.[1] Additionally, resolution of the softwood lumber dispute with Canada had no impact on the 37 other antidumping and countervailing duty orders on NAFTA-origin goods for which CDSOA distributions are blocked due to the declaratory judgment entered by the lower court here. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31196, 31204-31255 (May 30, 2008) (notice) (listing orders on Canadian and Mexican imports).[2]

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[1] In fact, two cases concerning CDSOA distributions are stayed pending resolution of this case. *Ivaco Rolling Mills 2004, L.P. et al v. United States*, Court No. 06-297 (Ct. Int'l Trade Nov. 21, 2006) (order granting motion to stay); *ThyssenKrupp Mexinox S.A. de C.V. et al v. United States*, Court No. 06-236 (Ct. Int'l Trade Sept. 25, 2006) (order granting motion to stay).

[2] On a related note, the Government contends that Petitioners are not proper parties to seek certiorari because the injunctive relief ultimately entered by the lower court only covers CDSOA disbursements to which Petitioners are not eligible – *i.e.*, disbursements stemming from imports of wheat. Government's Brief at 18-19. However, "any party" to the action below can bring a petition for a writ of certiorari. 28 U.S.C. § 1254(1) (2000). It is undisputed that Petitioners were parties to the consolidated action below. Moreover, the lower court entered declaratory relief explicitly covering all duties assessed on Canadian and Mexican goods, which the Government has interpreted as preventing CDSOA disbursements to Petitioners. Accordingly, the Government's argument that Petitioners are not proper parties here is simply baseless.

But perhaps even more importantly, the interpretation of Section 102(c) has far-reaching consequences beyond its application to CDSOA disbursements. Specifically, the relevant language subject to conflicting interpretations between the Federal Circuit and Ninth Circuit – *i.e.*, the language barring actions arising "by virtue of Congressional approval" of the relevant agreement – has been included as a statutory bar to causes of action in *every single* trade bill that has been adopted by Congress pursuant to the fast track mechanism.

Likewise, the validity of magic password provisions has far reaching consequences. In fact, according to the lower court, if Justice Scalia's concurrence in *Lockhart* is correct, it would impact not just the CDSOA but, *inter alia*, the Defense of Marriage Act (1 U.S.C. § 7 (2000)), the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb-3(b) (2000)), and the National Emergencies Act (50 U.S.C. § 1621 (2000)). *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006) (App. B at 50a).

Therefore, neither the repeal of the CDSOA nor the resolution of the softwood lumber dispute diminish the importance of the Circuit split over Section 102(c) or the confusion over magic password provisions. In order to resolve these two crucial issues, this Court should grant the Petition for a Writ of Certiorari.

CONCLUSION

For all of the above-stated reasons, the Government's arguments in opposition should be rejected and the Petition for a Writ of Certiorari should be granted.

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