No. 09-767

IN THE

Supreme Court of the United States

SKF USA INC.,
Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN US CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT TIMKEN US CORPORATION

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QUESTION PRESENTED

Whether Congress engaged in viewpoint discrimination in violation of the First Amendment when, in the now-repealed Continued Dumping and Subsidy Offset Act, it provided that a share of duties collected after an adjudication of injurious dumping would be distributed to parties that had petitioned for redress, or filed in support of the petition, but not to parties like SKF USA that, being affiliates of major dumpers, stated in their confidential responses to agency questionnaires that they opposed the petition for redress.

CORPORATE DISCLOSURE STATEMENT

Respondent "Timken US Corporation" (as identified in the caption) became Timken US LLC on March 27, 2008. It is a wholly owned subsidiary of The Timken Company, a publicly held company that has no parent and in which no other public company owns 10% or more of the stock.

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JURISDICTION

SKF USA's petition comes within 28 U.S.C. § 1254(1), but if review were granted, the Court would have to confront the question whether the Court of International Trade (CIT) had jurisdiction over this case under 28 U.S.C. §§ 1581(i) and 2636(i). *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (appellate court has "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'"). As explained at pages 29-32, *infra*, that question is best answered in the negative, which is one reason to deny the petition.

STATEMENT

In 1988, Timken's predecessor filed a petition seeking redress under the antidumping laws because certain products (bearings) imported from nine countries, including products made by foreign affiliates of SKF USA in five countries, were being dumped into the United States. Two federal agencies, the International Trade Commission (ITC) and the Department of Commerce (Commerce), investigated and adjudicated the petition.

To implement statutory requirements that a petitioner seeking redress must be filing on behalf of a domestic industry and that an industry (not just the petitioner) be suffering or threatened with material injury, the ITC sent detailed questionnaires to all known domestic bearing companies. One question asked domestic producers whether they supported, opposed, or took no position on the petition. As

expected for affiliates of major foreign producers accused of dumping and their domestic importers, SKF USA replied in its confidential formal filing that it opposed the petition. Commerce eventually found that imports of bearings were being dumped by the major producers in each of the countries investigated, and the ITC found that the dumping harmed the domestic bearings industry. In 1989, Commerce issued antidumping duty orders on imports from the nine countries, including on imports from SKF affiliates in five of the countries.

Before 2000, the government retained antidumping duties. In 2000, Congress, recognizing that many dumpers continued dumping even after imposition of duties, changed the law to "neutralize" the harm from continued dumping. *See* Pet. App. 160a (congressional finding). It provided that where dumping continued in the face of an antidumping order, the duties collected by the government would be distributed to certain domestic producers that invest in the industry despite the continued dumping. One statutory precondition for receiving such distributions was that the domestic producer had either filed or supported the petition for the antidumping order in its confidential questionnaire response or other filing in the antidumping proceeding. SKF USA, having opposed the petition in its confidential questionnaire response, was therefore disqualified.

The Federal Circuit rejected SKF USA's claim, first made four years after the statute's enactment, that a party's disqualification from monetary relief based on its unsuccessful (confidential) position opposing the petition for redress was viewpoint discrimination in violation of the First Amendment. Congress repealed the challenged duty-distribution law in 2006.

A. The Relevant Antidumping Framework

This dispute traces to 1988, when Timken's predecessor filed a petition alleging that foreign producers in nine countries were dumping certain antifriction (*e.g.*, ball) bearings into the United States and thereby causing material injury to the domestic bearings industry. At that time, as now, two agencies divided the fact-intensive task of evaluating antidumping petitions. *See United States v. Eurodif, S.A.*, 129 S. Ct. 878, 883-84 (2009). Commerce determined whether "dumping" was occurring, with its "fundamental task" being "to compare the United States price of imported merchandise with the value of 'such or similar merchandise' in the home market." *NTN Bearing Corp. of America v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997); *see* Pet. App. 4a. The ITC, in turn, determined "whether such dumping ha[d] 'materially injured' or threatened material injury to a United States industry," *id.*, requiring an extensive factual inquiry. *See American Permac, Inc. v. United States*, 831 F.2d 269, 275 (Fed. Cir. 1987). If both determinations were affirmative, orders issued to impose antidumping duties on imports. Pet. App. 6a.[1]

The agencies, which "almost always rel[y] on [private] petitioners to initiate antidumping proceedings" (Pet. App. 4a), act as neutral investigators and adjudicators under the preexisting legal standards and have no position on the allegations in advance. They reject more than half the petitions for

[1] Similar provisions involve "countervailing duties" (not at issue here), which target the domestic effects of imports supported by foreign subsidies (whereas "dumping" focuses on the disparity between home-country prices and import prices).

redress. From 1980 through 2007, only about 40% of petitions for relief resulted in antidumping or countervailing duty orders. *Antidumping and Countervailing Duty Handbook*, USITC Pub. 4056, at IV-7-8 (Dec. 2008), www.usitc.gov/trade_remedy/documents/handbook.pdf.

Congress required the agencies to conduct their proceedings, and either deny or grant relief, expeditiously. It established a staged process, with preliminary and then final determinations in both agencies subject to specified deadlines, and gave the agencies about one year to complete the entire process, including staff reports, hearings with interested parties, and agency determinations. *See* 19 C.F.R. pt. 351 Annexes III, VII (timelines). Reflecting the intensely factual nature of the determinations under existing law, including the determination of material injury to a domestic industry (19 U.S.C. § 1677(7)), the resulting antidumping orders are subject to review only for compliance with law and for "substantial evidence." 19 U.S.C. § 1516a(b)(1)(B)(i); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350 (Fed. Cir. 2006).

By 1988, Congress had established certain statutory standing requirements for parties filing petitions for redress of dumping, consistent with United States obligations under international trade agreements. The petitioner had to be an "interested party" filing "on behalf of an industry," where "industry" meant "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." *See Gilmore Steel Corp. v. United States*, 585 F. Supp. 670, 671 (CIT 1984) (quoting then-current 19 U.S.C.

§§ 1673a(b)(1), 1677(4)(A)); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 664-65 (Fed. Cir. 1992) (same). Those provisions imposed a "requirement of industry support" for the petition, which also was relevant to the material-injury issue. *Oregon Steel Mills Inc. v. United States Department of Commerce*, 862 F.2d 1541, 1545 (Fed. Cir. 1988) (relying on *Gilmore*); *see* Pet. App. 46a.[2]

B. The 1988-89 Antidumping Proceeding

The 1988 petition filed by Timken's predecessor sought imposition of antidumping duties for nine countries. Pet. App. 133a. "The petition was over 200 pages in length and included scores of pages of sales data collected from several countries, product descriptions and comparisons, detailed analysis of the U.S. antifriction bearing industry, and extensive proprietary financial data." *Id*. at 10a.

When the ITC sent its lengthy questionnaire to domestic producers to collect information about the industry (122 pages in SKF USA's case), it included a standard question asking each recipient whether it "supports the petition," "opposes the petition," or "does not wish to take a position on the petition." Ct. App. JA 73. SKF USA checked the second box: it "oppose[d] the petition." *Id*.; *see* Pet. App. 12a.

Contrary to the express premise of SKF USA's Question Presented—that it was denied any distribution because of its "publicly expressed opposition" (Pet. i; *see* Pet. 2, 3, 12, 13, 24, 27, 29, 30) —the determinative questionnaire response was *not* public.

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[2] In 1994, after the proceedings at issue here, Congress, pursuant to further treaty obligations, wrote specific numerical support requirements into the standing provisions. 19 U.S.C. § 1673a(c)(4); *see* Pet. App. 4a-5a n.1.

The agencies and SKF USA all treated the questionnaire response as confidential. Thus, "[b]oth the Commission and the Department of Commerce have interpreted [19 U.S.C. § 1677f, which requires confidentiality] to apply to information provided by questionnaire respondents, including whether or not they support a particular antidumping . . . petition." *Cathedral Candle Co. v. ITC*, 400 F.3d 1352, 1361 (Fed. Cir. 2005); *see* Pet. App. 15a n.9; Government Accountability Office, *Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, GAO-05-979, at 12 (Sept. 2005) (questionnaire responses are confidential). SKF USA confirmed the confidential treatment when, 16 years after filing its 1989 questionnaire response, it wrote to the ITC to "waive[] confidential treatment of its response to the ITC's question regarding support for the petition." Ct. App. JA 60-61 (March 2005 letter from SKF USA). And, as SKF USA effectively acknowledges (Pet. 9), the agencies expressly based SKF USA's ineligibility for distributions on the confidential questionnaire response. *See* Pet. App. 158a-159a (ITC letter refusing to add SKF USA to list of eligible recipients "because [it] had indicated that it opposed the petition *in its questionnaire response* in the original investigation") (emphasis added); Pet. App. 17a; GAO Report at 13.[3]

SKF USA is owned by a Swedish company, *see* Pet. ii, and other members of the SKF family were major accused dumpers in the matter. SKF USA's opposi-

[3] SKF USA's confidential opposition, in 1989, precluded its later receipt of CDSOA distributions, regardless of any publication it chose to make, then or later. Confidential supporters, to claim distributions, eventually had to waive confidentiality to permit publication of the list of potentially eligible recipients.

tion to the petition was hardly surprising or unusual for an affiliate of a major foreign accused dumper, "who would not normally be expected to support a petition." S. Rep. No. 103-412, at 35 (1994).[4] The ITC eventually noted that, in this proceeding, "all of [the foreign-owned domestic producers] are in opposition to the petition." Ct. App. JA 459 (footnote omitted).

In the hearings before the ITC, the SKF family of companies (as a unit) took the lead in opposing the petition. *See*, *e.g.*, ITC Preliminary Hearing Tr. 167 (Apr. 21, 1988); Pet. App. 48a-49a; Pet. 23-24. Timken's predecessor, for its part, supported its petition (on behalf of the industry) through lengthy fact-intensive filings and through live testimony. *See* Pet. App. 13a-14a.

After extensive investigation, conduct of several hearings, and receipt of many filings, Commerce found dumping and the ITC found material injury with respect to specified types of bearings from a number of countries, including Japan (where SKF had no production facilities) and Sweden, Germany, France, Italy, and the United Kingdom (where SKF producers were prominent). *Id*. at 11a-14a. Country-by-country orders issued in May 1989, which, as later judicially modified, imposed antidumping duties at

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[4] Several statutory provisions reflect the incentives of domestic producers to oppose antidumping relief if they also import sufficient volumes of major dumpers' goods or are affiliated with major dumpers. *E.g.*, 19 U.S.C. §§ 1673a(c)(4)(B), 1677(4)(B). Timken's predecessor in 1988 had foreign affiliates in one or more of the countries covered by the petition; such affiliates would also be subject to coverage by the relevant orders. None of Timken's predecessor facilities were selected for investigation in the original investigation; before and since the orders, volumes imported from such affiliates have been small.

levels ranging from about 60% to 132% for ball bearings from SKF producers in five countries (with different levels for other bearings). *See* 54 Fed. Reg. 20901 (1989) (Germany: 132%), 20902 (France: 66%), 20910 (UK: 61%); 58 Fed. Reg. 12932 (1993) (Italy: 69%; Sweden: 105%); 54 Fed. Reg. 20904-06 (Japan: duty of 73% on *amicus* Koyo's parent). Thereafter, Commerce conducted periodic reviews of the imports covered by the orders and found that, despite the orders, the Japanese and SKF companies, among others, continued dumping year in and year out. *See*, *e.g.*, First Bearings Sunset Review, USITC Pub. 3309 (June 2000) (Vol. 2), at BB-I-8-22; Second Bearings Sunset Review, USITC Pub. 3876, at BB-I-8-28 (Aug. 2006); Ct. App. JA 47. Customs continued to collect antidumping duties on those imports.

C. The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, or Byrd Amendment)

In 2000, Congress recognized a chronic problem with the existing regime: high levels of dumping continued even for firms covered by antidumping orders. Many foreign producers like the SKF companies in Europe, even after being found to have engaged in injurious dumping, evidently found it profitable to continue dumping despite the duties.

Congress found: "The continued dumping . . . of imported products after the issuance of antidumping orders . . . can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels." CDSOA, Finding (3), Pub. L. No. 106-387, 114 Stat. 1549A-72 (2000).[5] Domestic invest-

[5] The findings appeared as a note to 19 U.S.C. § 1675c before the 2006 repeal of the CDSOA. We cite "§ 1675c" (now repealed)

ment in production would thereby be harmed (though foreign owners of domestic producers, and domestic importers of dumped goods, might benefit from dumping): "Where dumping . . . continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit," and domestic businesses "may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable." CDSOA, Finding (4).

To address this problem, Congress provided that, where dumping continued after issuance of an antidumping order, collected duties would be distributed to certain "affected domestic producers." § 1675c(a), (b)(1). Reflecting the statutory purpose, the distribution was to be "on a pro rata basis based on" the amounts of specifically enumerated kinds of expenditures and investments that continued dumping impaired. § 1675c(d)(3), (b)(4). The CDSOA applied to all antidumping duty assessments from October 1, 2000, forward. CDSOA § 1003(c). If dumping subject to an order ceased, no duties would be collected, and none would be distributed.

Congress defined the eligible "affected domestic producers" to be limited to two groups of parties in the underlying antidumping proceeding (as long as they remained in operation and had not ceased production of the covered product). The eligible entities, as relevant here, were any "petitioner" that had taken the initiative to seek redress—in what turned out to be a meritorious petition—and any "interested party in support of the petition." § 1675c(b)(1).

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for the substantive CDSOA provisions. The CDSOA is printed at Pet. App. 160a-169a.

Congress required that the law be implemented quickly: It gave the ITC 60 days to compile a list of petitioners and those other parties who "by letter or through questionnaire response" indicated support of the petition for each order in effect on January 1, 1999. § 1675c(d)(1). Reliance on the formal filings in the ITC's records made the quick implementation possible.[6] Initially and in subsequent years, Customs had to publish the list and ask each potential recipient to certify its interest in a distribution, its eligibility, and its qualifying expenditures. § 1675c(d)(2). Congress also required creation of order-specific Treasury accounts to hold deposits of duty assessments. § 1675c(e). And it demanded prompt annual distributions—within 60 days after the new fiscal year began. § 1675c(c).

In February 2006, after several foreign governments successfully challenged the CDSOA at the World Trade Organization (WTO), *see* Pet. 7, Congress repealed the statute, making the repeal effective for goods entering the country on or after October 1, 2007. Pet. App. 170a. Thus, the statute has been repealed for several years. The repealed CDSOA affects a diminishing pool of collected duties (*i.e.*, on certain entries made before October 1, 2007).

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[6] On December 31, 1998, about 300 antidumping orders (plus about 50 countervailing duty orders) were in effect. ITC, *The Year In Trade: Operation of the Trade Agreements Program During 1998*, USITC Pub. 3192 (May 1999), at 139-47 (listing orders), www.usitc.gov/publications/docs/pubs/year_in_trade/PUB3192.pdf.

D. SKF USA's 2005 Request and This Litigation

1. In the immediate aftermath of the CDSOA's enactment, the ITC compiled and Customs published the list of eligible distribution recipients for the 1989 orders—in December 2000 and August 2001, respectively. Pet. App. 15a-16a, 22a. SKF USA, disqualified by the statute's requirements, was not included. For each year, 2001 through 2004, the government published in the *Federal Register* its intention to make distributions under the 1989 (as well as other) orders subject to the CDSOA. *See id*. at 16a; 66 Fed. Reg. 40782 (2001); 67 Fed. Reg. 44722 (2002); 68 Fed. Reg. 41597 (2003); 69 Fed. Reg. 31162 (2004) (all cited by Timken in CIT). And it made such distributions. *See* Ct. App. JA 1027-28, cited in SKF USA Ct. App. Br. 8. SKF USA, receiving no money, sat by. It did not sue in 2001, 2002, 2003, or 2004 to challenge the statute.

In March 2005, SKF USA asked the ITC to add it to the list of eligible recipients, a request made without regard to any particular year's distributions. Ct. App. JA 59-61 (letter to ITC); *see* Pet. App. 16a-17a. The ITC denied that request (again, without regard to any particular year's distribution) on April 20, 2005, based on SKF USA's 1989 questionnaire response. *See id*. at 158a-159a (ITC denial letter); *id*. at 17a. When Customs thereafter published the list of eligible recipients for 2005, SKF USA asked Customs for distributions, but Customs denied the request, in July 2005, because SKF USA was not on the list. *Id*.

2. SKF USA filed a complaint in the CIT on October 3, 2005, claiming that its exclusion from distributions by the CDSOA support requirement violated

equal protection and First Amendment guarantees. *Id*. at 17a-18a. On SKF USA's motion for summary judgment, the CIT agreed with the equal protection challenge and remanded to allow calculation of distributions for SKF USA. *Id*. at 129a-155a. The CIT later affirmed the resulting remand determination, which was limited to distributions of duties collected on imports from Japan, despite SKF USA's argument for expansion to other countries. *Id*. at 109a-128a; *see id*. at 20a.

3. The Federal Circuit reversed. *Id*. at 1a-52a. After concluding that SKF USA's 2005 suit was timely (*id*. at 21a-26a), the court of appeals held that SKF USA's First Amendment challenge failed. *Id*. at 26a-51a. (It also rejected SKF USA's equal protection challenge, *id*. at 51a-52a, which SKF USA does not pursue here.)[7]

The court explained that the CDSOA's support requirement is tied to an interested party's active participation in the proceeding, through a full questionnaire response or other submission or action, not a "bare statement" of position. *Id*. at 37a n.26. The CDSOA provides for distribution of monetary relief based on "actions (litigation support) rather than the expression of particular views." *Id*. at 36a. Thus, it "does not prohibit particular speech" (*id*. at 28a; *id*. at 36a n.25) or, even, impose a monetary liability (*id*. at 38a-39a). And in identifying who may receive distributions, Congress was not seeking to suppress expression:

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[7] Judge Linn dissented (Pet. App. 53a-100a), and when the full court denied en banc review (*id.* at 101a-103a), three colleagues joined his dissent from en banc review (*id.* at 103a-108a).

> Neither the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the [CDSOA] was to suppress expression. Parties who are awarded antidumping distributions under the [CDSOA] may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself. Even within the proceeding, the [CDSOA] does not prohibit opposing views but merely promotes the efforts of those who support enforcement.

Id. at 32a. Rather, the court concluded, the statute combines two policies: one, to "compensate domestic producers injured by dumping" (*id*. at 29a); two, among those injured, to "reward those who assist in enforcement" by initiating or supporting petitions that turn out to be meritorious in identifying violations of trade law (*id*. at 33a).

The court of appeals explained that no decision of this Court "suggest[s] that an award of a portion of the government's recovery to a party assisting enforcement (while not rewarding those who oppose enforcement) would be unconstitutional." *Id*. at 39a. This Court's decisions neither question the validity of such a restriction of monetary redress in adjudication nor "establish a standard" for First Amendment analysis of this particular kind of government action. *Id*. Noting, among other things, that "[r]ewarding parties . . . here is similar to commercially contracting with them to assist in the . . . enforcement of government policy in litigation," the court of appeals concluded that some form of intermediate scrutiny—whether drawn from commercial-speech standards or

from *United States v. O'Brien*, 391 U.S. 367 (1968)—was "appropriate." Pet. App. 40a & n.28.

The court of appeals then explained that the CDSOA passed muster under any such intermediate scrutiny. *Id*. at 40a-51a. The government has a substantial speech-neutral interest in preventing injurious dumping (*id*. at 41a), and rewarding parties that assist in ferreting out instances of violations of the antidumping statute advances that interest and does so in a legitimate way—as recognized in *qui tam* statutes, attorney's fees provisions, and measures sharing government recoveries with whistleblowers and informers (*id*. at 41a-42a). The CDSOA, like such measures, provides for payments only if the charge of injurious dumping under preexisting legal standards turns out to be correct, not for claiming injurious dumping when the claim proves meritless. *Id*. at 44a, 50a-51a ("We emphasize again that Congress rewards only successful enforcement effort. Where the petition is unsuccessful, neither petition supporters nor opposers receive government payments . . . .").

Finally, providing distributions to those who support the petition through questionnaire responses sufficiently fits the governmental interest. The participation of interested parties involves substantial effort (sometimes costing more than any CDSOA relief) and is of central value to the agencies. *Id.* at 47a-48a. And while that expense may be incurred by opponents of relief as well, "Congress could permissibly conclude that it is not required to reward an opposing party." *Id*. at 48a. That rationale applies with particular force to an opponent, like SKF USA, that "is owned by a foreign company charged with dumping" and that "undertook a role that was nearly

indistinguishable from that played by a defendant in a *qui tam* or attorney's fees award case." *Id*. at 48a; *see id*. at 48a-49a.

ARGUMENT

The decision below is correct, and there is neither a lower court conflict nor any other persuasive reason for this Court to grant review of SKF USA's constitutional challenge to the now-repealed statute.

SKF USA's sole question is whether it is "viewpoint discrimination in violation of the First Amendment" to deny eligibility for monetary benefits based on "publicly expressed opposition" to an antidumping petition. Pet. i. But that question is not even presented in this case. The premise of denial based on "publicly expressed opposition," part of the Question Presented and repeatedly stressed throughout the petition (Pet. 2, 3, 12, 13, 24, 27, 29, 30), is inapplicable here, because SKF USA's ineligibility under the CDSOA was unalterably fixed by its *confidential* opposition in its questionnaire response in 1989. Page 6, *supra*. That is reason enough to deny review.

Even if its statement of opposition had been public instead of confidential, SKF USA still would have no valid First Amendment claim. There is neither precedent nor sound justification for finding a First Amendment violation (1) when a neutral adjudicator, applying existing legal standards, asks interested parties whether they are aligned with the petitioner seeking relief or (2) when, having determined that relief is warranted, the adjudicator awards relief only to those parties electing to be so aligned. Although SKF USA now wants to share in the proceeds from an antidumping order it opposed, the denial of its claim does not reflect a penalty on the exercise of its

free-speech rights—by which SKF USA means its answer to the party-alignment question—but rather the natural consequence of what that answer represented: a decision (by a party whose corporate family was benefitting from illegal dumping) not to ask for relief in the first place. To treat this kind of practical management of claims in proceedings for adjudication as unconstitutional "viewpoint discrimination" would stretch that important concept beyond recognizable bounds.

Even apart from the merits, review should be denied. The ruling below does not conflict with any other circuit's decision. Indeed, it addresses a narrow, apparently *sui generis* issue not presented in any other case. Moreover, the statute at issue has been repealed, and SKF USA itself identifies no other statute it says presents the same basis for unconstitutionality it urges here. Not surprisingly, no *amicus* except plaintiffs with their own CDSOA challenges has filed in support of review. Nor is there any unfairness in the bottom-line result of denying a share of existing antidumping collections to SKF USA, which opposed redress for anyone (rather than claimed it) and whose foreign affiliates were major adjudicated dumpers that have continued their dumping.

For those reasons—and because SKF USA's delay in challenging the CDSOA until 2005 would present a jurisdictional impediment to addressing the First Amendment issue here—the Court should not reach out to consider SKF USA's novel and meritless claim for strict First Amendment scrutiny in this commercial adjudicatory arena. The petition should be denied.

A. The Court of Appeals Correctly Rejected SKF USA's First Amendment Claim

1. The decisive problem with SKF USA's First Amendment argument is that it takes no account of context. Antidumping proceedings involve adjudications in which Commerce and the ITC, after investigation, apply existing legal standards to complex facts. Neither agency has a predetermined position on the question of industry support or any other issue in the proceedings. As SKF USA itself acknowledges: "The government's objective in those investigations is not to impose antidumping duties in all cases but to make a fair determination of whether duties are warranted under the particular circumstances presented." Pet. 23; *see* Furniture Brands *Amicus* Br. 3-4 ("the government's interest in enforcing antidumping laws lies not in achieving a *particular* outcome" but "the *correct* outcome").

SKF USA does not claim that the First Amendment prohibits the ITC from asking domestic producers—who are interested parties in the proceeding—to indicate their support, or lack of it, for the imposition of antidumping duties. It argues only that, under the First Amendment, it cannot be denied a share of any duties generated by a petition that it opposed. But this would be an odd principle to find in the First Amendment. There is nothing sinister or suspicious about a rule that extends monetary relief only to claimants and to those parties aligned with them, and not to those indifferent, or opposed, to the awarding of any relief. And, while the decision to opt in or out implicates speech in the literal sense that the decision is conveyed by words, the denial of relief turns, not on the expression as such, but on the underlying choice in the formal proceeding not to

take the petitioner's side in seeking antidumping duties. Indeed, for SKF USA, it turns on having actually taken the accused dumpers' side in the proceeding.

Although the specifics appear to be *sui generis*, the CDSOA is hardly an unfamiliar or speech-threatening kind of measure. As the court of appeals explained, the very terms of the CDSOA rest distribution of monetary relief on two bases in combination—injury from dumping and an act of either filing or supporting a petition for relief from an alleged violation of preexisting, fact-intensive federal standards. *See* page 13, *supra*. For adjudicators to furnish awards to those who filed or joined a claim for redress of grievances, but not to those who refrain from calling for remedial action and those who oppose it (because of ties to major defendants), is common in our civil justice system and has never been thought to constitute viewpoint discrimination or to trigger strict scrutiny under the First Amendment. *See*, *e.g.,* Sup. Ct. R. 12.6 ("Parties who file no document will not qualify for any relief from this Court."); *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981) (party that failed to appeal is subject to *res judicata* despite appellate success of other party).

Thus, if the antidumping laws were enforced through tort actions, only those parties that agreed to be plaintiffs would be able to recover damages. In a class action, potential plaintiffs could be required to make express their decision to opt in or out. *See* Fed. R. Civ. P. 23(c)(2). Though that decision would be expressed through speech, the award of remedies only to plaintiffs and not to others would be neither impermissible viewpoint discrimination nor other-

wise unusual or illegitimate. The same conclusion applies to the CDSOA.

Likewise familiar and legitimate are other kinds of provisions for limited monetary distributions in successful litigation that uncovers a violation of preexisting legal standards, as with *qui tam*, attorneys' fees, and related measures. *See* Pet. App. 41a-42a.[8] The relevant principles apply all the more strongly here, where those who petitioned for redress or actively supported the petition are most likely to be seriously injured overall by (what turns out to be) unlawful dumping, and those who opposed redress are most likely to benefit overall, either because they imported the dumped goods or because they are corporate affiliates of major dumpers.[9]

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[8] The court of appeals relied on the terms of the CDSOA to describe what the statute actually does, then concluded that its actual functioning had analogues in familiar practices long accepted as legitimate for easily stated reasons. This analysis neither improperly relies on purposes unapparent on the statute's face (*contra* Pet. 17-20) nor improperly posits governmental interests to support constitutional validity (*contra* Pet. 21-24). It is, rather, consistent with the Court's methodology: "The purpose, or justification, of a regulation will often be evident on its face." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (rejecting strict scrutiny). SKF USA cites no contrary authority. Its only arguably pertinent decision, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), nowhere states that statutory validity can rest only on interests advanced by government counsel (indeed, statutes may be upheld despite the government's urging of invalidity); and what the Court rejected was an interest that was not apparent on the face of the statute and that the statute did not adequately fit.

[9] *Amici* Ashley Furniture *et al.*, to the extent they are not refighting their own underlying dumping determinations, explain chiefly how certain domestic firms adjusted to dumping (of furniture from certain Asian countries) by joining with

The CDSOA bears no resemblance to statutes invalidated because aimed at suppressing "dangerous ideas" or designed to "drive certain ideas or viewpoints from the marketplace." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (discussing precedents). There is no threat to public discourse on policy issues in this measure, which "merely rewards successful applicants" for redress before a neutral forum. Pet. App. 40a n.29. In the litigation-participation context, the Court has taken pains to avoid questioning even the affirmative imposition of a monetary assessment based on the litigation position a plaintiff took, notwithstanding First Amendment protections for filing suits: "[N]othing in our holding today should be read to question . . . the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002). The CDSOA involves the distinctively lesser measure of denying a monetary distribution, doing so based on a formal (nonpublic) filing responsive to an independently legitimate inquiry (to ascertain the representative status of the petitioner and the extent of actual or threatened injury). As applied here, the

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dumpers to share the benefits of dumping. That may be a rational economic response, but Congress hardly needs to support it by awarding monetary relief to such firms, thereby undermining the policy of stopping injurious dumping.

Contrary to the suggestion of *amici* Giorgio Foods *et al.* (at 6), the CIT found in *PS Chez Sidney, LLC v. ITC*, 442 F. Supp. 2d 1329, 1357 (CIT 2006), that it was "not irrational to believe that there may be some correlation, indeed, quite possibly a high one, between expression of support for a dumping petition and harm to the [questionnaire] responder," noting only that there was no "necessary" connection.

statute's effect is to deny relief to a party allied with a major perpetrator of illegal dumping.

The CDSOA thus reflects familiar, accepted principles of our legal system. It does not involve prohibitions or penalties or other affirmative liabilities. Nor does it target speech directed to the public. Like a variety of accepted aspects of our civil justice system that provide for awards to those who seek relief but not to those who oppose relief, the CDSOA raises none of the special threats to First Amendment principles, such as a skewing or significant chilling of public discourse (or personal expression), for which strict scrutiny is reserved. There is no justification for newly extending the highest level of First Amendment scrutiny into this arena, which, among other things, would invite unprecedented and unsettling challenges to fixtures of our legal system.

2. SKF USA does not dispute that, if some form of intermediate (or lower) scrutiny applies to this measure, the First Amendment is satisfied. Rather, it argues for "strict scrutiny" on the ground that the CDSOA is a form of unconstitutional "viewpoint discrimination." Pet. i, 14-15. Indeed, its question presented rests squarely on the premise that it was denied monetary distributions based on its "publicly expressed opposition" to the antidumping petition. Pet. i. But because this "public opposition" premise—stressed by SKF USA and the *amici* alike—is inapplicable here, SKF USA's challenge must fail. And it fails regardless, because no precedent has ever treated as unconstitutional viewpoint discrimination a measure that relies on a formal filing before a neutral adjudicator as a basis for determining qualification for relief in the proceeding—specifically, as applied to SKF USA, for denying monetary

relief when the submission supported the losing defendants.

As is readily apparent from familiar features of litigation, not all government distinctions based on views, regardless of the nature or context of the measure, are condemned or subjected to strict scrutiny. *See Davenport v. Washington Ed. Ass'n*, 551 U.S. 177, 188-89 (2007); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-50 (1983); *Connick v. Myers*, 461 U.S. 138 (1983). The Court has permitted selective conferral of benefits on particular speakers, even based on viewpoint, where the selection is not "aimed at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (internal quotation marks omitted). *See also United States v. American Library Ass'n*, 539 U.S. 194, 209-10 n.4, 212-13 (2003) (plurality) (distinguishing "decision not to subsidize" speech, not subject to strict scrutiny, from "direct regulation" or "penalties").

SKF USA cites no authority that even involves, let alone applies a strict-scrutiny viewpoint-discrimination rule to, a measure like the CDSOA addressing parties' claims for relief in adjudications under preexisting legal standards (especially as applied to SKF USA). *See* Pet. 14-16. Snippets taken from rulings in different contexts do not establish a viewpoint-discrimination rule for this context. *Cf. R.A.V. v. St. Paul*, 505 U.S. 377, 386-87 n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.").

For example, the two decisions SKF USA features most prominently are plainly inapposite. *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), involved a confiscation of criminals' earnings from writing about their crimes. And *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), involved a (limited) "public forum," an avenue for speakers to address their speech to listeners of their choosing among the public (or a segment of it), whereas antidumping proceedings are not public fora, and questionnaire responses (which are confidential) are formal filings addressed simply to a neutral adjudicator. SKF USA also mentions *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), but that case involved a ban on certain newsracks. In multiple ways, these authorities all address laws that involve matters quite different from the allocation of monetary relief in a neutral adjudicatory setting at issue here. Even the one relied-on decision that involves a litigation context, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001)—which SKF USA cites in only a limited way (Pet. 34)—is critically different: it involved a ban on funding certain private lawsuits that *challenged government laws*, a ban that the Court determined was "aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549. Nothing of the sort is present in this case.[10]

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[10] Other cases cited by SKF USA are no closer to the present context. Pet. 15 n.10 cites certain public or nonpublic forum cases. In addition, *Speiser v. Randall*, 357 U.S. 513 (1958), found only a due process violation in certain procedures for denying a tax exemption based on speech that the Court assumed California could punish. *Turner*, *supra*, rejected strict scrutiny, and a claim of content discrimination, in a challenge to a requirement that cable operators carry broadcast channels.

Finally, SKF USA suggests that the court of appeals decision is inconsistent with the limited scope of this Court's "commercial speech doctrine." Pet. 24-26. But that suggestion rests on the incorrect premise that the court of appeals deemed the questionnaire response to *be* "commercial speech." As SKF USA itself recognizes, that is not what the court of appeals did. Rather, after explaining that the novelty of SKF USA's claim meant that no precedent of this Court announced a directly applicable standard, the court "analogized" the CDSOA to a commercial contract for enforcement assistance (Pet. 24) and invoked the general three-part framework of the commercial-speech form of intermediate scrutiny as an "appropriate" structure for analysis, while noting that *O'Brien* intermediate scrutiny would produce the same result. Pet. App. 40a; *see id*. at 39a ("rewarding those who support government enforcement is at

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Perry v. Sindermann, 408 U.S. 593 (1972), involved non-renewal of employment based on public criticism in newspapers and other media. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), involved a ban on cable operators' carriage of certain sexual speech without signal scrambling during certain hours. *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a free-exercise-of-religion issue. *Burson v. Freeman*, 504 U.S. 191 (1992), involved, and upheld, a ban on campaigning near a polling place. *FCC v. League of Women Voters*, 468 U.S. 364 (1984), involved the special First Amendment doctrines involving broadcasting and applied that law to a ban on editorializing by federal-funds recipients.

The *Noerr-Pennington* cases featured by *amicus* Koyo (at 15-19), which SKF USA does not cite, involve imposition of affirmative liabilities based on lobbying political organs or filing lawsuits, do not invoke a viewpoint-discrimination rule, and as *BE & K* makes clear, do not question the imposition of attorney's fees, let alone a measure like the CDSOA involving allocation of relief.

least constitutional if those provisions satisfy the standards governing commercial speech").

Thus, not having declared that this was a case of commercial speech, the court of appeals said nothing to conflict with the definitions of that doctrine. More generally, with the decision not resting on that doctrine, the case presents no opportunity to address any debates about precisely what is within its bounds. Pet. 31-33. If that issue warrants review, the Court should await a case in which the lower court actually holds the matter to be covered by the doctrine, rather than merely drawing on its general framework to address a novel challenge.

B. There Is No Intercircuit Conflict Or Other Reason to Review the Decision Rejecting SKF USA's Challenge to This Repealed Statute

1. The decision below creates no intercircuit conflict. SKF USA's contrary assertion (Pet. 26-31) again rests on its disregard of critical differences between the CDSOA and the measures at issue in the decisions it cites.

SKF USA's main authority, *Lac Vieux Desert Band v. Mich. Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999), involved something quite different from the present case. It involved a city's grant of a contract-bidding preference based on the favored bidder's having engaged in political advocacy to city and state electorates by sponsoring and promoting voter referenda to alter city and state law (to permit gambling). *See* Pet. App. 44a n.32. The rewarding of public advocacy for legislative change is far afield from the CDSOA's distinction between proponents and non-supporters (including opponents) of petitions

for redress addressed to a neutral adjudicator applying preexisting standards.

Hoover v. Morales, 164 F.3d 221 (5th Cir. 1998), is likewise inapposite. It involved (a) a ban (b) on a State employee (c) testifying as a witness (d) against the pre-determined State position—a plain suppression of a viewpoint (to be evaluated under the distinctive body of public-employee First Amendment doctrine). Similarly, both *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), and *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), involved prohibitions (on signs or solicitation), not monetary relief in adjudication.

2. Review is also unwarranted because the statute at issue has been repealed. Although that fact does not moot the case, *see* Pet. 36 n.20, it does strongly counsel against the exercise of certiorari discretion. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 499 (1971) (Harlan, J., concurring). SKF USA urges review because Congress might some day re-adopt the CDSOA. Pet. 36-37. But such anticipatory instruction to Congress is not in keeping with the respect this Court shows Congress. Here in particular, the WTO ruling on the CDSOA makes any such re-enactment especially speculative.

Meanwhile, the legal issue here has no significance outside the CDSOA context. Not a single *amicus* has filed in support of certiorari except those who have pending suits to challenge the CDSOA. That fact confirms that the ruling below implicates no First Amendment interest of any consequence beyond this narrow measure. SKF USA itself does not identify

and accuse of unconstitutionality any other legislative or regulatory measure with the CDSOA's features.

SKF USA thus cannot plausibly claim that review is needed to avoid a chilling of speech. Of course, its own opposition to relief, in 1989, could hardly have been chilled by the 2000 enactment, and the statute's repeal precludes any future chilling. Moreover, with no other comparable measure identified by SKF USA, chilling outside the CDSOA context is pure speculation. More generally, in any setting like this one, the risk is surely minimal that a party will change its party-alignment position, rather than provide neutral adjudicators with its truthful response to a question, let alone that any such choices will distort the adjudicatory process. In any event, any such risk is not remotely substantial enough to overturn a familiar, legitimate measure awarding monetary relief only to claimants and not opponents in an adjudication.

3. The impact of the CDSOA itself does not justify review. Precise figures are unavailable, but SKF USA's estimate of $1 billion appears greatly excessive. Pet. 2, 8 & n.6, 13, 35.[11] Moreover, the continued effect of the repealed CDSOA is narrow.

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[11] Although referring to "special accounts," SKF USA cites figures for "clearing accounts" (Pet. 8 n.6), which are different. Moreover, SKF USA's figure encompasses all orders (not just those at issue in the cases containing CDSOA challenges). SKF USA's figures also come from October 2008—whereas the October 2009 figures for all orders' clearing accounts are about *half* of SKF USA's figure. And, of course, the amounts being held include vastly more than any amounts that might shift to challengers; they include, as well, amounts for antidumping relief to petitioners and supporters—which challengers would not receive regardless.

The CDSOA challengers are highly concentrated: 34 of the 40-plus challenges (and three of four *amicus* briefs) involve either domestic subsidiaries of foreign bearing companies or domestic companies importing furniture subject to antidumping duties.

In any event, there is no injustice in giving the CDSOA its remaining effect, especially as to producers like SKF USA. The amounts at stake are not assessments to be levied on SKF USA and other challengers, but only amounts they would not receive.[12] And with apparently one exception, all of the firms that believe they have enough at stake to file or join an *amicus* brief have, like SKF USA, strong economic ties to major dumpers (essentially the companies found to have engaged in injurious dumping in the original proceeding and to have continued dumping thereafter), either through corporate affiliation or through importing of dumped goods.[13] (That is also true of a substantial majority of the plaintiffs in the cases stayed in the CIT or Federal Circuit, while an additional three involve plaintiffs

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[12] Indeed, SKF USA and *amici* might receive nothing even if the CDSOA were invalidated: the "support" provision might be severed to limit eligibility to petitioners. *Cf.* Pet. App. 45a n.35.

[13] The one possible exception is PS Chez Sidney, which, in the antidumping proceeding concerning crawfish tail meat from China, checked the "support" box in the preliminary questionnaire and the "no position" box in the final questionnaire. *See* Giorgio Foods *Amicus* Br. 4-6. The ITC chose to treat the last statement (the questionnaire response in the final injury proceeding) as controlling. Chez Sidney's joint amicus, Giorgio Foods, is a self-declared importer of mushrooms from India and specifically objected to the petition with respect to India. *See* Giorgio Foods Amended Complaint in CIT, Case No. 03-00286, ¶ 32 (Oct. 12, 2006) ("Giorgio Foods opposed the petition with respect to India, and imported subject merchandise from India").

that were ineligible under CDSOA on the separate ground that they did not produce the product covered by the order at the time of the original antidumping investigation.)

Although they now all want to share in the proceeds, there is nothing unjust about denying affirmative monetary redress to persons whose corporate affiliates, or who themselves, were sizable beneficiaries, or even perpetrators, of the injurious dumping being remedied. Indeed, giving money back to such firms, after the dumping continued despite the imposition of antidumping-duty orders, would frustrate the clear and legitimate congressional policy to redress dumping.

4. Finally, there is a jurisdictional impediment to reaching the First Amendment issue presented by SKF USA. Timken (with the ITC) contended in the court of appeals that the CIT lacked jurisdiction over this case, because the applicable statute of limitations took SKF USA's complaint outside the CIT's jurisdiction. The Federal Circuit rejected that contention. Pet. App. 24a-26a. But the court should have concluded otherwise. That is a further reason to deny review of SKF USA's petition.

The governing limitations statute, 28 U.S.C. § 2636(i)—enacted as part of the same 1980 statute that added 28 U.S.C. § 1581(i), the basis of the CIT's jurisdiction here—declares that, with exceptions not applicable here, a "civil action of which the [CIT] has jurisdiction under section 1581 . . . is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." As the Federal Circuit assumed without deciding (Pet. App. 23a), Section 2636(i) is jurisdictional. No material distinction exists between that

provision and 28 U.S.C. § 2501, which the Court has held to be jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).[14]

SKF USA's challenge to the CDSOA, as applied to deny it distributions in 2005, should be held barred by the two-year statute of limitations. Although SKF USA did not file suit until 2005, its challenge accrued no later than the first concrete injury it incurred, in 2001, as a result of the 2000 action (the CDSOA) that conclusively barred it from receiving any distributions under the 1989 orders. No decision made by the government afterwards altered, or could have altered, the bar on SKF USA's receiving any distribution, whether in 2005 or earlier, or in any way changed SKF USA's constitutional argument. The agencies, lacking authority to lift the congressional bar, engaged only in non-discretionary application of the bar to SKF USA—which, though immediately affected by the statutory ineligibility for distributions, did not sue until 2005.

SKF USA undeniably could have challenged the CDSOA in 2001. And a new clock did not start in 2005 for SKF USA to challenge its ineligibility for

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[14] The jurisdictional character of Section 2636(i) made immaterial the timeliness of Timken's raising of the issue in the CIT. In January 2006, Timken had filed its answer to SKF USA's October 2005 complaint, and in March 2006, the CIT had established a schedule under which SKF USA, in May 2006, moved for summary judgment. In early July 2006, a few days before its response to SKF USA's summary judgment was due, Timken raised the issue of SKF USA's compliance with Section 2636(i) by moving to amend its answer to the complaint to add an affirmative statute-of-limitations defense (and laches). The CIT denied the motion, stating that it was "untimely" and, on the merits, that SKF USA's complaint came within Section 2636(i)'s limitations period. Ct. App. JA 87-88.

2005 distributions (which became available, of course, only in 2005) on grounds that depended only on the statute, not on any particular application. To conclude otherwise, as the Federal Circuit did (Pet. App. 25a), is incompatible with what this Court recognized as a fundamental "statute of limitations" principle in, *e.g.*, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Such cases held that where the defendant committed an alleged wrong that caused immediate injury to the plaintiff, that injury started the limitations period, and once the period ran, the plaintiff could not challenge that wrong when again injured *simply* by the automatic, non-discretionary propagation of that wrong into a later concrete application, causing additional injury but with no new facts altering the legal ground for the claim of wrong. In *Ledbetter*, where the challenged pay disparity within the limitations period did not exist, of course, until any employees were paid in that period, the Court applied that principle even though the employer could have eliminated the pay disparity within the limitations period. *Id.* at 623-43.[15]

The principle applies all the more strongly in this case, where the limitations provision is jurisdictional and an Act of Congress is challenged. The 2000 enactment of the CDSOA was the decision that

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[15] Congress has amended Title VII to change the result in *Ledbetter* in specified employment settings. *See* Pub. L. No. 111-2, 123 Stat. 5 (2009). But, except for those settings, the amendment does not alter the general underlying limitations principle. *See Ledbetter*, 550 U.S. at 627 n.2 (principle of earlier precedent remains valid, despite context-specific congressional modification).

conclusively foreordained the 2005 denial of distributions, the 2000 Act is what is alleged to be unconstitutional on grounds that do not vary at all with the year-by-year applications, the agencies had no discretion to alter the CDSOA's exclusion of SKF USA after 2000, and SKF USA was injured by the Act in 2001 in the very way it claimed as to 2005. SKF USA therefore had to challenge the CDSOA within two years. The agencies' automatic, non-discretionary application of the 2000 Act to deny 2005 distributions should not restart the clock for SKF USA's challenge.[16]

In short, SKF USA's suit came too late under a jurisdictional statute of limitations. That jurisdictional defect makes this case a poor vehicle to grant certiorari for review of the First Amendment issue even if the issue otherwise warranted review, which it does not.

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[16] A recently argued case, *Lewis v. City of Chicago*, No. 08-974, argued Feb. 22, 2010, involves a distinct limitations issue, concerning timeliness of a disparate-impact challenge to use of an employment test. There, Title VII's nonjurisdictional agency-charge clock runs from when "the alleged unlawful employment practice occurred" (42 U.S.C. § 2000e-5(e)(1)), and the substantive claim appears to be that each decision to "use" test results, based on disparate-impact standards, unlawfully "limit[ed]" or "adversely affect[ed]" employees based on race (42 U.S.C. §§ 2000e-2(a)(2), 2000e-2(k)(1)(A)(i)). Here, in contrast, the jurisdictional limitations clock starts when the cause of action "first accrues"; SKF USA claims viewpoint discrimination; and the only relevant challenged government *choice* was the enactment of the CDSOA, after which the agencies had to deny SKF USA relief in every application of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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