No. 09-

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 U.S. 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government engages in viewpoint discrimination in violation of the First Amendment when it denies eligibility for monetary benefits solely on the basis of an applicant's publicly expressed opposition to a government investigation.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were: (1) the Petitioner SKF USA Inc., and (2) the Respondents: the United States; the United States Customs and Border Protection; its Commissioner (Robert C. Bonner), in his official capacity; the United States International Trade Commission; its Chairman (Daniel R. Pearson), in his official capacity; and Timken U.S. Corporation.

Pursuant to Rule 35.3, the current Acting Commissioner of the United States Customs and Border Protection (Jayson P. Ahern) is automatically substituted for former Commissioner Robert C. Bonner in this Court. Similarly, the current Chairman of the United States International Trade Commission (Shara L. Aranoff) is substituted for former Chairman Daniel R. Pearson.

RULE 29.6 STATEMENT

Petitioner SKF USA Inc., a United States corporation, is a wholly owned subsidiary of AB SKF, a publicly owned corporation trading on the Swedish stock exchange.

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

OPINIONS BELOW

The Federal Circuit panel opinion is reported at 556 F.3d 1337 (Fed. Cir. 2009) and reprinted at App. 1a-52a (majority); 53a-100a (Linn, J., dissenting). The order denying *en banc* review and the opinion dissenting therefrom is reported at 583 F.3d 1340 (Fed. Cir. 2009). (App. 101a-108a.)

The decisions of the U.S. Court of International Trade ("CIT") are reported at 502 F. Supp. 2d 1325 (Ct. Int'l Trade 2007) and 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006). (App. 109a-155a.)

JURISDICTION

A divided panel of the Federal Circuit issued its opinions in this case on February 19, 2009. SKF USA filed a timely petition for rehearing *en banc* on April 3, 2009, which the court denied on September 29, 2009. (App. 101a-103a.) This Court has jurisdiction to review the Federal Circuit's decision under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Speech Clause of the First Amendment of the U.S. Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)), is set forth in the appendix at App. 160a-169a.

STATEMENT OF THE CASE

A federal trade statute – the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") – determines eligibility for funding on the basis of an applicant's public expression of support for a government trade investigation. Despite the viewpoint discrimination apparent on the face of this statute, a divided panel of the Federal Circuit affirmed its constitutionality under the less rigorous scrutiny reserved for commercial speech. The decision conflicts in numerous respects with this Court's First Amendment jurisprudence and with the decisions of other courts of appeals under similar circumstances. As much as $1 billion in distributions in over 40 pending cases are affected by the Federal Circuit's erroneous decision.

The CDSOA modified the government's handling of antidumping and countervailing duties collected by the federal government. Prior to the CDSOA, all such duties were deposited into the general treasury. In an effort to "effectively neutralize[]" the injury caused to domestic industries by sales of imported goods at less than fair value (*i.e.,* dumping),[1] Congress directed that the duties collected would henceforth be distributed on a *pro rata* basis to

[1] Pub. L. No. 106-387, § 1002(1), 114 Stat. 1549A-72 (2000).

affected domestic producers. 19 U.S.C. § 1675c (2000). The Act limits qualifying domestic producers, however, to those that petitioned the government for the antidumping investigation that led to the imposition of duties and those that expressed affirmative support of the petition. *Id.* § 1675c(b)(1)(A). If a domestic producer did not, "by letter or through questionnaire response," indicate its public support for the investigation, that producer is denied a share of the proceeds. *Id.* § 1675c(d)(1).

Petitioner SKF USA is a domestic manufacturer in an industry subject to antidumping orders. SKF USA applied for a *pro rata* share of CDSOA distributions intended to remedy the effect of dumping on domestic producers in its industry. Applying the CDSOA's petition support requirement, federal agencies denied SKF USA's request because, twelve years earlier, it had voiced opposition to the government investigation that resulted in antidumping duties in its industry. SKF USA was otherwise entitled to such distributions but for its protected speech.

SKF USA successfully challenged the constitutionality of the CDSOA's petition support requirement in the CIT. On appeal, a divided panel of the Federal Circuit reversed, rejecting SKF USA's First Amendment viewpoint discrimination challenge. The full Federal Circuit, which exercises exclusive jurisdiction over the CIT and the statute at issue here, divided 8-4 in denying *en banc* review.

A. Statutory Scheme

1. Antidumping Investigations

Under the Tariff Act of 1930, a domestic producer may petition the Department of Commerce ("Commerce") and the International Trade Commission ("ITC") for relief from imports that are dumped into the U.S. market. 19 U.S.C. § 1673a (2006); *see* 19 C.F.R. § 351.202 (2009). If Commerce determines that the petition sufficiently alleges facts necessary for the imposition of a duty and is filed on behalf of the domestic industry, it proceeds with an investigation to determine whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value. 19 U.S.C. § 1673a(c)(2).

At the same time, the ITC initiates a preliminary investigation to determine whether the imports materially injure or threaten material injury to the domestic industry. 19 U.S.C. § 1673b(a)(1). As part of that investigation, the ITC issues a lengthy questionnaire to domestic producers, seeking detailed information on sales, pricing, customers, employment and other market data. App. 47a. The questionnaire has the force and effect of a subpoena; responses are mandatory. 19 U.S.C. § 1333(a) (2006); 19 C.F.R. § 207.8. It states on its first page: "This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession (19 U.S.C. § 1333(a))." App. 56a.

Among its initial questions, the questionnaire asks for the respondent's position with respect to the antidumping petition: "Do you support or oppose the

petition?" App. 57a. A respondent may check one of three boxes in response: "Support," "Oppose," or "Take no position." *Id.* The remaining questions seek empirical data to assist the ITC's assessment of injury to the U.S. industry. Respondents are required to certify the accuracy and completeness of their questionnaire responses. 19 C.F.R. § 208.6(c).

If, after full investigation, Commerce and the ITC reach final affirmative dumping and injury determinations, respectively, then an antidumping duty is imposed on the subject merchandise. 19 U.S.C. §§ 1673, 1673e (2006).

2. The Byrd Amendment

Antidumping duties historically have been deposited into general revenue accounts of the U.S. Treasury. In 2000, Senator Byrd altered the handling of those funds by adding a provision to an agriculture appropriations bill during conference committee negotiations. The resulting amendment, the CDSOA (also known as the "Byrd Amendment"),[2] avoided consideration by relevant congressional committees and full debate on the floor.[3]

The CDSOA instructs U.S. Customs and Border Protection ("Customs") to put all antidumping duties

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[2] Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)).

[3] *See* 146 Cong. Rec. 22,216, 22,220 (2000) (amendment "was not considered by [a] committee in either the House or Senate") (Rep. Kolbe); *see also PS Chez Sidney, LLC v. ITC*, 442 F. Supp. 2d 1329, 1339 n.21 (Ct. Int'l Trade 2006).

into special accounts, one for each antidumping duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64 (2009). At the end of each fiscal year, Customs distributes funds collected in those special accounts on a *pro rata* basis to domestic producers in each affected industry. 19 U.S.C. § 1675c(d)(3).

The CDSOA restricts eligibility for distributions to "affected domestic producers" that make "qualifying expenditure[s]" for specified purposes, such as manufacturing facilities, equipment, and research and development. 19 U.S.C. § 1675c(a), (b)(4). An "affected domestic producer" is a manufacturer or producer that "was a petitioner or interested party in support of the petition with respect to which an antidumping order . . . has been entered" and that "remains in operation." *Id.* § 1675c(b)(1); *see also* 19 C.F.R. § 159.61(b) (2009). The Act directs the ITC to compile a list of producers that either petitioned for the duties or "indicate[d] support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). Thus, in most cases, it is the producer's response to the ITC questionnaire's "support" question as part of the underlying investigation that determines eligibility for Byrd distributions. Customs makes the distributions only to those producers listed by the ITC. *Id.* § 1675c(d)(3).

3. Domestic and International Criticism of the Byrd Amendment

The CDSOA generated considerable controversy. In signing the appropriations bill, President Clinton

called on Congress to "override this provision, or amend it to be acceptable, before they adjourn."[4] Several foreign governments successfully challenged the law before the World Trade Organization, which authorized retaliatory measures.[5] President Bush repeatedly called for the repeal of the CDSOA. *See* Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act, GAO-05-979, at 2 (Sept. 2005) ("*GAO Report*").

In September 2005, the U.S. Government Accountability Office ("GAO") issued a detailed report critical of the CDSOA. According to the report, "because the statute requires support, only firms that check the 'support' box [on the ITC questionnaire] are considered eligible." *GAO Report* at 12. The GAO expressed "concern" regarding this support requirement, especially in its application to investigations that predated the enactment of the CDSOA. In those circumstances, "producers had no way of knowing [at the time of the investigation] that their lack of expression of support for the petition would later adversely affect their ability to receive CDSOA disbursements." *Id.* at 11.

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[4] Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 2669, 2670 (Oct. 28, 2000).

[5] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000, – AB 2002-7,* WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

In light of the international and domestic response, Congress partially repealed the CDSOA in 2006. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006) (App. 170a). The repeal did not affect duties collected on merchandise entering the country before October 1, 2007, which will continue to be distributed to domestic producers notwithstanding the partial repeal. *Id.* § 7601(b). As of October 2008, more than $1 billion in funds still subject to the CDSOA remained in Customs' special accounts awaiting distribution.[6]

B. SKF USA's Administrative Claim for CDSOA Funds

SKF USA is a domestic manufacturer of ball bearings. Since 1914, SKF USA has operated continuously in the United States, employing over 4,000 employees at its various facilities throughout the country. SKF USA is one of the largest U.S. producers of antifriction bearings.

In 1988, Commerce initiated an antidumping investigation of ball bearings on petition by the Torrington Company. As part of its material injury investigation, the ITC sent domestic producer questionnaires to 50 bearing manufacturers,

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[6] *See* U.S. Customs and Border Protection CDSOA Annual Report FY 2008, Section III, Clearing Account Balances as of 10/1/08, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/section3_ balances.ctt/section3_balances.pdf.

including SKF USA.[7] SKF USA responded to the ITC's questionnaires, submitting 242 pages of preliminary and final responses. App. 73a.

SKF USA did not, however, express "support" for the investigation. When asked in the ITC questionnaire for its position on the petition, SKF USA answered that it opposed the petition. App. 12a. Commerce and the ITC nevertheless determined that the domestic industry was materially injured by sales of imports at less than fair value and subsequently issued antidumping orders against ball bearings from certain subject countries.

On March 1, 2005, SKF USA asked the ITC to add it to the list of producers eligible to receive CDSOA distributions relating to ball bearings from Japan. The ITC denied the request because SKF USA "had indicated that it opposed the petition in its questionnaire response in the original investigation." App. 158a-159a. Customs later denied SKF USA's claim for distributions because it was not on the ITC's list of eligible producers. App. 156a-157a.

C. The Decisions Below

SKF USA then filed a civil action in the CIT, which has exclusive jurisdiction over cases involving antidumping duties and their administration and enforcement. 28 U.S.C. § 1581(i)(2), (4) (2006). SKF

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[7] SKF USA is a subsidiary of AB SKF, a Swedish corporation. As part of its injury determination, the ITC determined that SKF USA was part of the domestic industry. *See Torrington Co. v. United States*, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd mem.*, 991 F.2d 809 (Fed. Cir. 1993).

USA challenged the denial of CDSOA distributions under the First Amendment and the equal protection component of the Fifth Amendment Due Process Clause. The CIT sustained SKF USA's challenge on equal protection grounds, pretermitting the First Amendment challenge. App. 129a-155a.[8] The government appealed under 28 U.S.C. § 1295(a)(5) (2006).

A divided panel of the Federal Circuit reversed. With respect to SKF USA's First Amendment challenge, the panel acknowledged that the statute explicitly restricts eligibility to "a petitioner or interested party in support of the petition." 19 U.S.C. § 1675c(b)(1)(A). Given this clear language, the majority rejected as "simply implausible" the government's argument that CDSOA distributions "are 'not based upon the viewpoint expressed' in antidumping proceedings." App. 30a.

The majority nevertheless declined to apply strict scrutiny review. It reasoned instead that the statute could be saved from invalidity by construing it in light of a statutory purpose expressly disclaimed by the government – "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." App. 33a. The majority applied the less rigorous scrutiny applicable to commercial speech, reasoning that commercial speech doctrine

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[8] Shortly before SKF USA's successful challenge in the CIT, another CIT decision invalidated the CDSOA on First Amendment grounds. *See P.S. Chez Sidney,* 442 F. Supp. 2d at 1359.

has been applied not only to speech "proposing a commercial transaction," but also "to regulation of other activities of a commercial nature." App. 39a. It reasoned that "[r]ewarding parties under the circumstances presented here is similar to commercially contracting with them to assist in the performance of a government function . . . ." App. 40a. The majority upheld the statute under this commercial speech standard.[9]

In dissent, Judge Linn criticized the "majority's undue focus" on statutory purpose in light of the viewpoint discrimination apparent on the statute's face. Judge Linn questioned the majority's use of statutory purpose "to shield the petition support clause from strict scrutiny under the First Amendment entirely." App. 63a. He criticized the majority for erroneously substituting a purpose expressly disclaimed by the government in lieu of the government's "actual, asserted interest." App. 70a. He concluded that the CDSOA effects a "viewpoint discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny." App. 54a.

SKF USA filed a petition for rehearing en banc, which the court denied. Judge Linn again dissented, in an opinion joined by Judges Newman, Rader, and Moore. App. 103a-108a. The dissent criticized the panel's application of commercial speech doctrine.

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[9] The majority also rejected SKF USA's related equal protection challenge, applying rational basis review. App. 51a-52a.

"The most significant problem with this analysis is that it creates a whole new category of speech—speech in circumstances that are 'similar to' commercial speech—and it subjects that speech to much less rigorous scrutiny under the First Amendment than it would otherwise receive." App. 107a. "Opening up this kind of exception should not be done lightly . . . ." App. 108a. Noting that 41 cases challenging the CDSOA were currently stayed in the CIT, the dissent reasoned that "'[t]he impact of the panel's decision is far reaching.'" *Id.* (citation omitted). "This case," it concluded, "is simply too important to allow the majority's incorrect First Amendment analysis to stand." *Id.*

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision violates important First Amendment principles established by a consistent line of this Court's decisions prohibiting government viewpoint discrimination. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Speiser v. Randall,* 357 U.S. 513 (1958). In contravention to these decisions, it authorizes the federal government to withhold federal benefits solely on the basis of a speaker's public opposition to a proposed government course of action. It justifies this facial viewpoint discrimination on the basis of a contrived purpose nowhere found in the statute and expressly disclaimed by the government. And it applies the lesser scrutiny of the commercial speech doctrine to political speech concerning matters of important government policy.

The disagreement within the Federal Circuit on the issues in this case is reflective of broader conflicts among federal courts of appeals. The panel's application of less rigorous scrutiny is in conflict with decisions of the Sixth Circuit, which apply strict scrutiny to statutes that distribute government benefits on the basis of a speaker's support for proposed governmental action. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (1999), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002). The decision below also amplifies broader doctrinal conflicts on the appropriate use of congressional purpose in analyzing statutes that differentiate speech on their face and on the proper scope of commercial speech doctrine.

The Federal Circuit's decision has serious repercussions for the administration of this federal program and others. It significantly chills speech in a government investigation, "limit[ing] the ability of persons or entities to take a particular political position freely." *Lac Vieux*, 172 F.3d at 407. It thus distorts the debate in a forum where the candid exchange of views is critical to the proper enforcement of the law. And it does so with respect to speech "directed at the core of one of the most contentious issues now debated among nations . . . ." *P.S. Chez Sidney*, 442 F. Supp. 2d at 1350.

More than 40 cases involving dozens of different imported products hinge on the outcome of this case. As much as $1 billion remain to be distributed under the CDSOA, extending the discriminatory impact of the statute for years to come. More broadly, the Federal Circuit's decision authorizes the government

to reward favored speech on any number of other contentious public policy issues, in turn punishing those who disagree with its favored positions.

The Court should grant certiorari to resolve the conflicts and prevent the damage to fundamental liberties caused by the Federal Circuit's erroneous determination.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

On its face, the CDSOA determines eligibility for federal funds based on the viewpoint expressed by an applicant on an important issue of public policy. If an otherwise eligible manufacturer failed to express "support" for the government's antidumping investigation of imports in its industry, the statute denies that manufacturer any part of the CDSOA funds. 19 U.S.C. § 1675c(a), (b)(1)(A). The Federal Circuit nevertheless declined to apply the strict scrutiny to which this Court subjects statutes that discriminate on the basis of viewpoint. *See, e.g., Rosenberger*, 515 U.S. at 829; *Simon & Schuster,* 502 U.S. at 116; *Speiser,* 357 U.S. at 529.

A fundamental tenet of the Free Speech Clause is that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. "Discrimination against speech because of its message is presumed to be unconstitutional," and targeting "particular views taken by speakers on a subject" is an "all the more blatant" and impermissible form of discrimination.

Id. at 828, 829; *see Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994).[10] In justifying the CDSOA's viewpoint discrimination on the basis of more lenient scrutiny, the Federal Circuit opens the door to government engaging more frequently in this "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

The Federal Circuit's decision evinces doctrinal confusion on numerous aspects of this Court's First Amendment jurisprudence.

A. The Federal Circuit Erroneously Subjects Viewpoint Discriminatory Funding Statutes to Lesser Scrutiny than Statutes That Prohibit Speech

First, the panel decision draws an unsupported bright line between statutes that "prohibit particular speech" and statutes, like the CDSOA, that appropriate benefits on the basis of that speech. App. 28a. The panel conceded that "[s]tatutes that are prohibitory in nature are rarely sustained," *id.*, but concluded that this Court's "cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment." *Id.*

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[10] Even in non-public forums, where government is afforded the greatest latitude in regulating speech, the Court has consistently held that speech restrictions must remain viewpoint neutral. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Speech Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

This Court has never drawn such a line in reviewing viewpoint discriminatory statutes. The government offends the First Amendment not only when it prohibits particular forms of speech, but also "when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828.[11] Thus, this Court applies the same heightened scrutiny to statutes that deny benefits based on protected speech as it applies to statutes that prohibit such speech. *Turner*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Any other approach "would allow the government to 'produce a result which [it] could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser*, 357 U.S. at 526).[12]

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[11] *See also id.* at 834 (reaffirming "the requirement of viewpoint neutrality in the Government's provision of financial benefits"); *Simon & Schuster,* 502 U.S. at 115; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Sherbert v. Verner,* 374 U.S. 398, 405 (1963) ("conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms").

[12] The government may consider viewpoint in the distribution of monetary benefits only where that funding is provided to facilitate of *its own* speech. *See, e.g., Rust v. Sullivan,* 500 U.S. 173 (1991). The panel majority suggested without deciding that it "might also be possible" to view this as such a case, App. 40a n.29, but it strains credulity to suggest that antidumping proceedings are somehow a program of

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B. The Federal Circuit Justifies Facial Viewpoint Discrimination in Light of a Perceived Benign Statutory Purpose

Second, having placed to the side the greater weight of this Court's viewpoint discrimination jurisprudence, the Federal Circuit compounded its error by disregarding entirely the discrimination effected by "the very terms of" the CDSOA. *See Rosenberger*, 515 U.S. at 831. Notwithstanding the statute's plain language targeting "support" for government action, the Federal Circuit posited that it could save the CDSOA from strict scrutiny by conceiving a benign legislative purpose to justify the statute without reference to the content of speech. Its reasoning disregards this Court's teaching that the "purpose, or justification, of a regulation will often be evident on its face." *Turner*, 512 U.S. at 642.[13]

The court of appeals relied for its benign-justification reasoning on *Ward v. Rock Against Racism*, 491 U.S. 781 (1980). In that case, this Court observed that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified*

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government speech. If anything, antidumping proceedings are a forum for producers to express their *private* opinions to assist the government in making a fair determination of whether duties should be imposed. *See* discussion, *infra,* pp. 22-24.

[13] *See also Burson v. Freeman,* 504 U.S. 191, 207 (1992) (applying strict scrutiny where statute's terms "distinguish among types of speech"); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (subjecting to strict scrutiny speech ban "defined solely on the basis of the content of the suppressed speech").

without reference to the content of the regulated speech.'" *Id.* at 791 (emphasis in original) (citation omitted). The Federal Circuit, however, misconceived this "justified without reference" language. *Ward* did not involve any claim of facial statutory discrimination. The *Ward* Court looked to the asserted justification of the statute to *expand* the protections of the First Amendment. It examined statutory purpose only when faced with a claim that a *facially neutral* statute directed at non-communicative attributes of speech (*i.e.*, decibel levels) was a subterfuge for suppressing speech on the basis of content. *See id.* at 791-92. In those limited circumstances, a court might find that a statute's purpose establishes that the regulation is a pretext for content-based discrimination. *Id. Ward*'s justified-without-reference-to-speech analysis is generally applied only in cases involving facially neutral "time, place or manner" restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

This Court has "expressly rejected the argument," endorsed by the Federal Circuit, "that 'discriminatory treatment . . . is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (citation omitted). "[O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . 'We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.'" *Simon & Schuster*, 502 U.S. at 117 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592

(1983)). Thus, "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases." *Turner*, 512 U.S. at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id.* at 642-43; *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Discovery Network, for instance, rejected a similar attempt to classify a statute that differentiated between categories of speech (newspapers and commercial handbilling) as content-neutral on the grounds that the *"justification* for the regulation is content neutral." 507 U.S. at 429 (emphasis in original). The Court found this argument "unpersuasive because the *very basis* for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id.* (emphasis added). The fact that there was no evidence that the city acted with "animus toward the ideas contained in respondents' publications" was irrelevant. *Id.* "Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.'" *Id.*[14]

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[14] In narrow circumstances inapplicable here, the Court has applied less rigorous scrutiny to a statute that targets the *secondary effects* of particular speech content. *See Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). *Renton* did not address a statute, like the CDSOA, that targets a particular viewpoint for disfavored treatment. Nor is their any assertion here that a manufacturer's speech opposing a governmental trade investigation carries with it any detrimental secondary

(Continued …)

It is "invariably the case [that] the government can frame the interest served by . . . [its] rules in essentially speech-neutral terms." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985) (footnote omitted). By disregarding plainly discriminatory language in light of a putative purpose unrelated to speech, the Federal Circuit's decision opens the door to any manner of creative viewpoint discrimination, bounded only by the imagination of the authors of legislative committee reports and sympathetic judges.

Nevertheless, the Federal Circuit's misapplication of *Ward* highlights an area of doctrinal uncertainty for which some commentators have expressed the need for clarification.[15] This case presents the opportunity for this Court to make clear that in determining whether a statute is impermissibly viewpoint discriminatory, the plain language of the challenged statute is paramount.

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effects unrelated to its content. *See Discovery Network*, 507 U.S. at 430 (rejecting secondary effects argument relating to commercial handbill newsracks).

[15] *See, e.g.*, Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. Rev. 1, 55-57 (2007-08) (Court's focus on purpose to separate content-based and content-neutral speech restrictions is "misguided" and has led to "anomalous results"); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. 595, 620 (2002-03) ("problems that haunt the content-based/content neutral inquiry stem almost entirely from the Court's failure to adhere to the face of a government action as its controlling feature").

C. The Federal Circuit Adopts a Statutory Purpose Expressly Disclaimed by the Government

Third, the Federal Circuit invented its purported statutory purpose only after rejecting the government's proffered justification. This invention of legislative purpose conflicts with this Court's many decisions that base First Amendment review on the actual, asserted purpose for a statute. *See* App. 67a (Linn, J., dissenting) (citing, *e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000)).

The government defended the CDSOA below on the grounds that its "support" requirement was a surrogate for determining the manufacturers most injured and thus most deserving of monetary compensation. Both the majority and the dissent properly rejected this purpose as insufficient to justify the statute's viewpoint discrimination. App. 30a (finding government's injury justification "simply implausible"); *see also id.* at 82a-83a (Linn, J., dissenting).

Having rejected the government's proffered justification, the panel turned its attention to devising a better one. Under the majority's construction, "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." App. 32a-33a.[16]

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[16] The court of appeals justified its reconstruction of legislative purpose as necessary to avoid the constitutional

(Continued …)

In its First Amendment cases, this Court has never substituted its own judgment for that of the political branches on the purpose of a legislative enactment. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational"). Instead, the actual, "asserted governmental interest" is the focal point of the First Amendment inquiry. App. 70a (Linn, J., dissenting) (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980)). This is true even in cases subject to less rigorous First Amendment review. *See Thompson*, 535 U.S. at 373; *Ward*, 491 U.S. at 790 (examining city's asserted justification of guideline as "regulatory measure to limit and control noise").

Here, the purpose invented by the panel is found nowhere in the statute's congressional findings. S*ee* Pub. L. No. 106-387, § 1002 (App. 160a-161a). It was, in fact, expressly *disclaimed* by the government in defending the statute below. App. 65a-66a. Moreover, this "reward" purpose is entirely fictitious. Under the panel's construction, CDSOA distributions

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question. Avoidance, however, is "a tool for choosing between competing plausible interpretations of a *statutory text,* resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). The doctrine does not allow a court "to ignore the government's asserted purpose and substitute our own when heightened First Amendment scrutiny applies." App. 70a (Linn, J., dissenting).

go only to those producers who actively assisted the government in its enforcement decision. The court defined "active assistance" as not merely expressing support for the petition but also providing substantive responses to the ITC's questionnaire. *See* App. 36a-37a n.26. But the panel's construction does not narrow the class of available recipients. Because responses to the ITC questionnaires are mandatory, *every* respondent provides substantive responses to the questionnaire. *See* App. 72a-73a (Linn, J., dissenting). Thus, the fulcrum of the majority's "reward" purpose remains the protected expression of the affected producer, *i.e.*, its response to the questionnaire's "support" question.

This reward justification also confuses the government's role in antidumping investigations. 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. *See* App. 55a (Linn, J., dissenting). To paraphrase a motto inscribed on the walls of the Department of Justice, the "United States wins its point whenever justice is done its citizens. . . ." *Brady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963).

Consistent with this proposition, the government acknowledged that "petition supporters and petition opponents provide exactly the same assistance to the government in antidumping investigations." App. 72a. SKF USA's participation in the investigation here illustrates that point. It provided reams of data in response to the ITC questionnaire, presented legal briefing, expert witness testimony and even oral

argument. *See* App. 48a-49a; *id*. at 73a-74a The only difference between SKF USA and those domestic producers that qualified for CDSOA distributions is that SKF USA provided this assistance to substantiate its publicly expressed *opposition* to the investigation.

The disconnect between the Federal Circuit's "reward" justification and the actual role a questionnaire respondent plays in an antidumping investigation illustrates the danger that arises when a court substitutes its judgment on statutory purpose for that of the political branches. The creation of a hypothetical and fictitious justification is the hallmark of the loosest possible constitutional scrutiny and is wholly inappropriate in First Amendment review. This fundamental error in the panel's analysis warrants review by this Court.

D. The Federal Circuit Erroneously Applies Commercial Speech Doctrine to Protected Speech on Issues of Public Policy

Finally, the Federal Circuit's decision effects a breathtaking misapplication of this Court's commercial speech jurisprudence. The panel acknowledged that, as a form of petitioning the government on a matter of important public policy, "SKF's opposition to the antidumping petition here is protected First Amendment activity." App. 38a. Shunning strict scrutiny, the panel majority reasoned that "rewarding those who support government enforcement is at least constitutional if those provisions satisfy the standards governing commercial speech." App. 39a. It analogized the

"rewarding" of speakers for support of an antidumping petition to "commercially contracting with them to assist in the performance of a government function," and concluded that the application of intermediate scrutiny under the commercial speech doctrine "seems appropriate." App. 40a.

This Court has, at various times, used different formulations to articulate the standard for determining what constitutes commercial speech. Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *see also Bd. of Trustees S.U.N.Y. v. Fox*, 492 U.S. 469, 482 (1989). In *Central Hudson*, the Court articulated the standard as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561.

Whatever this Court's precise standard, SKF USA's opposition to the antidumping investigation in its industry bears no resemblance to less jealously protected commercial speech. The court of appeals applied a standard reserved for advertising and similar promotional speech to a corporation's protected petitioning of a government agency on a matter of significant public importance. This Court has long held, though, that the free discussion of governmental affairs is "indispensible to decision-making in a democracy" – a proposition that is "no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). By stretching the commercial speech doctrine to reach

such core First Amendment speech, the court of appeals seriously dilutes the protections that the First Amendment affords businesses, whether corporate or individual-owned, in the discussion of how our government should conduct its affairs.

As the *en banc* dissent noted, the consequences of the Federal Circuit's opinion "should not be understated." App. 107a. It authorizes the government to favor one voice over another on an important public policy issue regarding the government's own conduct. It allows the government to take refuge in the lesser scrutiny associated with commercial speech simply by paying people to express a particular viewpoint in support of governmental policies. The decision creates an enormous loophole in the First Amendment's prohibition of viewpoint discrimination that this Court should close.

II. THE FEDERAL CIRCUIT'S DECISION CREATES NUMEROUS CIRCUIT SPLITS

As a result of its exclusive jurisdiction over appeals from the CIT, the Federal Circuit is the only circuit court of appeals that can review the constitutionality of the Byrd Amendment's support requirement. *See* 28 U.S.C. § 1581(i)(4); 28 U.S.C. § 1295(a)(5). Especially given the constitutional issue presented, the rule applied by the Federal Circuit is therefore a matter of "special importance to the entire Nation" warranting certiorari. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

While the Federal Circuit's exclusive jurisdiction negates the possibility of a conflict among the circuits on the precise statute at issue here, its

holding engenders several circuit splits among courts of appeals deciding similar issues—both in its failure to apply strict scrutiny review and in its broad use of the commercial speech test. The Court should grant certiorari to address the doctrinal tension created in the courts of appeals by the Federal Circuit's decision.

A. The Federal Circuit's Analysis Conflicts with Other Circuits on the Appropriate Test for Viewpoint Discrimination

The Federal Circuit is not the first circuit to consider the constitutionality of a regulation rewarding applicants based on their public support for government action. As the dissent observed, the "closest analogous case in the regional circuits" is the Sixth Circuit's decision in *Lac Vieux*, 172 F.3d 397 (1998), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002). App. 92a. Contrary to the decision here, the Sixth Circuit ruled that a statute rewarding support for government action must survive strict scrutiny. 172 F.3d at 409-10. In conflict with the holding of the Federal Circuit, the Sixth Circuit invalidated a city ordinance that afforded preferential treatment to supporters of proposed government action. 276 F.3d at 880.

Lac Vieux involved a First Amendment challenge to state and local statutes that gave a "preference" in casino licensing to casino developers who "actively promot[ed] and significantly support[ed] a state initiative authorizing gambling." *Lac Vieux*, 172 F.3d at 401 (citation omitted). The laws were challenged by an Indian tribe that had not provided political or public relations support for the successful ballot initiative but was nonetheless interested in

obtaining a gambling license. The tribe challenged the statutes for impermissibly "awarding preferences to parties 'for their political support of a particular side of a controversial political issue.'" *Id.* at 402 (citation omitted).

In its review of the First Amendment challenge, the Sixth Circuit ruled that "the ordinance is content-based and is therefore subject to strict scrutiny." *Id.* at 409-10. It relied upon the plain statutory language for this conclusion. "It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment." *Id.* at 409.

The Sixth Circuit recognized the significance of the burden imposed by the support requirement. "The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech." *Id.* at 407. That "chilling effect" arises, the court reasoned, "because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue." *Id.* at 407-08. On appeal after remand, the court invalidated the statute, reasoning: "Barring governments from endorsing or punishing political activity, or the lack of it, is among the paramount functions of the First Amendment's Free Speech Clause." *Lac Vieux*, 276 F.3d at 880. The court found that the city was unable to meet its

heavy burden of demonstrating that the statute is narrowly tailored to a compelling governmental interest; thus, "the preference renders the ordinance invalid." *Id.*

A more analogous statutory scheme is difficult to imagine. Like the CDSOA, the *Lac Vieux* statutes awarded government benefits on the basis of an applicant's prior support for a government initiative. The laws granted "a preference to certain entities because those entities took a particular view on a political issue." 172 F.3d at 408. Like the CDSOA, they denied the same preference to those who either spoke out against the proposed government action or took no public position. Unlike the Federal Circuit, the Sixth Circuit found impermissible viewpoint discrimination on the face of the challenged statutes and did not seek to justify the laws on the basis of a reward rationale.

The Federal Circuit majority limited its discussion of *Lac Vieux* to a single footnote. It distinguished the decision on the ground that "[t]he ordinance at issue in *Lac Vieux* did not reward the achievement of enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." App. 43a-44a n.32. But its attempt to distinguish *Lac Vieux* only highlights the opinion's doctrinal conflict with the decision of another court of appeals that invalidated similar government efforts to regulate support of government policy in judicial proceedings. *See Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998).

In *Hoover*, the Fifth Circuit invalidated a state university policy that prohibited professors from testifying as expert witnesses in litigation against

the state. *Id.* at 227. The court criticized the policy because it "drew a distinction between state employee speakers based on the content of the employees' relative speech." *Id.* "The one who testifies as an expert witness or acts as a consultant on behalf of the State is protected. The one who testifies as an expert witness or acts as a consultant on behalf of those who oppose the state in litigation is punished." *Id.* The Fifth Circuit concluded that the state policy was an invalid content-based restriction on speech. *Id.*

Hoover belies any notion that the "achievement of the enforcement of government policy through litigation" transcends political support for the government ballot initiative in *Lac Vieux.* That *Lac Vieux* involved "'political support' for legislative efforts" is of no significance since the "'[t]he free discussion of governmental affairs' protected by the First Amendment encompasses more than merely campaigning." App. 93a (Linn. J., dissenting) (citation omitted). The CDSOA expressly ties eligibility to the applicant's public expression of support for the investigation. It therefore requires a company's "political support" for the government's action, no less than the gambling ordinance at issue in *Lac Vieux. Id.*

The conflict between the Sixth and Federal Circuit is illustrated more broadly by the disagreement among the lower courts on the role of governmental purpose in First Amendment review. In contrast to the panel majority's heavy reliance on *Ward* here, other courts of appeals have declined to examine purpose when the statutory text is clearly content based. *See Solantic, LLC v. City of Neptune*

Beach, 410 F.3d 1250, 1259 n.8 (11th Cir. 2005). According to the Eleventh Circuit, this Court's more recent case law "has receded from [the *Ward*] formulation, returning to its focus on the law's own terms, rather than its justification . . . ." *Id.* at 1259 (citing *Discovery Network*, 507 U.S. at 429).

Similarly, in *ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), the Ninth Circuit reasoned that "we are not required to find a content-based purpose in order to hold that a regulation is content based." *Id.* at 793. Unlike the Federal Circuit, that court will find a statute to be content based (and subject to strict scrutiny) "if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." *Id.*; *see also State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006) (content-based nature of statute "is no less so because" of state's intent).

The Court should grant review to clarify the doctrinal confusion in the lower courts evinced by the Federal Circuit's decision.

B. The Federal Circuit's Analysis Conflicts with Other Circuits' Application of Commercial Speech Doctrine

The Federal Circuit's application of the *Central Hudson* standard for commercial speech highlights another area of doctrinal disarray in the courts of appeals. The circuits are deeply divided over when to apply *Central Hudson*'s commercial speech standard. Several circuits apply the narrower commercial speech definition articulated by this Court as speech that does no more than propose a

commercial transaction. *See Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002); *CFTC v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000); *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999). Others have adopted the broader *Central Hudson* "economic interests" standard, which subjects more speech to a lesser degree of First Amendment protection. *See IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000); *Hoover*, 164 F.3d at 225.

The majority's decision below goes well beyond any standard sanctioned by this Court or even other circuits. As the judges dissenting from the *en banc* denial explained, the majority applies less rigorous commercial speech review in "circumstances that are sufficiently similar to commercial speech (but are not actually commercial speech), such that the commercial speech test 'seems appropriate.'" App. 108a. This is a standardless standard. If allowed to stand, it will further dilute the protection available to commercial actors' speech on critical matters of public policy.

The Federal Circuit opinion thus presents an opportunity to consider issues left open when this Court dismissed as improvidently granted the writ in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam), a case involving the appropriate standard to apply to a commercial actor's speech addressing a matter of public controversy. This case presents none of the procedural infirmities that may have led the Court to dismiss the writ in *Nike*. The Court should use this occasion to clarify this important area of the law and

to correct the Federal Circuit's misapplication of commercial speech law to the CDSOA.

III. THE FEDERAL CIRCUIT'S DECISION PRESENTS A RECURRING PROBLEM OF CONSTITUTIONAL SIGNIFICANCE

The Federal Circuit's decision has dramatic ramifications. Customs currently holds as much as $1 billion in duties subject to distribution under the CDSOA. *See supra* note 6. Over forty cases, involving products as varied as crawfish and furniture, are currently stayed before the CIT and the Federal Circuit pending final resolution of this case. App. 108a; *see United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 & n.2 (1998) (certiorari granted where "[n]umerous cases" over which CIT exercised exclusive jurisdiction regarding constitutionality of federal statute "are currently pending in the [CIT] . . . ."). SKF USA, in particular, continues to suffer significant competitive injury from an unconstitutional statutory scheme in which its principal domestic competitors receive 38% of the total CDSOA funds distributed.[17]

The chilling effect of the CDSOA cannot be gainsaid. Any statute that awards or withholds benefits on the basis of an applicant's speech poses a significant risk of self-censorship. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). In this context, the effect of that self-censorship is to

[17] Timken U.S. Corp., its subsidiary MPB Corporation, and the Torrington Company (acquired by Timken in 2003) received approximately $395 million in CDSOA distributions between 2001 and 2004. *GAO Report* at 29 & n.39.

substantially skew the debate on an important matter of public policy and international relations—whether the government should impose duties on imported foreign goods. This Court has guarded against statutory schemes that "distort [the] usual functioning" of the legal process by favoring the expression of one viewpoint over another in legal proceedings. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001). Such viewpoint favoritism "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster*, 502 U.S. at 116.

This specter is not hypothetical. The WTO panel noted that a domestic producer had "'changed its mind'" concerning an antidumping petition by deciding to express support for that petition "in order to remain eligible for possible offset payment subsidies."[18] One producer has explained that the CDSOA "likely skews the information obtained by the ITC, as domestic producers that may have independent reasons for not supporting the imposition of antidumping or countervailing duties no longer communicate those views for fear of losing out on a share of the duties should they ultimately be imposed."[19] Indeed, the GAO found evidence that,

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[18] *See* Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R ¶ 7.45 (Sept. 16, 2002) ("*WTO Panel Report*"), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

[19] *See* Letter from Wieland Metals, Inc. to Congressman E. Clay Shaw at 2 (Sept. 2, 2005), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=3700; *see also WTO Panel Report* ¶ 7.45 ("producers that

(Continued …)

after enactment of the statute, some industry associations "reached out broadly to ensure producers were aware of the need to communicate support to the ITC." *GAO Report* at 11.

The partial repeal of the CDSOA does nothing to diminish the importance of the question presented here. Duties collected on merchandise that entered the United States before October 1, 2007, will be distributed under the program for years to come. *See* Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers: Notice, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009) ("[T]he full impact of the CDSOA repeal on amounts available for distribution may be delayed for several years" and "the distribution process will continue for an undetermined period . . . ."). The $1 billion dollars held in Customs clearing accounts will continue to be distributed each fiscal year to domestic producers until the accounts are depleted. The domestic producers entitled to distributions may vary annually depending on which producers submit proper certifications to Customs. Domestic producers that did not express support for a petition, however, will be excluded from distributions. It is this distribution process that burdens the First

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might not normally have supported an application may well be induced to as a result of the CDSOA, given the potential for offset payment subsidies, especially since they would otherwise render themselves less competitive vis-à-vis other domestic producers that do receive offset payment subsidies").

Amendment rights of dissenting producers, and this process is ongoing.[20]

Moreover, the partial repeal of the statute does nothing to remove its oppressive shadow from ongoing trade proceedings. Notwithstanding the controversy surrounding the original Byrd Amendment, reports have indicated legislative support for its re-enactment.[21] The mere possibility that Congress could reenact the statute weighs heavily in today's trade investigations, since producers do not know if their failure to express support for a petition in response to today's ITC questionnaire will "later adversely affect their ability to receive CDSOA disbursements." *See GAO Report* at 11. This uncertainty itself restricts and chills free speech. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (explaining chilling effect of potential prosecution). Only a ruling by this Court invalidating the statute can lift that chill.

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[20] On prior occasions, the Court has granted certiorari to resolve issues arising under repealed statutes, including the proper distribution of the funds under a partially repealed statute. *See Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 372 n.2 (1974) (case not mooted "for there remains the issue of substantial refunds of taxes collected under" repealed ordinance); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996) (reviewing repealed statute where repeal not retroactive); *see also Fulton Corp. v. Faulkner*, 515 U.S. 1156 (1995) (mem.) (denying motion to dismiss *Fulton* writ as improvidently granted).

[21] *See, e.g.*, *Byrd's Bad Idea Is Back*, Wall St. J. Online Aug. 11, 2008, *available at* http://online.wsj.com/article/SB121841227101628383.html.

Finally, the importance of the question presented is not confined to the trade context. The Federal Circuit's decision has implications well beyond the confines of antidumping disputes, since a statutory support requirement implicates the very core of protected speech: speech about government affairs. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("speech critical of the exercise of the State's power lies at the very center of the First Amendment").

"[A] function of free speech under our system of government is to invite dispute." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Statutes that trigger government benefits based on "support" for government action do precisely the opposite. They incentivize speech in favor of government policy and penalize any opposition. It requires little imagination to see how damaging such statutes might be. Under the court of appeals' reasoning, Congress might use monetary payments to encourage support for – and discourage dissent from – a wide range of government policies and decisions. For example, the decision would permit Congress to deny bailout funds to any automobile manufacturer that criticized government trade policies or to provide healthcare subsidies only to those citizens who spoke in favor of national healthcare reform.

Congress faces strong political pressures to penalize those who disagree with federal policies. In fact, at various times in our history, Congress has enacted statutes to discourage criticism of the government and its policies. The Sedition Act of 1918 famously criminalized speech deemed "scurrilous" or "abusive" to the government or its

military forces. Pub. L. No. 150, 40 Stat. 553 (1918). Similarly, in *Schacht v. United States*, 398 U.S. 58 (1970), the Court struck down a statute making it a crime for an actor to wear a military uniform in a theatric production if the production discredited the military. *Id.* at 59-60. Short of such prohibitions, there is nothing more tempting for government than to limit its largesse to those who support its policies.

This Court is unlikely to have a better vehicle for reaffirming fundamental viewpoint neutrality principles, for dispelling the lower court's confusion on the use of statutory purpose in the constitutional analysis and for ensuring that future legislative action conforms to proper constitutional standards. It should grant certiorari to provide that guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2009

APPENDIX

APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED FEBRUARY 19, 2009

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 2008-1005, 2008-1006, 2008-1007, 2008-1008

SKF USA, INC.,

Plaintiff-Cross Appellant,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendant-Appellant,

and

United States International Trade Commission,

Defendant-Appellant,

and

Timken U.S. Corporation,

Defendant-Appellant,

and

Appendix A

United States, Robert C. Bonner, Commissioner, United States Customs and Border Protection, and Daniel R. Pearson, Chairman, United States International Trade Commission,

Defendants.

Feb. 19, 2009

Before LINN and DYK, Circuit Judges, and STEARNS, District Judge.*

Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge LINN.

DYK, Circuit Judge.

The Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment") provides for the distribution of antidumping duties collected by the United States to eligible "affected domestic producers" of the dumped goods. 19 U.S.C. § 1675c(a) (2000). An "affected domestic producer" must be "a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." *Id.* § 1675c(b)(1)(A).

In 2005 the United States International Trade Commission ("ITC") and United States Customs and

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* Honorable Richard G. Stearns, District Judge, United States District Court for the District of Massachusetts, sitting by designation.

Border Protection ("Customs") denied SKF USA's ("SKF's") request for Byrd Amendment distributions, on the ground that SKF was not an eligible "affected domestic producer" because it had not been a petitioner and had not supported the petition resulting in the relevant antidumping duty order. SKF challenged this determination and the constitutionality of the Byrd Amendment in the Court of International Trade on First Amendment and equal protection grounds. The Court of International Trade held that the requirement that a claimant be a petitioner or "support" an antidumping petition violated "the Equal Protection guarantees under the Fifth Amendment to the Constitution," and that the statutory language imposing this requirement was severable from the Byrd Amendment, making SKF potentially eligible to receive distributions. *SKF USA Inc. v. United States*, 451 F.Supp.2d 1355, 1366-67 (Ct. Int'l Trade 2006).

On remand, the ITC and Customs determined that under the Court of International Trade's decision, SKF was eligible for Byrd Amendment distributions of approximately $1.4 million and that SKF's claims for additional distributions (made for the first time on remand) were not timely. The Court of International Trade upheld these remand determinations. *See SKF USA Inc. v. United States*, 502 F.Supp.2d 1325, 1328, 1334 (Ct. Int'l Trade 2007). We reverse, because we conclude that the Byrd Amendment is constitutional.

Appendix A

BACKGROUND

I

The trade laws of the United States further the government's policy against the dumping of goods. The statutory definition of "dumping" is "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34).

The Department of Commerce ("Commerce") calculates the "normal value" of the imported goods and compares that price with the price at which the imported goods are sold in the United States. *See id.* §§ 1677(1), 1677b(a). If the sales price is below the normal value, dumping has occurred. In turn, the ITC determines whether such dumping has "materially injured" or threatened material injury to a United States industry. *Id.* § 1673d(b)(1).

The government almost always relies on petitioners to initiate antidumping proceedings. The regulations specifically state that "[t]he Secretary [of Commerce] normally initiates antidumping . . . duty investigations based on petitions filed by a domestic interested party." 19 C.F.R. § 351.202(a). A petition must satisfy certain requirements and be filed "by or on behalf of the industry." 19 U.S.C. § 1673a(c)(1)(A).[1] After the filing of

1. This requires that "the domestic producers or workers who support the petition account for at least 25 percent of the

(Cont'd)

a petition, Commerce sends questionnaires to foreign producers and exporters to determine whether dumping has occurred. If there is a question as to the adequacy of the petition, Commerce sends questionnaires to domestic industry members as well. The ITC sends questionnaires to domestic producers, requesting production and other data in order to assist it in determining whether the dumping alleged in the petition has materially injured a domestic industry or has threatened it with material injury. At least since 1988, the ITC questionnaires have asked whether the recipient of the questionnaire supported, opposed, or took no position on the petition. Commerce and the ITC rely heavily on information gleaned from responses to their questionnaires.

If Commerce makes a final determination that "the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value,"[2] and if the ITC makes a final determination that a U.S. industry has suffered or is threatened with material injury,

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(Cont'd)

total production of the domestic like product" and that "the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition." 19 U.S.C. § 1673a(c)(4)(A).

2. "Normal value" and "fair value" are for the most part synonymous. Commerce regulations state that " '[f]air value' is a term used during an antidumping investigation, and is an estimate of normal value." 19 C.F.R. § 351.102(b)(22).

Commerce issues an antidumping duty order. *Id.* § 1673d(a)(1), (b)(1), (c)(2); *see also* 19 C.F.R. pt. 207; 19 C.F.R. §§ 351.205(a), 351.210(a). Such an order imposes a duty "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. Such duties are collected by Customs.

The Byrd Amendment, enacted in 2000, requires that antidumping duties collected by Customs be distributed to "affected domestic producers" for "qualifying expenditures."[3] Continued Dumping and Subsidy Offset

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3. The relevant portion of the Byrd Amendment, 19 U.S.C. § 1675c, reads:

> (b) Definitions
>
> As used in this section:
>
> (1) Affected domestic producer
>
> The term "affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—
>
> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.
>
> Companies, businesses, or persons that have ceased the production of the product covered by the order

(Cont'd)

Appendix A

(Cont'd)

or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.

. . . .

(4) Qualifying expenditure

The term "qualifying expenditure" means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

(F) Health care benefits to employees paid for by the employer.

(G) Pension benefits to employees paid for by the employer.

(H) Environmental equipment, training, or technology.

(I) Acquisition of raw materials and other inputs.

(J) Working capital or other funds needed to maintain production.

. . . .

Act of 2000, Pub.L. No. 106-387, § 1001-1003, 114 Stat. 1549, 1549A-72-75 (codified at 19 U.S.C. § 1675c (2000)), *repealed by* Deficit Reduction Act of 2005, Pub.L. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective October 1, 2007).[4] Under the Byrd Amendment, in order to qualify

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(Cont'd)

> (d) Parties eligible for distribution of antidumping and countervailing duties assessed
>
> (1) List of affected domestic producers
>
> The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

4. The Byrd Amendment was repealed in February 2006, but the repeal was not retroactive. The repeal provisions stated that "[a]ll duties on entries of goods made and filed before October 1, 2007 . . . shall be distributed as if [the Byrd Amendment] had not been repealed." Deficit Reduction Act of 2005, Pub.L. 109-171, § 7601(b), 120 Stat. 4, 154 (Feb. 8, 2006).

for distributions, a party must have been "a petitioner or interested party in support of the petition," and an interested party must have indicated that it supported a particular antidumping petition "by letter or through questionnaire response" to the ITC.[5] 19 U.S.C. § 1675c(b)(1)(A), (d)(1).

II

On March 31, 1988, the Torrington Company ("Torrington"), a United States producer of antifriction bearings, filed a petition with Commerce and the ITC requesting the imposition of antidumping duties on imported antifriction bearings. *See*, *e.g.*, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France*, 53 Fed.Reg. 15,074 (Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation). The petition alleged that imported bearings were being sold or were likely to be sold at less than fair value and that these imports materially injured or threatened to materially injure a United States industry. The petition also alleged that imported bearings were being sold at dumping margins ranging from 1% to 355%. *See*, *e.g.*, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 53 Fed.Reg. 15,073

5. The Byrd Amendment requires the ITC to prepare a "list of affected domestic producers," defined as "a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1).

(Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Japan*, 53 Fed.Reg. 15,076 (Dep't of Commerce Apr. 27, 1988) (initiation of antidumping duty investigation). 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.

In response to the petition, Commerce and the ITC initiated antidumping duty investigations. *See*, *e.g.*, *Antifriction Bearings from France*, 53 Fed.Reg. at 15,074. Commerce sent questionnaires to foreign manufacturers,[6] and to domestic industry members as well "[i]n order to determine whether a major proponent of the domestic industry opposes the petition." *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Italy*, 53 Fed.Reg. 45,361, 45,362 (Dep't of Commerce Nov. 9, 1988) (prelim.

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6. The foreign manufacturers included, for example, SKF's affiliated companies such as SKF UK Limited in the United Kingdom and Aktiebolaget SKF in Sweden. *See*, *e.g.*, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the United Kingdom*, 53 Fed.Reg. 45,312 (Dep't of Commerce Nov. 9, 1988) (prelim. determinations of sales at less than fair value); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from Sweden*, 53 Fed.Reg. 45,319 (Dep't of Commerce Nov. 9, 1988) (prelim. determinations of sales at less than fair value).

determinations of sales at less than fair value). Commerce subsequently determined that the majority of the domestic antifriction bearing industry supported the petition.[7]

Before making its final dumping determinations, Commerce also held several public hearings in February 1989, in which Torrington and other interested parties filed pre- and post-hearing briefs.[8] Each hearing examined imports from a different country. Commerce ultimately determined that imported antifriction bearings were being or were likely to be sold at less than fair value. *See*, *e.g.*, *Antifriction Bearings (Other*

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7. *See*, *e.g.*, *Antifriction Bearings (Other than Spherical Plain and Tapered Roller Bearings) and Parts Thereof from Italy and Spherical Plain Bearings and Parts Thereof, from Italy*, 54 Fed.Reg. 19,096, 19,097 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) (determining that petitioner had standing).

8. *See*, *e.g.*, *Antifriction Bearings (Other than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof from the United Kingdom and Spherical Plain Bearings Parts Thereof from the United Kingdom*, 54 Fed.Reg. 19,120, 19,121 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) ("A public hearing was held on February 14, 1989."); *Antifriction Bearings (Other than Needle Roller Bearings, Spherical Plain Bearings, and Tapered Roller Bearings) and Parts Thereof from Sweden and Needle Roller Bearings and Spherical Plain Bearings, and Parts Thereof, from Sweden*, 54 Fed.Reg. 19,114 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than and not less than fair value) ("A public hearing was held on February 9, 1989.").

than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed.Reg. 18,992 (Dep't of Commerce May 3, 1989) (final determinations of sales at less than fair value).

As part of its own investigation of the petition's allegations, the ITC sent detailed questionnaires to domestic ball bearing producers, seeking sales, employment, financial, and other data to help the ITC determine whether the domestic antifriction bearing industry had been materially injured (or threatened with material injury) by dumping. Eventually seven domestic companies, in addition to Torrington, supported the antidumping petition. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 73 Fed.Reg. 31,196, 31,220-21 (U.S. Customs and Border Protection May 30, 2008) (notice of intent to distribute) (listing eight companies as affected domestic producers eligible for Byrd Amendment distributions of antifriction bearing antidumping duties). The questionnaire responses of these petition supporters were hundreds of pages long, and several of the supporters prepared responses exceeding 300 pages. The supporters supplied voluminous data in response to the ITC's questionnaires, including extensive price and shipment data, product specifications, customer lists, internal company reports, descriptions of competitors, and detailed market analyses. Since it was a domestic producer, SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition.

Appendix A

During its investigation of the petition's allegations, the ITC held two proceedings. On April 21, 1988, the ITC held a conference at which "all persons who requested the opportunity were permitted to appear in person or by counsel." *See* U.S. Int'l Trade Comm'n, *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, *France*, *Italy*, *Japan*, *Romania*, *Singapore*, *Sweden*, *Thailand*, *and the United Kingdom: Preliminary Determinations*, at 3, Publication 2083 (May 1988). The ITC's report indicates that Torrington, the petitioner, appeared at the conference through counsel, assisted in the investigation, and submitted a post-conference brief providing over 120 pages of arguments, rebuttal, and analysis of the issues raised at the conference. *See id.* at A-62 n. 1 ("The petitioner . . . identified about 20 specific bearing products for which it reportedly encounters significant import competition. . . . With the help of the petitioner, the [ITC] staff selected 6 of these products to request pricing data.").

The ITC subsequently made a preliminary determination that there was a "reasonable indication that an industry in the United States is materially injured by reason of imports . . . of antifriction bearings." *Id.* at 1-2. On March 30, 1989, the ITC held a public hearing in connection with its final antidumping determination, where again "all persons who requested the opportunity were permitted to appear in person or by counsel." U.S. Int'l Trade Comm'n, *Antifriction Bearings (Other than Tapered Roller Bearings) and*

Appendix A

Parts Thereof from the Federal Republic Of Germany, *France*, *Italy*, *Japan*, *Romania*, *Singapore*, *Sweden*, *Thailand*, *and the United Kingdom: Final Determinations*, at 6, Publication 2185 (May 1989). Petitioner Torrington participated in this hearing by submitting pre-hearing and post-hearing briefs, as well as by providing economic testimony during the hearing on March 30, 1989. Petitioner Torrington's pre-hearing brief was over 200 pages long, and the brief proposed findings of fact and provided detailed analyses of the data provided in responses to the ITC's questionnaires. Much of the ITC's preliminary and final determination reports were devoted to analysis of petitioner Torrington's arguments. The ITC's final determination was that the "industry in the United States is materially injured by reason of imports [of antifriction bearings] . . . which have been found by the Department of Commerce to be [dumped]." *Id.* at 2.

After the ITC's final material injury determination, Commerce issued antidumping duty orders against antifriction bearings imported from several countries, including Japan. These orders covered countries where SKF's affiliated companies manufactured antifriction bearings that later were sold in the U.S. for less than fair value. SKF's affiliated companies thus were subject to duties. *See*, *e.g.*, *Ball Bearings*, *Cylindrical Roller Bearings*, *and Parts Thereof from Sweden*, 54 Fed.Reg. 20,907 (Dep't of Commerce May 15, 1989) (antidumping duty orders).

III

This case presents no questions concerning the existence of dumping, material injury, or the appropriate antidumping duty rate. Rather, the issue is the constitutionality of the Byrd Amendment. As noted earlier, the Byrd Amendment requires the duties collected under an antidumping duty order to be shared with the petitioner and other "affected domestic producers" that supported the corresponding antidumping petition. 19 U.S.C. § 1675c(a), (b)(1). The Byrd Amendment requires the ITC to prepare a list of the affected domestic producers that petitioned for or supported each existing antidumping duty order, and directs Customs to pay qualifying producers a pro rata share of the collected antidumping duties each year to the extent of their qualifying expenditures. *See id.* § 1675c(d).[9]

On December 29, 2000, the ITC sent Customs the list of petitioners and petition supporters for each antidumping duty order in effect on January 1, 1999, as

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9. Producers who did not appear on the ITC's original list of an antidumping duty order's affected domestic producers can join the list under limited circumstances, such as by acquiring a company that was on the original list or by waiving the confidentiality of their support of the original petition. *See* 19 C.F.R. § 159.61(b)(1)(i); *Cathedral Candle v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1358-59 (Fed.Cir.2005) (noting that producers were added to a Byrd Amendment distribution list after waiving the confidentiality of their support for the original antidumping petition).

required under § 1675c(d)(1) of the Byrd Amendment. In August 2001, Customs published a notice of intent to distribute fiscal year 2001 Byrd Amendment funds that included the current list of these eligible affected domestic producers and invited them to file certifications to obtain distributions. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed.Reg. 40,782 (U.S. Customs and Border Protection Aug. 3, 2001). SKF did not appear on the list and did not request to be added to the list. In July 2002, Customs published a similar notice and list for distributions of fiscal year 2002 Byrd Amendment funds. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722 (U.S. Customs and Border Protection July 3, 2002). SKF did not appear on or challenge this list. In July 2003, Customs published the notice and eligibility list for distributions of fiscal year 2003 Byrd Amendment funds. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 68 Fed.Reg. 41,597 (U.S. Customs and Border Protection July 14, 2003). Again, SKF did not appear on or challenge this list.

On March 1, 2005, for the first time, SKF asked the ITC to add SKF to its list of affected domestic producers under the antidumping duty order covering antifriction bearings from Japan.[10] The ITC denied this request on

10. Since that time, SKF has claimed that it is entitled to 2004 distributions. On September 29, 2006, SKF filed a (Cont'd)

April 20, 2005, explaining that the Byrd Amendment "allows for adding only those potentially eligible producers that indicated support of the petition by letter or through questionnaire response during the original investigation." J.A. 66. The list of affected domestic producers under the Byrd Amendment for fiscal year 2005 was later published in the Federal Register, and SKF was not included. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed.Reg. 31,566 (U.S. Customs and Border Protection June 1, 2005). On July 13, 2005, SKF submitted a certification to Customs requesting Byrd Amendment distributions for fiscal year 2005. On July 15, 2005, Customs denied SKF's request because SKF did not appear on the ITC's list of affected domestic producers.

On October 3, 2005, SKF filed a complaint in the U.S. Court of International Trade, alleging that the Byrd Amendment and the determinations by the ITC and Customs that SKF did not qualify for 2005 Byrd Amendment distributions violated the First Amendment and equal protection guarantees of the U.S. Constitution. SKF subsequently moved for summary

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complaint against Customs and the ITC in the Court of International Trade seeking 2004 Byrd Amendment distributions. Compl., Court No. 06-00328 (Ct. Int'l Trade September 29, 2004) (later consolidated into Consol. Court No. 06-00290). The government urges this claim is untimely. SKF also is seeking 2006 distributions. Compl., Court No. 07-000035 (Ct. Int'l Trade February 5, 2007).

judgment on the agency record. SKF challenged the distribution of duties collected pursuant to the antidumping orders covering ball bearings from several countries, or, in the alternative, of only the duties collected pursuant to the antidumping order covering ball bearings from Japan.

SKF argued that the Byrd Amendment violates the Constitution's equal protection guarantees because, in light of the compensatory purpose of the Byrd Amendment, there is no rational basis for distributing antidumping duties only to domestic producers who supported an antidumping petition, and excluding similarly situated domestic producers who opposed or took no position on a petition. SKF also argued that the Byrd Amendment violates the First Amendment because it discriminates based on the viewpoint expressed by the party seeking to share in the distribution of antidumping duties.

The ITC and Customs ("the government"), supported by Timken U.S. Corporation ("Timken," the successor to petitioner Torrington),[11] urged that the Byrd Amendment was constitutional under both the First Amendment and equal protection. The government asserted that the Byrd Amendment "identifies a group of beneficiaries that are entitled to compensation for unfair trade practices" and therefore

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11. When Timken acquired Torrington in 2003, Timken became an affected domestic producer eligible to receive antifriction bearing Byrd Amendment distributions. *See SKF USA Inc.*, 451 F.Supp.2d at 1363.

had a rational basis. Def.'s Resp. to Pl.'s Mot. J. Upon Agency R. 27. The government also asserted that the Byrd Amendment did not unconstitutionally restrict speech. Timken belatedly raised a statute of limitations defense, and the Court of International Trade declined to allow Timken to amend its answer to raise this issue. *See SKF USA Inc. v. United States*, No. 05-00542 (Ct. Int'l Trade July 14, 2006) (Order).

On the merits, the Court of International Trade held that the Byrd Amendment's restriction of distributions to antidumping petition supporters violated the Constitution's equal protection guarantees, applied to the federal government through the Fifth Amendment. *See SKF USA Inc.*, 451 F.Supp.2d at 1366. The court found that because the antidumping laws are designed to benefit entire industries rather than individual companies, and because dumping similarly injures all members of a domestic industry, parties who participate in antidumping investigations are similarly situated whether they support or oppose the antidumping petition being investigated. The court could not "discern a reasonable correlation between an entity's decision to support a petition and the gravity of the entity's injury." *Id.* at 1362. Applying rational basis review, the Court of International Trade concluded that treating supporters and opposers of antidumping petitions differently was "not rationally connected to any legitimate objective" and thus that the Byrd Amendment unconstitutionally denied equal protection to SKF. *Id.* at 1362-63.

The court also held that the petition support requirement was severable from § 1675c(b)(1) of the Byrd Amendment. The effect was to replace the words "in support of the petition" with the words "in a petition" in § 1675c(b)(1)(A), and thus to define an "affected domestic producer" as "a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." *Id.* at 1365.

The Court of International Trade remanded the case to Customs and the ITC "to review their decisions denying SKF [Byrd Amendment] disbursements." *Id.* at 1367. Pursuant to the remand, Customs and the ITC determined that SKF was eligible to receive over $1.4 million in 2005 Byrd Amendment distributions under the antidumping duty order covering antifriction bearings from Japan. On review of these remand determinations, SKF argued that it was entitled to additional 2005 distributions, including distributions from antidumping duty orders involving antifriction bearings imported from additional countries. The Court of International Trade held that Customs and the ITC had complied with the remand. The court also held that SKF's certifications requesting additional 2005 distributions were untimely, because 19 C.F.R. § 159.63(a) requires certifications to be filed within sixty days of Customs' notice of intent to distribute Byrd Amendment funds for a particular fiscal year, and SKF's additional certifications were filed more than a year after Customs' July 2005 notice. *See SKF USA Inc.*, 502 F.Supp.2d at 1334.

Appendix A

The parties timely appealed and cross-appealed to this court. The government and Timken appeal the Court of International Trade's decision that SKF is eligible to receive Byrd Amendment distributions, and SKF cross-appeals the Court of International Trade's decision that SKF did not timely file its amended certification requesting additional 2005 Byrd Amendment distributions.

DISCUSSION

I

We first address whether the Court of International Trade had jurisdiction to hear SKF's claims. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)).

Under 28 U.S.C. § 1581(i), "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States" arising from "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" and their "administration and enforcement." However, an action under 28 U.S.C. § 2636(i) is "barred unless commenced in accordance with the rules of the court within two years after the cause

of action first accrues." The government and Timken both argue that SKF's challenge was untimely but on different theories. The government asserts that SKF's cause of action accrued either in December 2000 when the ITC sent to Customs the list of affected domestic producers, or in August 2001 when Customs published the list of affected domestic producers. Timken, in contrast, contends that SKF's cause of action accrued either when the Byrd Amendment was enacted on October 28, 2000, or in August 2001 when the ITC's list of affected domestic producers was published.[12]

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12. The parties devote considerable attention to debating whether SKF's cause of action falls under the continuing claim doctrine, which recognizes that under some circumstances a new cause of action accrues each time a periodic payment is denied, even though some antecedent event determined the right to the payment. *See*, *e.g.*, *Hatter v. United States*, 203 F.3d 795, 797-98, 800 (Fed.Cir.2000) (en banc), *aff'd in part*, *rev'd in part* 532 U.S. 557, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001) (holding that where pursuant to statute taxes were withheld from judicial paychecks, a separate cause of action accrued with each individual paycheck under the continuing claim doctrine); *Brown Park Estates—Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455-58 (Fed.Cir.1997) (holding that a claim was untimely because the cause of action accrued when the government administratively made an allegedly improper rent adjustment, and that later payments based on the earlier adjustment did not create separate causes of action under the continuing claim doctrine). The continuing claim cases are not, however, concerned with the question here—namely, whether a claim can accrue before the amount of the recovery can be calculated.

SKF argues that the statute of limitations defense has been waived because it was not timely raised in the Court of International Trade.[13] The ITC and Timken argue that the statute of limitations is jurisdictional rather than an affirmative defense and thus can be raised for the first time on review.

Recently in John R. Sand & Gravel Co. v. United States, the Supreme Court addressed 28 U.S.C. § 2501, the statute of limitations for bringing claims in the Court of Federal Claims. __ U.S. __, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). The Supreme Court held that because § 2501 is jurisdictional, it requires "sua sponte consideration" by courts even when a party waives the issue of timeliness. *Id.* at 752. In holding § 2501 to be jurisdictional, the Supreme Court distinguished between statutes of limitations that are affirmative defenses and those that are jurisdictional, describing jurisdictional statutes of limitations as "seek[ing] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." *Id.* at 753.

We assume, but do not decide, that the statute of limitations in § 2636(i) is jurisdictional under *John R.*

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13. Rule 8(d) of the Rules of the Court of International Trade requires a party to raise any statute of limitations defense in its answer. *See Ct. Int'l Trade R.* 8(d) (2002) (amended November 25, 2008; effective January 1, 2009) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense.").

Sand & Gravel Co. We hold that the filing of SKF's complaint was timely in any event because the cause of action did not accrue until June 1, 2005.[14]

SKF's claim for Byrd Amendment distributions could accrue only when suit could be filed. "A limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.' " *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 85 L.Ed. 605 (1941)) (holding that a cause of action does not accrue under a pension plan statute until the plan's trustees calculate payments and the payer then misses a scheduled payment). While SKF could have filed a facial challenge to the Byrd Amendment immediately after its enactment and could have filed suit before 2005 to challenge a pre-2005 fiscal year's distributions, here SKF could not file suit to recover fiscal year 2005 Byrd Amendment distributions

14. While the two-year statute of limitations applies to constitutional claims for monetary recovery, *see Stone Container Corp. v. United States*, 229 F.3d 1345, 1349-50 (Fed.Cir.2000), we also need not decide whether the statute of limitations here applies to facial constitutional claims. Some cases have suggested that a limitations period could not apply to facial First Amendment claims. *See Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir.2004), *cert. denied* 544 U.S. 968, 125 S.Ct. 1725, 161 L.Ed.2d 615 (2005) ("We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations." (citing *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir.1991))).

until it was known whether Byrd Amendment distributions would be available.[15] When either the Byrd Amendment was passed in 2000 or when the list of eligible affected domestic producers was prepared or published in 2000 or 2001, it was not known whether there would be Byrd Amendment distributions available in 2005. For instance, Commerce could have reviewed and revoked the antidumping duty order, and then there would have been no collected duties to distribute. There might have been no imports of antifriction bearings in 2005 subject to the order, and thus no duties would have been collected. SKF also could not file suit to recover fiscal year 2005 Byrd Amendment distributions until SKF knew it had incurred qualifying expenditures during that fiscal year.

The earliest SKF's claim could have accrued was when Customs published its notice of intent to distribute duties under Byrd Amendment for fiscal year 2005 and invited potentially eligible producers to file certifications requesting a share of the distributions. This notice, including the ITC's list of affected domestic producers

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15. *See also Bianchi v. United States*, 475 F.3d 1268, 1274 (Fed.Cir.2007) (determining that a cause of action seeking royalties had accrued when the amount of royalties was calculated); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988) ("It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." (citing *Japanese War Notes Claimants Assoc. of the Phil., Inc. v. United States*, 178 Ct.Cl. 630, 373 F.2d 356, 358 (1967), *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967))).

potentially eligible to receive such distributions, was published in the Federal Register on June 1, 2005. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed.Reg. 31,566 (June 1, 2005). SKF filed its complaint on October 3, 2005, well within the two-year statute of limitations under § 2636(i). Thus the Court of International Trade's jurisdiction over SKF's claims was not time-barred.

II

We have jurisdiction under 28 U.S.C. § 1295(a)(5), and our review of statutory and constitutional issues is de novo. *See U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1381 (Fed.Cir.2002).

Although the Court of International Trade did not reach SKF's First Amendment claims, on appeal SKF urges its First Amendment theory as its primary ground for affirming the Court of International Trade's judgment.[16] We first consider that question, recognizing in that connection our well established obligation to construe statutes to avoid constitutional difficulties.[17]

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16. We also note that another decision of the Court of International Trade held that the support requirement of the Byrd Amendment violates the First Amendment. *See PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 442 F.Supp.2d 1329, 1358-59 (Ct. Int'l Trade 2006). Appeals to our court from that decision have been stayed pending the outcome of this case.

17. *See United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909) ("[W]here

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In performing this obligation, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895)). Indeed, courts are obligated to adopt a saving construction even when the interpretation finds little support in the literal language of the statute.[18] While we need not go so far to sustain

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a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

18. For example, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994), the Supreme Court construed the Protection of Children Against Sexual Exploitation Act of 1977 to require scienter regarding the age of performers, despite the lack of support for this construction given by a grammatical reading of the statute, in order to avoid "serious constitutional doubts." *Id.* at 78, 115 S.Ct. 464. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, (1979), the Supreme Court avoided constitutional questions by construing the National Labor Relations Act not to confer Board jurisdiction over teachers in church-operated

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the statute here, contrary to the dissent, the doctrine of constitutional avoidance is not "irrelevant," Dissenting Op. at 1368, but lies at the heart of our obligation as a reviewing court.

In addressing the constitutionality of the Byrd Amendment, it is also important to keep in mind that the statute does not prohibit particular speech. Statutes that are prohibitory in nature are rarely sustained, and cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment.

In considering limited provisions that do not ban speech entirely, the purpose of the statute is important. As the Supreme Court noted in *Ward v. Rock Against Racism*, in many contexts "[t]he government's purpose is the controlling consideration." 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). This is not to suggest

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schools, in light of "the absence of a clear expression of Congress' intent" to do so, *id.* at 507, 99 S.Ct. 1313, and despite the "[a]dmittedly . . . very broad terms" of the statute, *id.* at 504, 99 S.Ct. 1313. Also, in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) the Court construed the Railway Labor Act as not giving unions the power to use a member's dues to support political causes over the member's objection, in order to "avoid serious doubt" about the statute's constitutionality, without any basis in the statute's text. *Id.* at 749, 768-69, 81 S.Ct. 1784.

that a benign purpose will necessarily save a statute,[19] but a suppressive purpose may render it unconstitutional. Moreover, the legitimacy of a statute's purpose is important in a First Amendment analysis whether the appropriate test is strict scrutiny (requiring a determination of the state's compelling interest) or some lesser form of scrutiny (requiring a determination of the state's substantial interest).[20] Thus, purpose is a critical question, and we must first determine the purpose of the Byrd Amendment.

The government contends that the Byrd Amendment was designed to compensate domestic producers injured by dumping. That is correct.[21] The problem here is that that appears not to be the Byrd

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19. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("[O]ur cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (internal quotation marks omitted)).

20. *See*, *e.g.*, *Simon & Schuster*, 502 U.S. at 118-19, 123, 112 S.Ct. 501 (addressing compelling interests).

21. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed.Cir.2003) (noting that under the Byrd Amendment antidumping duties "bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behaviors"); 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (describing the Byrd Amendment as designed in part for "compensation to U.S. industries" and providing a way for U.S. industries "to recover monetarily" from "losses sustained as a result of unfair foreign trade practices").

Amendment's *only* purpose. As the Court of International Trade correctly noted, the statute did not compensate all injured domestic producers, but only those who filed an antidumping petition and those who supported it. *See SKF USA Inc.*, 451 F.Supp.2d at 1361-62.

The government disagrees, arguing that the statute's only purpose was to compensate those who are injured by dumping, and that the statute simply used petition support as a surrogate for injury. In other words, the government argues that the sole purpose of the Byrd Amendment's support requirement was to identify those producers suffering the greatest injury, asserting that the Byrd Amendment distributions are "not based upon the viewpoint expressed" in antidumping proceedings. Resp./Reply Br. of Def.-Appellant U.S. Customs & Border Protection at 15, 20. We find this suggestion simply implausible in light of the statute's explicit restriction that only "a petitioner or interested party in support of the petition," 19 U.S.C. § 1675c(1)(A), may receive Byrd Amendment distributions, the absence of any evidence in the legislative history that the support requirement was designed as a proxy for injury, and the availability of far more direct and accurate methods of measuring injury.[22]

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22. Indeed, the ITC itself determines that parties may suffer material injury even though they have not supported a petition. *See* U.S. Int'l Trade Comm'n, *Certain Bearings From China*, *France*, *Germany*, *Hungary*, *Italy*, *Japan*, *Romania*, *Singapore*, *Sweden*, *and the United Kingdom (Review)*, at 46,

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We turn then to the question of whether this subsidiary purpose renders the statute unconstitutional under the First Amendment.

SKF's theory is that the Byrd Amendment's restriction of distributions to antidumping petition supporters is impermissibly designed to penalize those who oppose antidumping petitions. SKF asserts that the Byrd Amendment "plainly discriminates among participants in an antidumping investigation on the basis of viewpoint by granting a financial benefit only to those domestic producers who publicly indicated support for a particular investigation." Br. Pl.-Cross Appellant SKF USA Inc. 40 (internal quotation marks omitted). SKF argues that the Byrd Amendment violates the First Amendment because "a manufacturer who opposes an investigation is penalized . . . for expressing its views on the matter." *Id.* As the dissent points out, Dissenting Op. at 1364, if this were the purpose of the Byrd Amendment, it might well render the statute unconstitutional under Supreme Court cases such as *Speiser v. Randall*, 357 U.S. 513, 529, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 832, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Legal Services Corp.*

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Publication 3309 (June 2000) ("The level or extent of industry support for continuation of an [antidumping] order alone cannot be dispositive, for we . . . are required to assess independently whether revocation [of the order] is likely to result in the continuation or recurrence of material injury.").

v. Velazquez, 531 U.S. 533, 548, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), each of which held unconstitutional the distribution of a government benefit designed to favor the speech preferred by the government.

However, this construction of the statute is not compelled or even supported by the available evidence. Neither the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the Byrd Amendment was to suppress expression.[23] Parties who are awarded antidumping distributions under the Byrd Amendment 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 Byrd Amendment does not prohibit opposing views but merely promotes the efforts of those who support enforcement.

An alternative construction also exists that is both more consistent with the available evidence of legislative intent and may save the statute. Under this construction, the purpose of the Byrd Amendment's

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23. There is nothing in the legislative history of the Byrd Amendment to suggest that its purpose was to suppress expression. The legislative history addresses the primary purpose of the Byrd Amendment, to compensate injured parties. *See* 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (referring to "our injured domestic industries" and describing the Byrd Amendment as designed in part to "help injured U.S. industries recover").

limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings. This interpretation is not only consistent with the statutory language but also is supported by the stated purpose to strengthen enforcement of the trade laws. Congressional findings supporting the Byrd Amendment state that "United States unfair trade laws have as their purpose the restoration of conditions of fair trade" and that "injurious dumping is to be condemned." Pub.L. No. 106-387, § 1002, 114 Stat. at 1549A-72; *see also* 146 Cong. Rec. 23,117 (2000) (statement of Sen. Byrd) (describing the Byrd Amendment as necessary to "deter unfair trade practices"). These findings also state that "continued dumping . . . after the issuance of antidumping orders . . . can frustrate the remedial purpose of the laws" to the detriment of "domestic producers . . . small businesses and American farmers and ranchers" and that the "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." Pub.L. No. 106-387, § 1002, 114 Stat. at 1549A-72-73.

The dissent rejects this interpretation, relying primarily on the government's representations at oral argument that the Byrd Amendment is not designed to reward those who assist in enforcement. Dissenting Op. at 1365-66. We disagree. First, the government's views that the Byrd Amendment was not designed to reward parties assisting the government is part and parcel of the government's unsuccessful effort in this litigation

(at odds even with the government's position before the World Trade Organization)[24] to suggest that the Byrd Amendment compensation scheme is only designed to compensate affected parties, a position which both the majority and the dissent reject.

Second, the views of the government as litigator are simply not binding on the issue of Congressional intent. Indeed, the Supreme Court has repeatedly rejected the government's litigation views in construing Congressional statutes. *See*, *e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646-47, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) (recognizing and then rejecting the government's interpretation of a statute); *United States v. Reorganized CF & I Fabricators of Utah*, *Inc.*, 518 U.S. 213, 223-24, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (rejecting the government's interpretation of a tax statute).

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24. *See* Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.502, WT/DS217/R, WT/DS234/R (Sept. 16, 2002), *available at* http:// www. wto. org/ english/ tratop_ e/ dispu_ e/ 217_ 234 r_ a_ e. pdf (stating as the United States position in a World Trade Organization proceeding that the Byrd Amendment "has nothing to do with the administration of the anti-dumping and countervailing duty laws" and that "[t]he amount of the [Byrd Amendment] distributions have [sic] nothing to do with the injury to the domestic producer or the recovery of 'damages' by the domestic producer").

Third, the government, while rejecting the reward construction, does not remotely support the dissent's suppression construction.

Fourth, and most importantly, the government's arguments cannot relieve us of our obligation to construe the Byrd Amendment to avoid a finding of unconstitutionality. This obligation extends to the ascertainment of a statute's purpose. Thus, for example, in *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 29 S.Ct. 527, 53 L.Ed. 836 (1909), the Supreme Court rejected the government's interpretation of the statutory purpose, concluding that if the Court adopted the government's view of the "result intended to be accomplished" by the statute, the Court would need to address several "grave constitutional questions." 213 U.S. at 404-05, 406 (1909). The Court upheld the statute by adopting a view of the purpose of the statute different from that of the government, noting that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 408, 412. So too, in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), the Supreme Court upheld an immigration statute's civil detention provisions by interpreting them to be limited in scope in order to avoid "a serious constitutional problem." *Id.* at 690, 121 S.Ct. 2491. The Court concluded that there was no "clear indication of congressional intent" that the statute had only the purposes asserted by the government. *Id.* at 697, 121 S.Ct. 2491. Here too,

as we have discussed, the reward construction of the Byrd Amendment is reasonable.[25]

Finally, if we were to view this case as involving the construction of statutory language rather than an exercise in ascertaining statutory purpose, the result would be the same. The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views. Indeed, in some respects a limiting construction of the statute is necessary to cabin its scope so that it does not reward a mere abstract expression of support.[26] The Supreme Court has

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25. Relying on *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), the dissent suggests that only interests asserted by the government in litigation may be considered. Dissenting Op. at 1368-69. *Western States* stands for no such proposition. There the statute was on its face designed to (and did) prohibit speech. The Court declined to consider a justification for the prohibition that was not supported by the legislative history or the government in argument. *See Western States*, 535 U.S. at 373-74, 122 S.Ct. 1497. Here there is no prohibition, and in addressing the constitutional question we are left to choose between two constructions, neither of which is urged by the government: a purpose to suppress expression, or a purpose to reward assistance. Nothing in *Western States* remotely suggests that we can or should adopt the construction that renders the statute unconstitutional and that is less likely in light of the statute's history.

26. Thus, we construe the Byrd Amendment's language providing for payments to a "petitioner or interested party in (Cont'd)

frequently adopted limiting constructions of statutory language not suggested by the government. For example, the Court in *DeBartolo* adopted a limiting construction of a provision of the National Labor Relations Act despite the broad construction urged by the Board. *See DeBartolo*, 485 U.S. at 575, 108 S.Ct. 1392; *see also United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 868, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (Kennedy, J., dissenting) ("We have not considered ourselves foreclosed from adopting saving constructions the parties failed to suggest.").

We proceed to consider whether the reward construction would make the statute constitutional. To be sure, the reward construction does not render the First Amendment irrelevant. The Supreme Court has held that the First Amendment right to petition includes the right to petition the courts (and administrative agencies) for relief, so long as the petition is not objectively baseless. Thus, in *BE & K Construction Co. v. NLRB*, the Court held that the National Labor

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support of the petition" to only permit distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions). In other words, we agree with the Court of International Trade to the extent that it construed the Byrd Amendment to permit distributions to those who "participated." *SKF USA Inc.*, 451 F.Supp.2d at 1365. Each of the supporters in this case responded to an ITC questionnaire and thus participated actively in the proceeding.

Relations Board could not impose liability on an employer for litigating an unsuccessful lawsuit against a union where the lawsuit was not objectively baseless, because such litigation was protected by the First Amendment. 536 U.S. 516, 529-30, 536-37, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002). In *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, the Court held that the First Amendment barred the imposition of antitrust liability for commencing litigation that was not objectively baseless. 508 U.S. 49, 51, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642, (1972) (recognizing that the First Amendment right to petition extends to petitioning "administrative agencies . . . and to courts").

Under that line of cases, we have little doubt that SKF's opposition to the antidumping petition here is protected First Amendment activity.[27] But as the Supreme Court has made explicitly clear, its holding in *BE & K Construction* that litigation enjoys First Amendment protection does not suggest that it is

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27. *See, e.g., Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1377 (Fed.Cir.2004) (applying *Professional Real Estate Investors* to state-law tort claims and noting that "[a] plaintiff claiming that a patent holder has engaged in wrongful conduct by asserting claims of patent infringement must establish that the claims of infringement were objectively baseless"); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369 (Fed.Cir.1998) ("[S]ham litigation requires more than a failed legal theory." (citing *Prof'l Real Estate Investors*, 508 U.S. at 60-61 & n. 5, 113 S.Ct. 1920)).

unconstitutional to reward prevailing parties. The Court stated that "nothing 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.*, 536 U.S. at 537, 122 S.Ct. 2390. Nor do the Supreme Court's cases suggest 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. In other words, the First Amendment, at least in some circumstances, does not bar rewarding parties who assist the government in litigation, even if such rewards disadvantage a losing party that asserted an unsuccessful defense that is not objectively baseless.

At the same time, the Supreme Court's right to petition cases do not establish a standard for determining when such rewards would be permissible and when, if ever, they would be forbidden by the First Amendment. We think that rewarding those who support government enforcement is at least constitutional if those provisions satisfy the standards governing commercial speech. While the commercial speech doctrine typically applies to speech proposing a commercial transaction, it has been applied as well to regulation of other activities of a commercial nature. *See*, *e.g.*, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir.2008) (upholding a statute regulating the data mining of physician prescription histories as commercial speech). In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* itself, the Supreme Court broadly defined "commercial speech"

as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Rewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation. The well established *Central Hudson* test seems appropriate.[28] *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343.

Under *Central Hudson*, regulation of lawful and non-misleading commercial speech is permissible if (1) "the asserted governmental interest is substantial," (2) "the regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." *Id.* The Byrd Amendment satisfies this test, even if we view the Byrd Amendment as regulatory in nature.[29]

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28. Even if we apply the test for speech combined with conduct in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for reasons that are clear from the text the Byrd Amendment would still be constitutional.

29. There is a serious question as to whether the Byrd Amendment should be treated as regulatory at all, since it merely rewards successful applicants. Alternatively, it might also be possible to view the Byrd Amendment as legitimately promoting the government's viewpoint. *See Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 546, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). We need not reach that question here.

First, preventing dumping is a substantial government interest. Congress has broad powers under the Constitution to regulate trade. *See* U.S. Const., Art. I, § 8, cl. 3; *see also Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56, 53 S.Ct. 509, 77 L.Ed. 1025 (1933) (Congress has "plenary" power to regulate foreign commerce); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193, 6 L.Ed. 23 (1824). In addition, "[s]o long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)). No party here questions the authority of the government to ban dumping or to spend money to enforce the antidumping laws.

Second, the Byrd Amendment directly advances the government's substantial interest in trade law enforcement by rewarding parties who assist in this enforcement. The government has a substantial interest in rewarding those who assist in the enforcement of government policy. We are not aware of any Supreme Court case that rejects the legitimacy of such rewards. Indeed, given its limited resources, it is now common for the government to reward those who assist in enforcing government policies through litigation or administrative proceedings. Such rewards may take a variety of forms. For example, qui tam actions reward private parties for successfully bringing suit on behalf

of the government.[30] Such rewards have a long history. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77, and nn. 5-7, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (describing the history of qui tam and informer statutes in England and the United States). Other statutes do not authorize private parties to commence the actions but allow the private parties a portion of the government's recovery or otherwise reward the private parties' assistance to the government. *See* 26 U.S.C. § 7623 (awarding a portion of the collected proceeds to whistleblowers who assist the Internal Revenue Service in detecting tax underpayments); 19 U.S.C. § 1619 (allowing compensation of informers who help enforce the customs laws). The government also rewards parties who vindicate government policy through the award of attorney's fees to successful plaintiffs, for example, in actions under Title VII of the Civil Rights Act of 1964 and other statutes.[31]

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30. *See* 31 U.S.C. § 3730(b) (permitting private parties to sue as qui tam relators on behalf of the government under the False Claims Act, 31 U.S.C. § 3729, which provides penalties and damages for presenting false or fraudulent monetary claims to the government); *Id.* § 3730(d) (rewarding False Claims Act qui tam relators with between 10 and 30 percent of the government's recovery).

31. *See*, *e.g.*, S.Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (discussing the Civil Rights Attorney's Fees Awards Act of 1976: "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have

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The government's authority to reward those who assist in enforcement is generally unquestioned, and as discussed above, the Supreme Court's decision in *BE & K Construction* appears to conclude that such awards are generally permissible under the First Amendment. The Supreme Court's decision in *Legal Services Corp. v. Velazquez* is not to the contrary. In *Velazquez*, the Supreme Court invalidated Congressional restrictions that barred government-funded legal services attorneys "from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution." 531 U.S. at 537, 121 S.Ct. 1043. *Velazquez* hardly suggests that the government could not reward those who assist in supporting the validity of federal statutes. It rests entirely on the proposition that legal services lawyers did not perform that role. Rather they represented the interests of independent clients (who might or might not support the legislation) and not the interests of the government.[32]

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a meaningful opportunity to vindicate the important Congressional policies which these laws contain."); 42 U.S.C. § 1973/(e) (allowing attorney's fees to be awarded to prevailing parties other than the United States in the enforcement of voting rights).

32. The Byrd Amendment is also unlike the city ordinance granting casino development preferences only to developers promoting the passage of gambling legislation. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich.*

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In contrast, the Byrd Amendment—like qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees—shifts money to parties who successfully enforce government policy. It is significant here that those who bring and support antidumping petitions receive Byrd Amendment distributions only if the antidumping petition is successful. The Byrd Amendment does not reward unsuccessful efforts.[33] At bottom, neither SKF nor its supporting amici appear to contend that parties providing significant assistance to the government in enforcing the antidumping laws may not be rewarded.

The remaining question is whether the Byrd Amendment is overly broad. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. At oral argument SKF agreed that petitioners in antidumping proceedings

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Gaming Control Bd., 172 F.3d 397, 409-10 (6th Cir.1999) (holding that the ordinance was "content-based" and thus subject to strict scrutiny review under the First Amendment). The ordinance at issue in *Lac Vieux* did not reward the achievement of the enforcement of government policy through litigation, but instead involved "political support" for legislative efforts. *Id.* at 408.

33. Fewer than half of the antidumping petitions brought from 1980 to 2006 were successful. Of the 1,110 antidumping cases, 469 or 42.3% received a final affirmative ITC determination. *See* (U.S. Int'l Trade Comm'n, *Import Injury Investigations Case Statistics (FY 1980-2006)*, at 3 n. 6 (January 2008), *available at* www. usitc. gov/trade_remedy/Report-01-08-PUB.pdf).

supply substantial assistance to the government in enforcing the trade laws. While in theory Commerce may itself initiate an antidumping duty investigation under 19 U.S.C. § 1673a(a), it is common for the government to rely on the filing of a private party petition with Commerce for an antidumping duty investigation under 19 U.S.C. § 1673a(b).[34] Not only do petitioners call the government's attention to the existence of a violation (similar to an informer), they provide substantial assistance during the course of investigations. The general role of an antidumping petitioner is to gather and present information reasonably available to it in order to support its allegations that dumping is occurring and materially injuring a domestic industry. *See* 19 U.S.C. § 1673a(b)(1); 19 C.F.R. § 351.202(b); 19 C.F.R. § 207.11. In the antifriction bearing petition underlying this case, petitioner Torrington prepared and submitted the petition and then at two ITC proceedings appeared through counsel and submitted briefs to support its arguments. The Byrd Amendment's reward of such assistance serves to advance the government's interest in enforcing its trade laws.[35]

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34. *See* 19 C.F.R. § 351.202(a) ("The Secretary [of Commerce] normally initiates antidumping and countervailing duty investigations based on petitions filed by a domestic interested party.").

35. The dissent rejects the view that rewarding petition supporters satisfies this third prong of the *Central Hudson* test. Dissenting op. at 1373-74. For the reasons stated in the text, we disagree. Notably, the dissent fails to explain why an even narrower construction of the statute—urged by Timken—limiting the rewards to petitioners alone would not render the statute constitutional.

However, SKF appears to contend that the government's interest does not extend to rewarding those who merely support the petition.[36] The support requirement in the Byrd Amendment reflects the ITC's practice of asking questionnaire recipients to advise the ITC whether they support, oppose, or take no position on an antidumping petition. This support question is part of the ITC's material injury investigation and is not designed solely to determine eligibility for Byrd Amendment distributions. This practice indeed was established many years before the passage of the Byrd Amendment in 2000. *See*, *e.g.*, J.A. 73 (Producers' Questionnaire in the ITC's antifriction bearings antidumping duty investigation in 1989); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 981 (Fed.Cir.1994) (referring to the support question in a 1987 ITC antidumping investigation questionnaire). Those who support antidumping petitions typically fill out questionnaires from the ITC. Each of the successful Byrd Amendment claimants here did so.

While those supporting a petition by completing a questionnaire may supply less assistance than petitioners, the *Central Hudson* test does not require perfect correspondence of means and ends. As the Supreme Court held in *Board of Trustees of the State*

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36. However, SKF itself recognizes the contribution made by petition supporters: "[i]t is based on the information supplied by the domestic producers that participate in an investigation that the ITC reaches an injury determination, which leads to the issuance of an order." Br. Pl.-Cross Appellant SKF USA Inc. at 48.

University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the "not more extensive than is necessary" portion of the *Central Hudson* test requires "a fit that is not necessarily perfect, but reasonable" and "leave[s] . . . to governmental decisionmakers to judge what manner of regulation may best be employed." *See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (upholding a statute's "incidental burden on speech" under the First Amendment because "[i]t suffices that the means chosen by Congress add to the effectiveness of" the government's substantial interest, applying the expressive conduct test formulated in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 117 (1st Cir.2005).

ITC questionnaires in particular are extremely detailed, requesting several years of data on a domestic producer's shipments, employment, sales, finances, pricing, customers, and competitors. *See*, *e.g.*, U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, *available at* http:// www. usitc. gov/ trade_ remedy/ 731_ ad_ 701_ cvd/investigations/question/USProducer Questionnaire.pdf. In proceedings before the World Trade Organization, the government has recognized that the costs of responding to such questionnaires are substantial. *See* Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.834, WT/DS217/R, WT/DS234/R, (Sept. 16, 2002), *available at* http:// www. wto. org/ english/ tratop_ e/

dispu_ e/ 217_ 234 r_ a_ e. pdf (suggesting in a World Trade Organization proceeding that the cost of filing or supporting a U.S. antidumping petition would be "a million plus dollars"). The record here demonstrates that petition supporters in the antifriction bearing antidumping investigation spent substantial sums preparing their questionnaire responses. Indeed, the government has gone so far as to suggest that Byrd Amendment distributions are not of sufficient size to adequately compensate those who support such petitions for their efforts. *See id.* ("The costs of participating in an investigation for an industry, already materially injured or threatened with material injury, could be far greater than the [potential Byrd Amendment] disbursements received years later.").

To be sure, domestic industry participants opposing the petition are also required to fill out questionnaires, as SKF did in this case. However, Congress could permissibly conclude that it is not required to reward an opposing party.

Opposing parties' interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping. Indeed, SKF here undertook a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case. At the ITC's April 21, 1988, preliminary determination conference, SKF urged through counsel that Torrington's petition be denied, and provided an analysis of data to refute Torrington's assertion that

the U.S. antifriction bearing industry was being or was about to be materially injured by dumping. At the ITC's March 30, 1989, final determination hearing, SKF urged through counsel that the domestic antifriction bearing industry was not being materially injured by dumping and was not threatened with material injury. To support this argument, SKF's president testified that the history of the production capacity, capital investments, and sales prices of the domestic antifriction bearing industry demonstrated that it was not being materially injured. SKF submitted an economic analysis brief, and at the hearing SKF's economic expert, Dr. Peter Linneman, a professor at the Wharton School of the University of Pennsylvania, testified about how his pricing analysis of the antifriction bearing industry showed no evidence of actual or threatened material injury. SKF's counsel also introduced testimony from the executives and counsel of several foreign antifriction bearing producers that opposed Torrington's petition.

Opponents may equally impede the investigation simply by refusing to cooperate. This is recognized by the statute itself, which recognizes that such failure to cooperate is a serious problem, and allows Commerce and the ITC to use "facts otherwise available" in making antidumping determinations when a party "withholds information that has been requested," "fails to provide such information," "significantly impedes a proceeding," or provides unverifiable information. 19 U.S.C. § 1677e(a). The statute further allows Commerce and the ITC to find that a party has "failed to cooperate by not acting to the best of its ability to comply with a

request for information," and to subject such an uncooperative party to "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" when Commerce and the ITC make antidumping determinations. 19 U.S.C. § 1677e(b); *see also* H.R.Rep. No. 103-826 (Part I), at 105 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3877. At various times we have upheld the efforts of Commerce and the ITC to compel a response from recalcitrant respondents or use the "facts available" mechanism.[37]

At best the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery. There is no suggestion that such parties must be favored by an award of attorney's fees or other compensation similar to that given to prevailing plaintiffs who successfully enforce government policy. It was thus rational for Congress to conclude that those who did not support the petition should not be rewarded. We emphasize again that Congress rewards only successful enforcement

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37. *See*, *e.g.*, *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir.2003) ("[T]he statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do."); *F. lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("[I]t is within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative.").

effort. Where the petition is unsuccessful, neither petition supporters nor opposers receive government payments under the Byrd Amendment.

In summary, the Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment.[38]

III

Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.

SKF's equal protection challenge to the Byrd Amendment is based on the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *see also Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975))). The applicable standard is rational basis review. *See Hodel v. Indiana*, 452 U.S. 314, 331, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("Social and economic legislation . . . that does not employ suspect

38. For the same reason, the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech.

classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979))). We reject SKF's equal protection challenge because we find that the Byrd Amendment is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping. The Byrd Amendment does not violate the equal protection guarantees of the Fifth Amendment.

In light of our disposition of this case, SKF's claim that the Court of International Trade improperly denied SKF's amended certification is moot.

CONCLUSION

For the foregoing reasons, the decision of the Court of International Trade is reversed.

REVERSED

COSTS

No costs.

LINN, Circuit Judge, dissenting.

The so-called "petition support requirement" of the Byrd Amendment requires that a company publicly express "support of the petition" resulting in an antidumping duty order in order to be eligible to receive any funds collected as a result of the order. 19 U.S.C. § 1675c(b)(1)(A) (2000) (repealed 2006). Put simply, under the petition support requirement, if a domestic company publicly expresses the viewpoint that the government should impose a tariff on an importer, then the domestic company is eligible to receive some part of that tariff. If the domestic company either expresses the viewpoint that a tariff should not be imposed or takes no public position, it is not eligible.

The majority concedes that the petition support requirement implicates the First Amendment, but it concludes that the Byrd Amendment satisfies the test for regulation of commercial speech, because "reward[ing] injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings" is "similar to commercially contracting with them to assist in the performance of a government function." Maj. Op. at 1352, 1355. I respectfully disagree.

The Byrd Amendment has nothing to do with rewarding helpfulness during trade investigations as the majority suggests. The majority errs by relying on the statutory construction doctrine of constitutional avoidance to graft its "reward" purpose onto the statute,

when that purpose is not apparent in the statutory text or legislative history and has been expressly disclaimed by the government in this case. The majority compounds this error by using its "reward construction" of the petition support requirement to justify evaluating the constitutionality of the requirement under the more lenient commercial speech doctrine, when, in fact, the petition support requirement regulates pure political speech and—by the language of the statute itself—"petition[ing]." *See* U.S. Const. amend. 1 ("Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances"). Because I would conclude that the petition support requirement is an unconstitutional viewpoint discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny, I respectfully dissent.[1]

I

Under 19 U.S.C. § 1673, an antidumping duty can only be imposed if the Department of Commerce ("Commerce") first determines that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and the International Trade Commission ("ITC") then determines that a domestic industry "is materially injured, or . . . is threatened with material injury." The purpose of an

1. While I disagree with section II of the majority's opinion, I agree with the majority's analysis of the Court of International Trade's jurisdiction as set forth in section I of its opinion. *See* Maj. Op. § I.

antidumping investigation is to determine whether these two criteria have been satisfied. *See*, *e.g.*, 19 U.S.C. § 1673a(a)(1) ("An antidumping duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1673 of this title exist.").

Critically, an antidumping duty order is neither required nor even permitted in every case of dumping. As the majority correctly points out, "dumping" is merely "the sale or likely sale of goods at less than fair value." *Id.* § 1677(34). But an antidumping duty order requires an additional finding of material injury to the domestic industry. The companies that make up the domestic industry may reasonably disagree as to whether particular dumping has "materially injured" the domestic industry as a whole. Indeed, recognizing the complex and somewhat subjective nature of the material injury requirement, we have held that the ITC "has broad discretion" in determining whether the domestic industry has been materially injured. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336-37 (Fed.Cir.2005) (concluding that ITC's methodology in assessing material injury is entitled to *Chevron* deference). Thus, one member of the domestic industry may honestly believe that the industry is not harmed by particular dumping, while another member may honestly believe that the industry has been harmed. It is the ITC's obligation to sort out these conflicting views in an antidumping duty investigation.

Appendix A

During the course of the ITC's investigation, the ITC submits questionnaires to domestic producers in the affected industry. As the majority notes, these questionnaires are "extremely detailed, requesting several years of data on a domestic producer's shipments, employment, sales, finances, pricing, customers, and competitors" and "the costs of responding to such questionnaires are substantial." Maj. Op. at 1358. Yet all members of the domestic industry who receive such a questionnaire are required by law to complete it. *See* 19 U.S.C. § 1333(a), (f) (authorizing ITC to request information, issue subpoenas, and demand statements under oath); *see also* U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire ("*Producers' Questionnaire*"), at 1, *available at* http:// www. usitc. gov/ trade_ remedy/ 731_ ad_ 701_ cvd/ investigations/ question/ USProducer Questionnaire. pdf ("This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession. . . ."). Moreover, each questionnaire requires that an authorized company official certify the correctness of all responses. *Producers' Questionnaire* at 1.

The questionnaire includes various questions related to the harm that the member of the domestic industry has suffered as a result of alleged dumping. Specifically, the questionnaire includes question III-14, which asks whether the domestic company "experienced any actual negative effects on its return on investment or its growth, investment, ability to raise capital,

existing development and production efforts (including efforts to develop a derivative or more advanced version of the product), or the scale of capital investments as a result of imports of" the allegedly dumped product. *Id.* at 13. Likewise, question III-15 asks whether the domestic company "anticipate[s] any negative impact of imports of" the allegedly dumped product. *Id.* Questions IV-20 and IV-21 also ask for detailed information about any lost revenues or lost sales as a result of dumping. *Id.* at 24-25.[2]

In addition to all of these questions about the harm that the alleged dumping has caused each domestic producer, the questionnaire includes, in its "General Information" section, question I-3, which asks simply "Do you support or oppose the petition?" *Id.* at 2. Question I-3 offers three possible choices with corresponding checkboxes: "Support," "Oppose," and "Take no position." *Id.* at 2.[3] It is the domestic producer's response to this question that the ITC uses to determine whether the "petition support requirement" of the Byrd Amendment has been satisfied.

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2. Similar questions appeared on the version of the questionnaire that SKF completed in 1989. *See* Final Questionnaire of SKF USA, Inc. at 106-07.

3. The equivalent to this question that appeared in the version of the questionnaire that SKF completed in 1989 was question I.2, which asked "Please indicate, by checking the appropriate box, the position that your firm takes with respect to the petition. (CHECK ONLY ONE)" and offered the choices "Supports the petition," "Opposes the petition," and "Does not wish to take a position on the petition." *See* Final Questionnaire of SKF USA, Inc. at 6.

Notably, Commerce also uses responses to question I-3 to determine whether a petition seeking imposition of an antidumping duty is filed "on behalf of the industry"—as is required by 19 U.S.C. § 1673a. For a petition to meet this requirement, "domestic producers or workers who support the petition [must] account for at least 25 percent of the total production of the domestic like product" and "domestic producers or workers who support the petition [must] account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition." *Id.* § 1673a(c)(4)(A)(i)-(ii). In other words, question I-3 is an opportunity for each member of the domestic industry to vote on whether a petition should or should not go forward. To go forward, the petition needs the votes of at least 25% of the domestic industry by production, and no more than 50% in opposition.

Under the Byrd Amendment, United States Customs and Border Protection ("Customs") disburses duties collected pursuant to antidumping duty orders to "affected domestic producers" who submit a certification claiming that they have incurred certain specified types of expenditures. *Id.* § 1675c. Though the ordinary meaning of "affected domestic producer" would not seem to require that the producer have taken any particular position in the antidumping duty investigation that resulted in the antidumping duty order, the Byrd Amendment includes a special definition of "affected domestic producer" that imposes just such a requirement:

The term "affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

> (A) was a *petitioner or interested party in support of the petition* with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.

Id. § 1675c(b)(1) (emphasis added).

SKF participated in the investigation that led to the antidumping order at issue in this case, but SKF opposed the petition on the ground that the domestic industry was not being materially injured by dumping. The ITC disagreed with SKF and found material injury. But even though SKF is a member of the injured industry, SKF is precluded from receiving distributions by operation of the petition support requirement, as a result of expressing its view that an antidumping duty order should not be imposed.

II

The majority begins its First Amendment analysis by reciting the well known doctrine of constitutional avoidance, which holds that "[w]here an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (*cited in* Maj. Op. at 1349). Applying this doctrine, the majority concludes that the purpose of the Byrd Amendment was not, as the government argues, only "to compensate those who are injured by dumping," Maj. Op. at 1351, but rather "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *id.* at 26. From this conclusion, the majority reasons that evaluating the petition support requirement under the commercial speech doctrine "seems appropriate," because "[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function." *id.* at 31. Applying the *Central Hudson* test for commercial speech, the majority concludes that the petition support requirement survives First Amendment scrutiny, and that the petition support requirement "is not more extensive than is necessary to serve [the government's] interest" in rewarding injured parties who assist in antidumping investigations. *Id.* at 31 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)).

While the majority opinion is well written, thoughtful, and thorough, I respectfully disagree with

several aspects of the majority's analysis. First, the majority focuses on the Byrd Amendment as a whole, rather than on the challenged portion of the Byrd Amendment—namely, the petition support requirement in the definition of "affected domestic producer." SKF does not challenge the constitutionality of imposing a duty on dumped goods that harm a domestic industry, nor does it challenge the constitutionality of distributing the duties collected as a result of antidumping orders to domestic producers. To the contrary, SKF challenges only the petition support requirement of 19 U.S.C. § 1675c(b)(1)(A). That is, SKF challenges only the aspect of the Byrd Amendment that precludes it from receiving duties solely because it answered "Oppose" to question I-3 of the investigation questionnaire. Thus, the issue is whether the petition support requirement—not the Byrd Amendment as a whole—survives First Amendment scrutiny. *See*, *e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (focusing on specific challenged clause of statute and holding that "[u]nder the strict-scrutiny test, respondents have the burden to prove that the [challenged] clause is (1) narrowly tailored, to serve (2) a compelling state interest"). Thus, it is not, as the majority suggests, the government's "interest in trade law enforcement" that matters. Maj. Op. at 1355. The relevant interest is the government's more limited interest in conditioning receipt of distributions on public support for an antidumping position.

Second, in my view, the majority's undue focus on "determin[ing] the purpose of the Byrd Amendment,"

Id. at 23, is inconsistent with the Supreme Court's First Amendment jurisprudence. The Supreme Court has made clear that it is a statute's effect on speech that matters, not its intended purpose. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (internal quotation marks omitted)). The question is not whether Congress intended the Byrd Amendment to violate the First Amendment. The question is whether it does.

To be sure, determining whether the government interest served by a restriction on speech is "compelling"—or, in some cases, "important" or "substantial"—is a part of the First Amendment analysis. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (holding that content-based restrictions on political speech in public forum must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983))); *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343 (assessing whether "the asserted governmental interest is substantial"); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (assessing

whether regulation "furthers an important or substantial governmental interest"). But the Byrd Amendment's purpose plays a much greater role in the majority's analysis than serving an important government interest. The majority uses its view of the purpose of the Byrd Amendment to shield the petition support clause from strict scrutiny under the First Amendment entirely. Specifically, the majority reasons that *because* the purpose of the Byrd Amendment was to reward injured parties who assisted government enforcement of the antidumping laws, then the petition support requirement is "similar to commercially contracting with [parties] to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation." Maj. Op. at 1355. Thus, the majority uses the purpose of the Byrd Amendment as justification for applying the more lenient *Central Hudson* test, rather than strict scrutiny. I know of no case—and the majority has cited none—in which an unambiguous statute that would otherwise be subject to strict constitutional scrutiny receives more lenient scrutiny because of its perceived purpose.

Third, I believe that the majority is incorrect in concluding that that purpose is to reward parties that assist the government in antidumping investigations. *Id.* at 1352 ("[T]he purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings."). There is nothing in the

statutory text or legislative history of the Byrd Amendment to suggest that its purpose was to reward assistance or cooperation with the government's investigation of dumping. To the contrary, the purpose of the Byrd Amendment was to compensate domestic producers injured by dumping. The text and structure of the statute itself makes that clear in specifying that distributions are made to "affected domestic producer[s]"—domestic producers that have been "affected" (i.e., injured) by dumping. 19 U.S.C. § 1675c. The majority relies on general statements in the Congressional findings that "United States unfair trade laws have as their purpose the restoration of conditions of fair trade" and that "injurious dumping is to be condemned." Maj. Op. at 1352. But neither these statements nor anything else in the statutory text says anything at all about rewarding parties for "assist[ing] government enforcement" in antidumping proceedings.

Moreover, the legislative history of the Byrd Amendment supports the view that its purpose was to compensate injured domestic producers: "Current law also does not contain a mechanism to help injured U.S. industries recover from the harmful effects of foreign dumping and subsidization." 145 Cong. Rec. S497, 497 (1999) (statement of Sen. DeWine). The majority's reliance on general statements in the legislative history—e.g., that the Byrd Amendment is necessary to "deter unfair trade practices" and that "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved"—is to no avail, because none of these statements says

anything about rewarding parties for helping to enforce trade laws. Maj. Op. at 1352.

I note further that the majority's "reward for assistance" rationale was not argued by either of the two government agencies that are parties to this appeal. To the contrary, the government argued that the purpose of the Byrd Amendment was *solely* compensation for injury, not reward for assistance: "Simply stated, as a supplement to unfair trade laws already in existence, in the [Byrd Amendment], Congress chose to provide a separate monetary remedy to a subset of domestic producers that were the *most seriously injured* by foreign unfair trade practices, and it rationally assumed that this subset of most-harmed producers would be those producers that had supported the petition." Br. of Defendant-Appellant U.S. Customs & Border Protection at 20-21 (emphasis added). At oral argument, the government expressly and repeatedly rejected the court's suggestion that the Byrd Amendment was intended to reward parties for assisting the government. *See* Oral Arg. at 14:25-31, 15:18-23 available at http:// oralarguments. cafc. uscourts. gov/ mp 3/ 2008- 1005. mp 3 (government responding to question about purpose of Byrd Amendment "to reward people who bring these antidumping petitions and those who support the petition" by stating that "[t]he purpose of this classification should not really be seen as one of rewarding"); *id.* at 25:15-31 ("There is nothing in that statute, your honor, that indicates any attempt to reward parties as opposed to provide a subsidy to American manufacturers who have been injured."); *id.* at 1:03:42-

1:04:36 ("The parties seem to be in agreement that this statute and the classification is really not that similar to the situation of relators in qui tam cases where they are providing a service to the government and receiving some amount by statute as a reward for having brought to the attention of the government fraud, waste, and abuse."); *see also id.* at 23:34-24:03 ("It was . . . apparent on the face of the findings of Congress that preceded the [Byrd Amendment] and also the floor statements of Senator DeWine and Senator Byrd that this was intended to be a remedial statute that was going to aid members of domestic industry that continue to be injured by dumping. . . .").

The majority dismisses the government's repeated statements rejecting the "reward for assistance" rationale.[4] Specifically, the majority argues that "the views of the government as litigator are simply not binding on the issue of Congressional intent." Maj. Op. at 1352. But—as the majority's own parenthetical summaries make clear—the cases that the majority cites

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4. The majority states that I "rely[ ] primarily on the government's representations at oral argument" to conclude that the purpose of the Byrd Amendment is not the "reward for assistance" rationale that the majority advances. Maj. Op. at 1352. As discussed in detail, the statutory text of the Byrd Amendment, its legislative history, the conduct of antidumping investigations in practice, and the example of this very case all make clear that the purpose of the Byrd Amendment was not to reward companies for assisting the government in antidumping investigations. The fact that the government agrees that "reward for assistance" was not the purpose of the Byrd Amendment is only one of many reasons that I would reject it.

for that proposition all address the views of the government as to the proper interpretation of ambiguous statutory language, not to the asserted *purpose* of a statute for purposes of constitutional scrutiny. *See Id.* ("*Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646-57, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) (recognizing and then rejecting the government's *interpretation of a statute*); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 223, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (rejecting the government's *interpretation of a tax statute*)" (emphases added)). The Supreme Court has recognized that it is the government's "asserted" purpose that is relevant in assessing the constitutionality of a statute—i.e., the purpose that the government as litigator asserts to justify the statute in the face of a constitutional challenge. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) ("The asserted interests . . . are undeniably important"); *Texas v. Johnson*, 491 U.S. 397, 407, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("[W]e must decide whether Texas *has asserted an interest* in support of Johnson's conviction that is unrelated to the suppression of expression. . . . " The State offers two separate interests to justify this conviction. . . .) Thus, the burden is on the government–in litigation—to identify the interest served by the regulation and to prove that it is "compelling," "substantial," or "important." *See, e.g.*, *Boos*, 485 U.S. at 321, 108 S.Ct. 1157 ("[W]e have *required the State to show* that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (internal quotation marks omitted and emphasis added)). In fact, in *Central*

Hudson—the very case that establishes the commercial speech test that the majority applies—the Supreme Court made clear that it is the interest that the government asserts in litigation challenging a regulation that is relevant for the constitutional inquiry:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the *asserted* governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest *asserted*, and whether it is not more extensive than is necessary to serve that interest.
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> *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343 (emphases added). Thus, it is the government's asserted purpose—not the "reward for assistance" purpose expressly rejected by the government—that is relevant to the First Amendment analysis here. It is not the role of the court to substitute its judgment for that of the government and to decide which interest the government should have "asserted."

The majority also relies heavily on the doctrine of constitutional avoidance, which it suggests "extends to the ascertainment of a statute's purpose." Maj. Op. at 1353. The well-established "canon of constitutional avoidance" holds that "[w]here a possible construction of a statute would render the statute unconstitutional, courts must construe the statute 'to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " *Consolidation Coal Co. v. United States*, 528 F.3d 1344, 1347 (Fed.Cir.2008) (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575, 108 S.Ct. 1392). The doctrine of constitutional avoidance is a doctrine of statutory interpretation—that is, it is relevant when the court is construing disputed statutory language. *See*, *e.g.*, *Fisherman's Harvest*, *Inc. v. PBS & J*, 490 F.3d 1371, 1377 (Fed.Cir.2007) (discussing "canon of constitutional avoidance in statutory interpretation"). In this case, there is no statutory construction to be performed. The parties do not dispute the meaning of the petition support requirement, and the parties do not dispute that, if the petition support requirement is constitutional, it was correctly applied to SKF. There is therefore no statutory construction dispute, and the doctrine of constitutional avoidance is irrelevant.

The majority, however, reasons that the doctrine of constitutional avoidance "extends to the ascertainment of a statute's purpose." Maj. Op. at 1353. That is, in the majority's view, when evaluating whether a statute serves a compelling, substantial, or important government interest, the court should look not to the

interest that is clear from the statutory text or legislative history, nor to the interest that the government actually puts forward during litigation, but rather to any interest that "would make the statute constitutional." *Id.* at 1354. I respectfully disagree. While it is proper under rational basis review to evaluate whether any hypothetical interest would render a statute constitutional, under the heightened scrutiny required by the First Amendment, we evaluate only the government's actual, asserted interest. *See*, *e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-74, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) ("The dissent describes another governmental interest. . . . Nowhere in its briefs, however, does the Government argue that this interest motivated the advertising ban. Although, for the reasons given by the dissent, Congress conceivably could have enacted the advertising ban to advance this interest, we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational. The *Central Hudson* test is significantly stricter than the rational basis test . . . ." (citations omitted)); *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."). I cannot agree that the doctrine of constitutional avoidance allows us to ignore the government's asserted purpose and substitute our own when heightened First Amendment scrutiny applies.

Moreover, though the majority cites two cases for its theory that the doctrine of constitutional avoidance extends to the "ascertainment of a statute's purpose," Maj. Op. at 1353, those cases actually involve the interpretation of statutory language—not the government interest served by the statute. In the pre-*Lochner Delaware & Hudson* case on which the majority principally relies, the Supreme Court did apply the principle of constitutional avoidance and make reference to the government's view concerning the "result intended to be accomplished" by the statutory provision at issue, but it did so solely for the purpose of construing disputed statutory language. *See U.S. ex rel Attorney Gen. v. Del. & Hudson Co*, 213 U.S. 366, 404-05, 29 S.Ct. 527, 53 L.Ed. 836 (1909) ("Let us, *as a prelude to an analysis of the [statutory] clause, for the purpose of fixing its true construction*, and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one."). Likewise, the *Zadvydas* case on which the majority relies considered the doctrine of constitutional avoidance solely for the purpose of statutory construction. *See Zadvydas v. Davis*, 533 U.S. 678, 689-90, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) ("[W]e read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's postremoval-period detention to a period reasonably necessary to bring about that alien's removal from the United States. . . . A statute permitting indefinite detention of an alien

would raise a serious constitutional problem."). I am aware of no case in which the Supreme Court has applied the doctrine of constitutional avoidance—as the majority does here—to determine the asserted purpose of an unambiguous statute in a constitutional challenge.

It also seems to me that the "reward for assistance" rationale for the Byrd Amendment makes little sense in light of the regulations governing the conduct of antidumping investigations. All members of the domestic industry who receive a questionnaire—whether they support the petition or not—are required to complete the questionnaire and to certify to its accuracy. Moreover, the ITC has the authority to subpoena any additional information that it needs from otherwise unwilling companies. *See* 19 U.S.C. § 1333(a), (f); *Producers' Questionnaire* at 1. This explains why the government admitted at oral argument that petition supporters and petition opponents provide exactly the same assistance to the government in antidumping investigations. *See* Oral Arg. 22:41-23:07 ("[W]hat the government obtains form the questionnaire responses is the same for those who supported and thereby are eligible under the classification the [Byrd Amendment] to receive these funds and for those who opposed or took no position. So, *they are also aiding the government* in a government function in that respect. Certainly that is true." (emphasis added)); *see also id.* at 18:50-19:10 ("[Companies that do not support the petition] are required by law to respond to the questionnaire in the same way that those who have answered the question checking support are required

to do so."); *id.* at 20:10-28 ("[The Court:] Is there something different that parties who support the petition provide to the government as compared to parties that don't support the petition? [The government:] Not that I'm aware of. I don't think that that is an important distinction. . . .").

The facts of this case illustrate why the purpose of the Byrd Amendment cannot have been the reward for assistance rationale that the majority suggests. The majority details the submissions that petitioner Torrington and petition supporters made during the investigation that led to the antidumping order in this case. *See* Maj. Op. at 1342 (noting that "the petition was over 200 pages in length"); *id.* at 1343-44 ("The questionnaire responses of these petition supporters were hundreds of pages long, and several of the supporters prepared responses exceeding 300 pages."); *id.* at 11 ("Petitioner Torrington's pre-hearing brief was over 200 pages long. . . ."). The majority also notes that "SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition," *id.* at 1343, but what the majority fails to point out is that SKF's questionnaire responses also totaled *more than 200 pages*. *See* Preliminary and Final Responses of SKF USA, Inc. (242 pages). In fact, if, as the majority's analysis suggests, assistance in an antidumping investigation can be measured in part by the page length of questionnaire responses, SKF was actually *more* helpful that several supporters of the petition that have received distributions under the Byrd Amendment. *See*, *e.g.*, Response of Emerson Power Transmission Co.

(122 pages). Likewise, while the majority claims that Torrington's briefing "assisted in the investigation," Maj. Op. at 1343, it fails to acknowledge that SKF also submitted briefing—totaling 163 pages—during the investigation.

To the extent that the majority recognizes SKF's participation in the antidumping investigation, the majority sees it as evidence *against* SKF, going so far as to suggest that SKF "impede[d] the investigation" by opposing it. *See Id.* at 39-40. However, SKF did nothing to impede, and merely expressed its view that the domestic industry was not being or about to be materially injured by the alleged dumping. SKF, like other petition opponents, submitted expert analysis and briefing supporting that view to the ITC. The majority does not suggest that SKF withheld any information or submitted any evidence or argument in bad faith. To the contrary, SKF's only "fault" was that the ITC ultimately disagreed with it and concluded that the domestic industry was, in fact, harmed—a decision that the ITC had not yet made at the time SKF opposed the petition, and a decision that we have held is firmly committed to the ITC's discretion. *See Nucor*, 414 F.3d at 1336 (noting ITC's "broad discretion" in assessing material injury). If taking an opposing view in a proceeding were tantamount to "impeding" an investigation, then every losing party in every action to which the government is a party (not to mention every criminal defense attorney) would be guilty of obstruction. SKF, acting in good faith, assisted in the antidumping investigation by complying with its

obligation to submit detailed questionnaire responses, by submitting expert evidence and briefing, and by providing its honest viewpoint to the ITC. The only difference between SKF and the petition supporters was that SKF thought that the ITC should have come to a different conclusion. This illustrates precisely why rewarding petition supporters for their assistance in an investigation cannot have been the Byrd Amendment's purpose.

My fourth disagreement with the majority concerns its conclusion that the First Amendment test for commercial speech "seems appropriate" in this case. Citing *Central Hudson*, the majority concludes that the Supreme Court has "broadly defined 'commercial speech' as 'expression related solely to the economic interest of the speaker and its audience.' " Maj. Op. at 1355. But *Central Hudson* did not concern whether the speech at issue—advertising by an electric company—was or was not commercial. The parties agreed that the speech was commercial. *Central Hudson*, 447 U.S. at 560-61, 100 S.Ct. 2343. The case in which the Supreme Court actually considered the definition of commercial speech came three years later. In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court considered whether informational pamphlets distributed by a contraceptive manufacturer and promoting the use of prophylactics were commercial speech. 463 U.S. 60, 62, 65-66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). The Supreme Court recognized that "the core notion of commercial speech [is] speech which does no more than propose a commercial transaction." *Id.* at 66, 103 S.Ct. 2875

(internal quotation marks omitted). Nevertheless, the Supreme Court concluded that the pamphlets were commercial speech:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that [the manufacturer] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.
>
> The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.

Id. at 66-67, 103 S.Ct. 2875 (citations omitted). The Court went on to say that "[a] company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Id.* at 68, 103 S.Ct. 2875. Thus, as one commentator has put it, speech is commercial under *Bolger* if: "(1) [i]t is an advertisement of some form, (2) it refers to a specific product, and (3) the speaker has an economic motivation

for the speech." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.3.7.2.

The speech affected by the petition support clause is not commercial speech under *Bolger*. A statement compelled in response to an ITC questionnaire is not an advertisement, nor does it refer to a specific product. SKF may have had "an economic motivation" for answering the questionnaire, but, as *Bolger* makes clear, "an economic motivation . . . would clearly be insufficient by itself to turn [speech] into commercial speech." *Bolger*, 463 U.S. at 67, 103 S.Ct. 2875; *see also Bigelow v. Virginia*, 421 U.S. 809, 818, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) ("The State was not free of constitutional restraint merely ... because appellant's motive or the motive of the advertiser may have involved financial gain. The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." (citations and internal quotation marks omitted)). To the contrary, SKF's response to the question "Do you support or oppose the petition?" is precisely the kind of "direct comment[ ] on public issues" for which it has "the full panoply of protections available" under the First Amendment.[5]

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5. The majority also relies on a recent case from the First Circuit that, as an alternative ground for its decision, reasoned that the transfer of data that identified which physicians had prescribed specific pharmaceuticals was commercial speech. *See* Maj. Op. at 1355 (citing *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54-55 (1st Cir.2008)). In that case, the First Circuit rejected

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Moreover, even if the majority were correct that the test for commercial speech is whether the regulated "expression relate[s] solely to the economic interests of the speaker and its audience," Maj. Op. at 1355, I cannot agree that this test is satisfied here. The majority reasons that "[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function, in this particular context assisting in the enforcement of government policy in litigation." *Id.* The majority's analysis, however, does not actually address the speech at issue. The petition support clause conditions receipt of funds on expressing support for an antidumping petition. The question is whether *that* regulated expression—namely, expressing support for an antidumping petition—"relate[s] solely to the economic interests of the speaker and its audience." The majority's view that companies who support a petition are more likely to provide assistance to the government and therefore enter into a quasi-

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a "narrower definition of commercial speech limited to activities 'propos[ing] a commercial transaction,' "—and instead reasoned that the data transfer at issue "at most embod[ied] expression related solely to the economic interest of the speaker and its audience." *IMS*, 550 F.3d. at 54. The *IMS* case plainly involved the sale of data—i.e., a commercial transaction that involved payment for the supposed "speech," which the court reasoned was actually not speech at all, but rather conduct. *Id.* To the extent that the majority concludes that *IMS* stands for the broader proposition that any speech that involves the "economic interests of the speaker" is commercial speech, I respectfully submit that either the majority's reading of *IMS* is incorrect, or *IMS* was incorrectly decided.

contractual relationship is immaterial. The issue is simply whether the expression of support itself relates solely to the economic interests of the company and the audience. Even setting aside whether a statement of support for a petition reflects the economic interests of the company making a statement, it cannot be said that the petition support requirement relates solely to the economic interest of the audience—here, the ITC. The ITC had no economic interest in whether SKF expressed support for the petition or did not. Thus, I cannot agree that the majority's "commercial contract" analogy, even if correct, would support application of the commercial speech doctrine under *Central Hudson*.

Further, it is noteworthy that the majority's view that the commercial speech test "seems appropriate" is not a view shared by any party to this case. Nowhere in any of its briefing does either the government or the ITC argue that the commercial speech doctrine is applicable. Moreover, appellant Timken expressly argues that the commercial speech doctrine is *not* applicable. *See* Response—Reply Br. of Defendant-Appellant Timken U.S. Corporation at 41 n. 48 ("Providing factual information to the ITC bears no resemblance to the concept of commercial speech, and, by definition, the [Byrd Amendment] does not involve the regulation of commercial speech, which has generally been defined as 'speech proposing a commercial transaction.' "). I agree with the parties that the commercial speech doctrine is inapplicable.

Fifth, even if the majority were correct that *Central Hudson*'s test for the constitutionality of commercial speech were the correct test, I cannot agree with the

majority that the petition support requirement would survive that test. In *Central Hudson*, the Supreme Court held that:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. Even assuming that the other elements of the *Central Hudson* test could be met, the petition support requirement cannot satisfy the final element, because it cannot be said to be "not more extensive than is necessary to serve [the asserted] interest." *Id.*

If, as the majority reasons, the government interest furthered by the petition support requirement is "to reward injured parties who assisted government enforcement" in antidumping investigations, Maj. Op. at 1352, then the petition support requirement is far more extensive than is necessary to serve that interest. A much more straightforward method of ensuring the cooperation of private parties in antidumping investigations would be simply for the ITC to compel the cooperation of uncooperative parties through the subpoena process—as

it already has the authority to do. *See* 19 U.S.C. § 1333(a), (f). Moreover, to the extent that Congress intended to compensate parties for the expense of preparing petitions or questionnaire responses as the majority suggests, *see* Maj. Op. at 1358-59, it could simply authorize reimbursement of reasonably incurred expenses to parties that cooperate willingly—a far less restrictive measure than precluding petition opponents from receiving any remedial duties. Reasoning that *Central Hudson* does not require a perfect fit between means and ends, the majority argues that "[t]hose who support antidumping petitions typically fill out questionnaires from the ITC." *Id.* at 1358. But the majority ignores that all *recipients* of questionnaires are *required* to complete them—whether they support or oppose the petition. Indeed, by definition, a party excluded from receiving disbursements as a result of checking the "Oppose" box in response to questionnaire question I-3 has *necessarily* filled out the questionnaire. While *Central Hudson* may not require a perfect correspondence of means and ends, I cannot agree that the petition support requirement places is "not more extensive than necessary" to the furtherance of an alleged interest in rewarding cooperation in an antidumping investigation.[6]

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6. The majority questions my seeming failure to explain why an even narrower construction of the Byrd Amendment—"limiting the rewards to petitioners alone"—would not meet the final requirement of the *Central Hudson* test. *See* Maj. Op. at 1357 n. 35. Because the majority does not adopt this narrower construction, the significance of the majority's criticism is not clear. In any event, as discussed in detail below, I disagree that limiting distributions to petitioners alone would cure the First Amendment problem. *See infra* at 1357-58.

Even if the interest served by the petition support requirement were the interest identified by the government—namely, "provid[ing] a separate monetary remedy to a subset of domestic producers that were the most seriously injured by foreign unfair trade practices," Br. of Defendant-Appellant U.S. Customs & Border Protection at 20-21—I would still conclude that it fails to satisfy the final element of the *Central Hudson* test. It may be true that a party that is more seriously injured by dumping is more likely to check the "Support" box in response to question I-3 than a party that is less seriously injured. But *Central Hudson* requires more: that the regulation be not more extensive than necessary.

If the government interest is to compensate the most seriously injured domestic producers, the ITC could look to the detailed financial data provided in response to the rest of the questionnaire, determine for itself which producers are most seriously injured, and distribute collected duties accordingly. Because these better proxies exist (and, in fact, are already part of the questionnaire), the government is wrong to assert that a company's response to question I-3 places a burden on speech that is not more extensive than necessary to accomplish its goal of compensating the most seriously injured producers.

Not only is the petition support requirement not the best proxy for injury, it is not even a particularly good one. As the Court of International Trade found, "there are a multitude of reasons why an entity might decide to support, oppose, or take no position in an antidumping investigation" that are unrelated to the seriousness of its injury. *SKF USA Inc. v. United States*, 451 F.Supp.2d 1355,

1362 (Ct. Int'l Trade 2006). A domestic company, like SKF, that is a subsidiary of a foreign importer, might oppose a petition because it concludes that the worldwide injury caused to its parent by an antidumping duty order would be greater that the injury that the subsidiary suffers domestically as a result of dumping. More altruistically, a company might simply have the ideological view that any restrictions on trade—including restrictions on dumping—are bad. It might be willing to endure serious injury resulting from dumping, rather than support a petition that would, in its view, restrict free trade. Finally, as was the case with amicus Giorgio Foods, Inc., a domestic producer might oppose a petition to protect business relationships in foreign countries having nothing to do with the domestic market, or it might decline to support a petition for fear of retaliation in export markets. *See* Br. of Amicus Curiae Giorgio Foods, Inc. & PS Chez Sidney LLC at 2, 9-10. To conclude summarily, as the government does, that the petition support requirement identifies the most seriously injured domestic producers evinces a naive view of the economics of international trade. Thus, I cannot conclude that the final element of the *Central Hudson* test would be met, applying either the majority's or the government's asserted government interest.[7]

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7. In a footnote, the majority asserts an alternative basis for affirmance: "[e]ven if we apply the test for speech combined with conduct in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for reasons that are clear from the text the Byrd Amendment would still be constitutional." Maj. Op. at 1355 n. 28. I respectfully disagree. For the same reasons that it cannot satisfy *Central Hudson*'s "not more

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Sixth and finally, the majority's analogy to qui tam actions is simply inapposite. The primary federal qui tam statute is the False Claims Act, 31 U.S.C. §§ 3729-33. Under § 3730(b) of the False Claims Act, a private person may bring an action in the name of the government against a defendant believed to have knowingly presented a false or fraudulent claim for payment to the government. If the defendant is proven to have presented a false claim, the defendant is liable to the government, and the private party who initiated the action may receive up to a thirty percent share of the proceeds of the action or settlement, and reasonable expenses, costs, and attorneys fees. *Id.* § 3730(d). *See generally Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 122-23, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003) (describing qui tam provisions of False Claims Act). Qui tam actions for false patent marking work in the same way. *See* 35 U.S.C. § 292(b) ("Any person may sue for the penalty [of $500 per offense for falsely marking an article as patented or 'patent pending'], in which event one-half shall go to the person suing and the other to the use of the United States.").

The majority analogizes antidumping proceedings to qui tam actions, reasoning that the operation of the Byrd Amendment, like a qui tam proceeding, "reward[s] private parties for successfully bringing suit on behalf of the

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extensive than is necessary" requirement, the Byrd Amendment cannot meet *O'Brien*'s requirement that any "incidental restriction on alleged First Amendment freedoms [be] no greater than essential to the furtherance of [the government's asserted] interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

government." Maj. Op. at 1356. It carries this analogy further, arguing that "SKF here undertook a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case" by opposing the antidumping petition. *Id.* at 1358-59. To be sure, Commerce and the ITC rely on private companies—namely, members of the domestic industry that have been harmed by dumping—to bring dumping to its attention through the petition process. But beyond that, the analogy to qui tam proceedings fails. In a qui tam case, the defendant has committed a violation of the law that causes harm to the government, and the government shares its recovery with the plaintiff—an uninjured third party. In other words, a qui tam action is an action by a representative (the plaintiff) against a wrongdoer (the defendant), on behalf of a victim (the government).

By contrast, when a foreign company improperly dumps goods in the domestic market, the foreign company is the wrongdoer, and its victims are the members of the domestic industry. A petitioner brings an action on behalf of the injured domestic industry. Thus, an antidumping action by petition is an action by a representative (the petitioner) against a wrongdoer (the foreign company), on behalf of victims (the members of the domestic industry). In summary form:

Appendix A

	Representative	Wrongdoer		Victim
Qui tam	Plaintiff	v. Defendant	on behalf of	Government
Antidumping investigation	Petitioner	v. Foreign company	on behalf of	Domestic industry

Two obvious distinctions are apparent. First, in qui tam proceedings it is the government—the victim—that willingly elects to share a portion of its compensation with the uninjured plaintiff representative, essentially as a bounty for bringing the action. But in an antidumping investigation, the government is not the injured party. It is the members of the domestic industry—not only including the petitioner and petition supporters, but also including all other domestic producers—that are injured and entitled to compensation for its injury.

Second, the majority is wrong to equate SKF to a defendant in a qui tam action. The defendant in a qui tam action is the wrongdoer—the company that violates the law. In an antidumping investigation, the role of the qui tam defendant is played by the foreign company that does the dumping. SKF was a victim of that dumping as one of the injured members of the domestic industry. In sum, the majority's analogy to qui tam proceedings is simply inapposite, and it cannot shield the petition support requirement from First Amendment scrutiny. The government recognized as much at oral argument, remarking that "[t]he parties seem to be in agreement that this statute and the classification is really not that similar to the situation of [plaintiffs] in qui tam cases." Oral Arg. at 1:03:42-1:04:36.

III

In my view, the petition support requirement should be subjected to strict scrutiny as a content-based restriction on political speech in a public forum. The principles that control the outcome of this case are beyond serious dispute. First, "a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny. Thus, [the government must] show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Second, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citation omitted). Third, under the so-called "unconstitutional conditions" doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Taken together, these principles establish—at an absolute minimum—that a regulation is subject to strict scrutiny if it denies a benefit on the basis of expression

of a specific viewpoint on a political matter in a public forum. *Cf. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409-10 (6th Cir.1999) (holding that ordinance that "grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue" was subject to strict scrutiny). I would conclude that the petition support requirement denies a benefit on the basis of expression of a viewpoint on a political matter in a public forum, and is therefore subject to strict scrutiny.

First, in my view, the petition support requirement is viewpoint discriminatory. Under the petition support requirement, a domestic company is ineligible for a distribution unless the company was in "support of the petition," as indicated by its response to question I-3, "Do you support or oppose the petition?" 19 U.S.C. § 1675c(b)(1)(A); *Producers' Questionnaire* at 2. Domestic companies who express the viewpoint that an antidumping order should issue are eligible; companies who do not express that viewpoint are not. This is classic viewpoint discrimination. As discussed in detail above, *see supra* at 9, it is immaterial that the government does not intend to suppress a particular viewpoint. It is the viewpoint-discriminatory *effect* of the statute that offends the First Amendment.

Second, the petition support requirement affects political speech. "Political speech, of course, is 'at the core of what the First Amendment is designed to protect.' " *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct.

2618, 2626, 168 L.Ed.2d 290 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)). Moreover, political speech is not merely advocacy on behalf of a particular candidate. Rather, it encompasses "the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). In this case, the petition support requirement requires that a domestic company have expressed the view that a duty should be imposed on a specific class of foreign goods, based in part on whether the domestic industry has been or will be "materially injured." *See* 19 U.S.C. § 1673. Notably, not only does the ITC consider the views of opponents when deciding whether the material injury requirement has been met, but § 1673 actually precludes a petition from going forward unless it has support from 25% of the domestic industry by production, and no more than 50% in opposition. *See* 19 U.S.C. § 1673 a(c)(4)(A)(i)-(ii). Taking a position on this question before the ITC—the body charged with determining whether there has been or will be material injury—is therefore not only political speech on an issue of public concern, but effectively a vote on whether the petition should go forward. It is therefore plainly political speech at the core of the First Amendment's protection.

For the same reasons that it affects political speech, the petition support requirement implicates the First Amendment's Petition Clause. As the Supreme Court has explained:

> The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.*, at 552. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789).

McDonald v. Smith, 472 U.S. 479, 482, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). By conditioning receipt of a benefit on the expression of a particular view to the governmental agency charged with making a decision, the petition support requirement necessarily impedes companies from "communicat[ing] their will" to the relevant government officials.

Third, the petition support requirement affects speech in a designated public forum. The government creates a designated public forum when it makes a space "generally available to a certain class of speakers."

Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). The ITC not only creates a designated public forum for domestic producers by inviting them to share their views on a petition, but it in fact *requires* them to do so. *See* 19 U.S.C. § 1333(a), (f); *Producers' Questionnaire* at 1. Moreover, the petition support requirement requires both that the domestic producer support the petition, and that it allow its support to be publicly known. *See* 19 U.S.C. § 1675c(d) (requiring publication of qualified recipients of distributions). I would conclude in these circumstances that an ITC proceeding is a limited public forum for speech by domestic producers.

We are, of course, not the first court of appeals to consider the constitutionality of a government regulation that provides a benefit to a party as a reward for prior political expression. The closest analogous case in the regional circuits is the Sixth Circuit's decision in *Lac Vieux*, 172 F.3d 397, *appeal after remand* 276 F.3d 876 (6th Cir.2002), *cert. denied*, 536 U.S. 923, 122 S.Ct. 2589, 153 L.Ed.2d 779 (2002). In that case, two casino developers had spent substantial sums of money to advertise and promote the passage of a ballot initiative to legalize casino gambling in Detroit, Michigan. *Id.* at 400. After the ballot measure passed, the Detroit City Council adopted an ordinance giving preference for casino licenses to developers who had actively promoted the ballot initiative. *Id.* at 401. The Lac Vieux Desert Band of Lake Superior Chippewa Indians—a potential casino developer that had not lobbied for passage of the ballot initiative but wanted a casino license—challenged

the ordinance on First Amendment grounds. *Id.* at 402. The Sixth Circuit held that the ordinance "impose[d] a burden based on the content of political speech" and that the ordinance was content based and therefore subject to strict scrutiny. *Id.* at 409-10.

The majority dismisses *Lac Vieux* in a footnote, reasoning that it "did not reward the achievement of the enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." Maj. Op. at 1356 n. 32. I agree that an ITC investigation is not an election by ballot initiative, but I do not think that this distinction is of any significance. "[T]he free discussion of governmental affairs" protected by the First Amendment encompasses more than merely campaigning. *Mills*, 384 U.S. at 218, 86 S.Ct. 1434. Moreover, because the ITC requires domestic producers to provide their views on a petition and is required to take those views into account, the petition support requirement, like the ordinance in *Lac Vieux*, does concern a company's "political support" for a proposition (as in *Lac Vieux*) or a petition (as in this case).

I would conclude that because the petition support requirement is viewpoint discriminatory toward political speech in a public forum, it is subject to strict scrutiny. To survive, it must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Even assuming that the interests asserted by the majority (reward for assistance) and the government (remedy for

the most seriously injured domestic producers) were compelling, I cannot conclude that the petition support requirement is narrowly drawn to achieve either. As discussed in detail above, less restrictive means exist to achieve either interest. *See supra* at 23-26. I would therefore conclude that the petition support requirement is unconstitutional.

IV

Because I would affirm the judgment of the Court of International Trade that the petition support requirement is unconstitutional,[8] I briefly address the remaining issues concerning severance and SKF's amended certification.

A. Severance

"[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it valid."

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8. I agree with the majority's conclusion that, if the Byrd Amendment were subject to rational basis review under the Equal Protection Clause, it would survive—though I do so for different reasons. Though the petition support requirement is not a good proxy for the seriousness of a domestic producer's injury, I would not conclude, as the Court of International Trade did, that it is an *irrational* proxy. I would therefore affirm the judgment of the Court of International Trade solely on the alternative basis that the petition support requirement violates the First Amendment.

El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 96, 30 S.Ct. 21, 54 L.Ed. 106 (1909). Timken argues that even if the petition support requirement is unconstitutional, the Court of International Trade erred by severing the statute so that opponents of a petition were eligible for benefits. Instead, Timken contends that the statute should be severed so that only petitioners—not any other "interested part[ies] in support of the petition"—would be eligible for distributions.

There are two problems with Timken's proposed approach. First, it would run contrary to Congress's intent, clear from the face of the statute, to distribute collected duties to "affected domestic producers." "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Califano v. Westcott*, 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J., concurring in part and dissenting in part)). Here, Congress's intent is clear from the overall structure of the Byrd Amendment. The Byrd Amendment authorizes distributions to "affected domestic producers." 19 U.S.C. §§ 1675c(b)-(d). The petition support requirement is only one of several parts of the definition of "affected domestic producers"—an "affected domestic producer" must also be a "manufacturer, producer, farmer, rancher or worker representative (including associations of such person)" and must "remain[ ] in operation." *Id.* § 1675c(b)(1). Additionally, a producer that has "ceased the production

of the product covered by the order or finding" is excluded from the statutory definition of "affected domestic producer." *Id.*

Plainly, Congress intended to distribute funds collected as a result of antidumping duty orders to more "affected domestic producers" than simply the petitioner who initiated the action. If Congress had intended to limit distributions to petitioners, the statute simply would have authorized distributions to "petitioners." There would be no need for an elaborate definition of "affected domestic producer," with its various requirements and exclusions. Congress's intent therefore must necessarily have been not to reward petitioners for assistance, but to provide a monetary remedy to injured members of the domestic injury, to offset the injuries caused by dumping. In fact, the very title of the Byrd Amendment—the Continued Dumping and Subsidy *Offset* Act of 2000—evinces to this purpose. *See also* 145 Cong. Rec. S497, 497 (1999) (statement of Sen. DeWine) ("Current law also does not contain a mechanism to help injured U.S. industries recover from the harmful effects of foreign dumping and subsidization."). It would be inconsistent with this intent to remedy the constitutional defects in the Byrd Amendment by limiting recovery to petitioners.

The second problem with Timken's approach is that it would not actually cure the First Amendment defect of the petition support requirement. Notably, Timken made its severance argument in the context of a finding by the Court of International Trade that the petition

support requirement violated the Equal Protection Clause because it was not rationally related to a legitimate government purpose. While it might be true that limiting distributions to petitioners only—rather than petitioners and parties that supported the petition—might cure any problem that the petition support requirement had overcoming the rational basis test, the statute would still fail strict scrutiny under the First Amendment, even if severed as Timken proposed, because it would still condition the receipt of funds on expression of a political viewpoint and petitioning activity—namely, filing a petition that argues that an antidumping duty order should enter. Moreover, the statute would still fail strict scrutiny, because less restrictive means are available to serve the interests identified by the majority (reward for assistance) and the government (remedy for the most seriously injured domestic producers). Thus, I would conclude that the Court of International Trade properly severed the Byrd Amendment by removing the petition support requirement.

B. SKF's Cross Appeal

SKF argues on cross appeal that the Court of International Trade was wrong to hold that Customs was not required to accept SKF's amended certification for fiscal year 2005 distributions under the Byrd Amendment. Customs rejected SKF's amended certification as untimely. "[T]his court reviews the trial court's decision *de novo*, reapplying the same standard utilized by that court"—here, the standard of review

under the Administrative Procedure Act. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1004 (Fed.Cir.2003). Under the Administrative Procedure Act:

> The reviewing court shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law; [or]
> >
> > (E) unsupported by substantial evidence. . . .

5 U.S.C. § 706 (2006).

The timing of certifications pursuant to the Byrd Amendment is governed by Treasury regulations. "At least 90 days before the end of a fiscal year, Customs will publish in the Federal Register a notice of intention to distribute assessed duties received as the continued

dumping and subsidy offset for that fiscal year." 19 C.F.R. § 159.62(a). That notice contains instructions for filing a certification to claim a distribution. *Id.* § 159.62(b)(2). "In order to obtain a distribution of the offset, each affected domestic producer must submit a certification . . . that must be received *within 60 days* after the date of publication of the notice in the Federal Register, indicating that the affected domestic producer desires to receive a distribution. The certification must enumerate the qualifying expenditures incurred by the domestic producer since the issuance of an order or finding for which a distribution has not previously been made. . . ." *Id.* § 159.63(a) (emphasis added).

SKF admits that the certification that it submitted within the sixty-day time frame contained expenditure data only for a one manufacturing facility. It did not seek to amend its certification until after the Court of International Trade held that the petition support requirement was unconstitutional. SKF admits that its amended certification was untimely, but argues in essence that submitting a complete certification would have been futile, because "it was a foregone conclusion that Customs would reject SKF['s] certification." Br. of Plaintiff-Cross Appellant SKF USA Inc. at 67. It further argues that its failure to submit a complete certification was harmless.

I disagree. Plainly, SKF's certification was *not* futile, because the Court of International Trade, reviewing Customs's rejection of the certification, held that the Byrd Amendment was unconstitutional and, as a result,

that Customs should not have rejected SKF's certification. If SKF believed when it filed its certification that its challenge to the constitutionality of the Byrd Amendment was worth consideration by Customs, the Court of International Trade, and this court, then SKF should have expended its own time and effort to provide a complete and timely certification for all of its expenses. I would affirm Customs's refusal to accept SKF's amended certification under the Administrative Procedure Act's standard of review.

* * *

For the foregoing reasons, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING REHEARING AND REHEARING EN BANC (WITH DISSENT), DATED SEPTEMBER 29, 2009

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 2008-1005, 2008-1006, 2008-1007, 2008-1008

SKF USA, INC.,

Plaintiff-Cross Appellant,

v.

UNITED STATES CUSTOMS
AND BORDER PROTECTION,

Defendant-Appellant,

and

United States International Trade Commission,

Defendant-Appellant,

and

Timken U.S. Corporation,

Defendant-Appellant,

and

Appendix B

United States, Robert C. Bonner, Commissioner, United States Customs and Border Protection, And Daniel R. Pearson, Chairman, United States International Trade Commission,

Defendants.

Sept. 29, 2009

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges, and STEARNS, District Judge.*

ORDER

PER CURIAM.

A petition for rehearing en banc was filed by the Cross Appellant, and a response thereto was invited by the court and filed by the Appellants. The court granted the motions of Giorgio Foods, Inc. and PS Chez Sidney LLC, Koyo Corporation of U.S.A., NSK Corporation, and American Furniture Manufacturers Committee for Legal Trade and Micron Technology, Inc. for leave to file briefs as amici curiae. The petition for rehearing was referred to the panel that heard the appeal, and

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* Honorable Richard G. Stearns, District Judge, United States District Court for the District of Massachusetts, sitting by designation, was on the original panel, and participated only in the decision of the petition for panel rehearing.

thereafter the petition for rehearing en banc, responses, and the amici curiae briefs were referred to the circuit judges who are in regular active service. A poll whether to rehear the appeal en banc was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

(3) The mandate of the court will issue on October 6, 2009. FOR THE

LINN, Circuit Judge, with whom NEWMAN, RADER and MOORE, Circuit Judges, join, dissents from the denial of the petition for rehearing en banc.

LINN, Circuit Judge, with whom NEWMAN, RADER, and MOORE, Circuit Judges, join, dissenting from the denial of the petition for rehearing en banc.

Because the Byrd Amendment's "petition support" requirement regulates political speech in violation of the First Amendment, and because the panel's decision relies on a novel, and in my opinion flawed, analytic framework in sustaining that requirement, I respectfully dissent from the court's decision not to rehear this case en banc.

Appendix B

The so-called "petition support requirement" of the Byrd Amendment requires that a company publicly express "support of the petition" to be eligible to receive any funds collected as a result of the order. 19 U.S.C. § 1675c(b)(1)(A) (2000) (repealed 2006). Under the petition support requirement, if a domestic company publicly expresses the viewpoint that the government should impose a tariff on an importer, then the domestic company is eligible to receive some part of that tariff. If the domestic company either expresses the viewpoint that a tariff should not be imposed or takes no public position, it is not eligible. The statute thus restricts political speech and petitioning activity and implicates the First Amendment.

The majority opinion invokes the doctrine of constitutional avoidance to "construe" the "purpose" of the challenged statute to avoid applying strict scrutiny review to this statute under the First Amendment. But the avoidance doctrine "is a tool for choosing between competing plausible interpretations of a statutory text," *Clark v. Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), not *1342 inventing a hypothetical purpose for a statute, *cf. Fisherman's Harvest, Inc. v. PBS & J*, 490 F.3d 1371, 1377 (Fed.Cir.2007) (discussing "canon of constitutional avoidance in statutory interpretation"). Because there is no statutory construction dispute here, the doctrine is inapplicable.**

** The government contends in its petition brief that the panel majority's opinion construed the text of the Byrd Amendment to limit payments to supporters who expended resources in "actively

(Cont'd)

Appendix B

The majority finds that the purpose of the statute was "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or

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(Cont'd)

supporting" the petition. Def.-Appellant United States Customs and Border Protection Resp. to Pet. for Reh'g En Banc 2. But this is not what the opinion actually says. The majority based its analysis almost entirely on the construction of the *purpose* of the Byrd Amendment, then-in dicta-stated that "if we were to view this case as involving the construction of statutory language rather than an exercise in ascertaining statutory purpose, the result would be the same." *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1353 (Fed.Cir.2009) (emphasis added). The only reference to a construction of the statute is in footnote 26, which does not actually limit the statute. It says:

> [W]e construe the Byrd Amendment's language providing for payments to a "petitioner or interested party in support of the petition" to only permit distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions).

Id. at 1354 n. 26. While "actively supported" seems, facially, to limit the petition support requirement, the parenthetical makes clear that this is not a limitation at all. It only excludes "a party that did no more than submit a bare statement that it was a supporter without answering questionnaires." *Id.* In fact, all members of the domestic industry, whether they support or oppose the petition, are *required* to complete questionnaires. *See* 19 U.S.C. § 1333(a); *see also U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, at 1*, available at http://www.usitc.gov/trade_remedy/documents/USProducerQuestionnaire. pdf.

supporting antidumping proceedings." *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1352 (Fed.Cir.2009). There are two fundamental problems with this "reward for assistance" rationale (apart from the fact that the government did not assert it in its original briefs and disclaimed it at oral argument). First, the "reward for assistance" rationale assumes that the government has a strong interest in imposing an antidumping duty order. That is, it assumes that the government's interest is in an investigation that results in a finding of dumping and a finding that a duty order must be imposed. But, as the government acknowledges, the government's interest is in a fair antidumping investigation, not in an antidumping investigation that necessarily results in a duty order. Def.-Appellant United States Customs and Border Protection Resp. to Pet. for Reh'g En Banc 11. The majority assumes that only those parties that provide information and argument in support of a duty order are assisting the government, but in fact, all participants in an investigation—whether they support or oppose the entry of a duty order—are assisting the government in reaching the *right* result.

Second, the "reward for assistance" purpose ignores the fact that all members of the affected domestic industry are *required* to submit questionnaire responses, and the International Trade Commission can issue subpoenas to obtain any information that it needs. *See* 19 U.S.C. § 1333(a), (f) (2006) (authorizing International Trade Commission to request information, issue subpoenas, and demand statements under oath);

see also U.S. Int'l Trade Comm'n, Generic U.S. Producer Questionnaire, at 1, available at http:// www. usit c.gov/ trade_remedy/731_ad_701_cvd/investigations/ question/ USProducerQuestionnaire.pdf ("This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession") There is no need to provide a reward for assistance that those in the affected domestic industry *must* provide.

The majority held that "[r]ewarding parties under the circumstances here" was "similar to commercially contracting with them" and then concluded that the commercial speech test "seem[ed] appropriate." *SKF*, 556 F.3d at 1355. The most significant problem with this analysis is that it creates a whole new category of speech-speech in circumstances that are "similar to" commercial speech-and it subjects that speech to much less rigorous scrutiny under the First Amendment than it would otherwise receive.

The negative consequences of this new exception should not be understated. Under the Supreme Court's traditional analysis, the First Amendment has required strict scrutiny of content-based restrictions on political speech in a public forum. *See*, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (holding that content-based restrictions on political speech in public forum must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948,

74 L.Ed.2d 794 (1983))); *cf. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409-10 (6th Cir.1999) (holding that ordinance that "grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue" was subject to strict scrutiny). What the *SKF* opinion does is to use the purpose it created to establish a new and ambiguous exception: speech in circumstances that are sufficiently similar to commercial speech (but are not actually commercial speech), such that the commercial speech test "seems appropriate." *SKF*, 556 F.3d at 1354. Opening up this kind of exception should not be done lightly, nor should it be done without clearly defining when the exception is applicable.

In my opinion, the petition support requirement is an unconstitutional viewpoint-discriminatory restriction on political speech and petitioning activity that cannot survive strict scrutiny. Although the Byrd Amendment was repealed in 2006, "[t]he impact of the panel's decision is far reaching. Forty-one cases pertaining to the [Byrd Amendment] are currently stayed before the CIT. As of October 1, 2008, more than $1 billion remained in Customs Clearing Accounts awaiting future distribution." Pl.-Cross Appellant Pet. for Reh'g En Banc 4-5 (citation omitted). This case is simply too important to allow the majority's incorrect First Amendment analysis to stand. For these reasons, I respectfully dissent from the court's denial of the petition to rehear this case en banc.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, DATED JULY 26, 2007

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 07-116
Court No. 05-00542

SKF USA INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, United States Customs and Border Protection, Robert C. Bonner (Commissioner, United States Customs and Border Protection), United States International Trade Commission, and Stephen Koplan (Chairman, United States International Trade Commission),

Defendants,

and

Timken U.S. Corporation,

Defendant-Intervenor.

July 26, 2007

Appendix C

OPINION

TSOUCALAS, Senior Judge.

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

II. Standard of Review

As set out in the Administrative Procedure Act ("APA")[1] this Court "will set aside Customs' denial of offset distribution only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1354 (Fed.Cir.2006)(quoting *Candle Corp. of America v. U.S. Int'l Trade Comm'n*, 374 F.3d 1087, 1091 (Fed.Cir.2004)(citing 5 U.S.C. § 706 (2000))).

III. Background

On September 12, 2006, this Court issued an order directing the United States International Trade Commission ("ITC" or "Commission") and the Bureau

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1. The provisions of subchapter II and chapter seven of title five of the United States Code were originally enacted on June 11, 1946, and are popularly known as the Administrative Procedure Act. It has been amended since. *See* 5 U.S.C. §§ 551-559, 701-706.

of Customs and Border Protection ("Customs")[2], to "re-examine their decision to deny SKF [Continued Dumping and Subsidy Offset Act of 2000] disbursements for the 2005 fiscal year in accordance with" this Court's decision in *SKF USA Inc. v. United States* (" *SKF USA* "), __ CIT __, 451 F.Supp.2d 1355 (2006). On December 8, 2006, Customs filed its remand determination. *See Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*"), December 8, 2006.[3] On December 11, 2006, the ITC filed its remand determination. *See* Letter from Patrick V. Gallagher, Jr., ITC, to the Honorable Tina Potuto Kimble, Clerk of the Court (Dec. 11, 2006) ("*ITC Remand Determination*"). On January 10, 2007, SKF USA Inc. ("SKF" or "Plaintiff") and Defendant-Intervenor, Timken U.S. Corp. ("Timken") filed their comments upon the remand results. *See* Pl.'s Comments on Remand Determinations Issued By Def.

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2. The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed.Reg. 20,131 (April 23, 2007).

3. Though the ITC issued its remand in the form of a letter to the Honorable Tina Potuto Kimble, Clerk of the Court, CIT, on December 11, 2006, the ITC did previously advise Customs of the results. *See Custom's Remand Determination* at 1 ("The ITC has informed [Customs] that SKF has been added to its list of potential affected producers for Bearings from Japan . . . for fiscal year 2005.").

Appendix C

United States Customs and Border Protection and Defendant United States International Trade Commission ("SKF Comm.") at 10; Defendant-Intervenor's Comments on the Remand Results ("Timken Comm.") at 4.

In its remand, the ITC determined that SKF "did participate in the original investigation by questionnaire response and the company is eligible, using the definitions announced in [*SKF USA*], to be placed on the list prepared by the [ITC] under the Byrd Amendment for the order covering ball bearings from Japan." ITC *Remand Determination* at 2. As such, the ITC "revised the Byrd Amendment list for the antidumping duty order on ball bearings from Japan to include" SKF. *Id.* at 2.

In its remand, Customs stated:

> In its July 13, 2005, certification, SKF sought a disbursement in the amount of its total qualifying expenditures, $115,033,000.00. Including SKF's certification, the total qualifying expenditures submitted by affected domestic producers for Commerce Case No. A-588-804[4] would have been $3,873,340,322.67.

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4. Commerce determined that there were sales at less-than-fair value resulting in an antidumping duty order. *See Antidumping Duty Orders for Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, Inv. No. A-588-804, 54 Fed.Reg. 20,904 (Dep't

(Cont'd)

> A total of $47,810,802.17 was available for distribution to affected domestic producers in this Commerce Case. In accordance with 19 U.S.C. § 1675c(d)(3) and 19 C.F.R. § 159.64(c)(2), affected domestic producers would only be entitled to receive a pro rata share of the available funds because the total qualifying expenditures certified exceeds the amount available for distribution. SKF's certified qualifying expenditures represent 2.9699% of the total qualifying expenditures for this Commerce Case No. A-588-804.
>
> If, after all opportunities for rehearing and/or appeal have been exhausted, [*SKF USA*] is the final court decision upon this action, SKF would receive a distribution for up to $1,419,933.01 in CDSOA funds for fiscal year 2005, to the extent these funds are either recoverable from the affected domestic producers who initially received them or are available. . . .

Custom's Remand Determination at 1-2.

(Cont'd)

Commerce May 15, 1989). Following the enactment of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not originally included. *See SKF USA*, —CIT at ——, 451 F.Supp.2d at 1358.

On January 10, 2007, SKF filed comments to both the *ITC Remand Determination* and *Customs' Reconsideration* with this Court. *See* SKF Comm. at 10. Comments were also submitted by Timken on the same day. *See* Timken Comm. at 4. Rebuttal comments were submitted by the ITC, Customs and Timken on January 30, 2007. *See* Def. U.S. International Trade Commission's Response to Pl.'s Comments on the Commission's Remand Determination ("ITC's Reb.") at 1-9; Response to Comments Upon Remand Results ("Customs' Reb.") at 16; Rebuttal Comments of Timken U.S. Corporation to SKF USA's Comments on the Remand Results ("Timken's Reb.") at 15.

IV. Discussion

A. Contentions of the Parties

1. SKF's Contentions

SKF agreed with the final results of both *Customs' Reconsideration* and the *ITC Remand Determination* (collectively, the "Remand Determinations") to the extent that both Customs and the ITC (collectively, the "Defendants") now find that SKF is eligible to be placed on the list of "affected domestic producers" and is as such eligible to receive distributions under 19 U.S.C. § 1675c. *See* Pl.'s Comm. at 2. SKF, however, objects to the ITC having "only revised the CDSOA 'affected domestic producer' list to include [SKF] for the antidumping duty order on ball bearings from Japan." *Id.* at 3.

SKF stresses that "the investigation in which the [ITC] noted that [SKF] participated was not limited to Japan, but covered ball bearings from nine countries." *Id.* at 3. SKF further contends that this Court's decision in SKF "with regard to the ITC was limited only as to fiscal year 2005. It was not limited as to country." *Id.* at 4. Furthermore, SKF contends that a determination that SKF is eligible for disbursements under all outstanding ball bearing orders would be consistent with SKF's last request for relief, which requested that this Court:

> issue an order severing from the antidumping law, those provisions of 19 U.S.C. 1675c . . . that limit eligibility for disbursements to only those domestic producers that support antidumping petitions and declaring those provisions unconstitutional, null and void, and issue an order declaring that [SKF] is entitled to be considered for distribution of a proportionate share of CDSOA disbursements for fiscal year 2005.

Id. at 5 (citing to Am. Complaint at 17, ¶ 4).

SKF further argues that as Customs relied solely on SKF's July 13, 2005 certification, Customs thereby failed to consider the amended certification for Japan, as well as other certifications. *See id.* at 6. SKF specifically raises Customs' refusal to consider an amended certification for disbursements under the antidumping order against ball bearings from Japan, as well as certifications for seven other countries, which

SKF filed with Customs on September 28, 2006. *Id.* at 6. SKF contends that this "refusal to use the amended certification to calculate [SKF' s] proportional share of disbursements is unsupportable." *Id.* at 6.

2. ITC's Contentions

The ITC contends that when "SKF filed its appeal in October 2005, [SKF] made clear that it was challenging only the two agency's actions relating to its requests for Byrd Amendment distributions for the Japanese order." ITC Reb. at 2; (citing to Complaint, ¶¶ 7, 15). The ITC stresses that SKF's claim "reflects a not particularly subtle attempt to broaden the scope of [SKF' s] appeal and the nature of the Court's decision on this matter." *Id.* at 4.

The ITC stresses that the scope of the Court's review in the case at bar " 'is confined to the record developed before the agency[.]' " *Id.* at 5 (citing to *Ammex, Inc. v. United States*, __ CIT __, 341 F.Supp.2d 1308, 1311 (2004)). Thus, the ITC argues, "the decisions subject to this appeal are *only* the [ITC's] and Customs' denial of [SKF's] requests to be declared eligible for Byrd distributions relating to the Japanese ball bearings order for fiscal year 2005." *Id.* at 5. The ITC further stresses that "at no point in [the] administrative process did [SKF] even suggest that the [ITC] or Customs had been mistaken in interpreting their requests as relating only to the Japanese ball bearings order." *Id.* at 6. Additionally, the ITC argues that SKF had previously made it clear that it was its intent to challenge the actions

of Customs and the ITC in denying its request under the Japanese ball bearing order, and that SKF only challenged the actions of the Defendants in connection with the disbursement of funds collected under an antidumping order on ball bearings from Japan. *See id.* at 6 (citing to Complaint at ¶ 7). The ITC concludes by contending that this Court's opinion in *SKF USA* did not indicate that the ITC or Customs "should go beyond the scope of their underlying determinations and this appeal by making a new set of decisions as to whether [SKF] was entitled to receive Byrd distributions under any order than the order covering Japan." *Id.* at 7.

3. Timken's Contentions

Timken initially disagreed with the decision in *SKF USA*, in which this Court declared that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") violates the Equal Protection Clause. *See* Timken Br. at 1-2. Though "Timken disagrees with the Court's conclusions and reserves its right to appeal, Timken believes the determinations of the ITC and [Customs] are consistent with the opinion of the Court[.]" Timken Br. at 3. Timken, however, contends that Customs has made a ministerial error by certifying SKF's qualifying expenditures to 2.9699%, thereby entitling SKF to receive $1,419,933.01 of the $47,810,802.17 available for distribution. *See id.* at 3. Timken argues that Customs had previously rounded the allocation percentage to the billionth decimal place, and not the ten thousandth, as is indicated above. *See id.* (citing to *FY 2005 CDSOA Annual Disbursement Report*). Timken surmises that

SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." *Id.*

Additionally, Timken contends that SKF's comments on the remand determinations are not responsive to the remand results and should thus be rejected. See Timken's Reb. at 2. Timken states that an agency's "determination 'will be upheld as long as the Court can reasonably discern how the agency arrived at the decision' as long as it is 'in accordance with law.' " *Id.* at 2; (citing to *Cathedral Candle Co. v. United States*, 27 CIT 1541, __, 285 F.Supp.2d 1371, 1375 (2003)).

Timken contends that both Customs and the ITC correctly limited their determinations on remand to the question of SKF eligibility for CDSOA distribution with respect to the antidumping order on ball bearings from Japan alone, as SKF only sought eligibility for and distribution to the antidumping duty order on ball bearings from Japan. *Id.* at 2-3. Timken asserts that in the case at bar judicial review of agency determinations must be based on all the documents before the agency at the time of determination. *See id.* at 3. Timken further asserts that the full record of documents used by both Customs and the ITC indicates that SKF "referred only to the Japan ball bearings order in requesting agency action." *Id.* at 4. As such, Timken assert that both the ITC and Customs remand determinations were consistent with this Court's remand instructions from *SKF USA*, 30 CIT at __, 451 F.Supp.2d at 1367. *See id.* at 6.

Timken further argues that even if SKF's "new certification covering seven additional orders and qualifying expenditures of $8,164,858,000 could have been considered on remand [Customs] would not have been required to accept certifications filed over a year too late on September 28, 2006, contrary to the statutory and regulatory deadlines governing FY2005 certifications and distributions." *Id.* at 8. Timken stresses that "in order to receive CDSOA distributions for FY2005, Custom's regulations required eligible affected domestic producers to file certifications . . . by August 1, 2005." *Id.* at 9 (citing to 19 C.F.R. § 159.63(a); 70 Fed.Reg. 31,566 (June 1, 2005)). Timken concludes by contending that in *SKF USA* this Court stated that it entrusted Customs to determine how SKF receives its pro rata share of the FY2005 CDSOA disbursements, and Customs' action since the decision have complied with this Court's instructions. *See id.* at 15 (citing to *SKF USA*, — CIT at ——, 451 F.Supp.2d at 1366).

4. Customs' Contentions

Customs begins its contentions by agreeing with Timken's argument that SKF's CDSOA distribution was miscalculated through a ministerial error. *See* Customs' Reb. at 3. Customs asserts that it initially erred in calculating the allotted SKF distribution at 2.9699%, as opposed to the proper 2.969865553% allocation. *See id.* Accordingly, Customs requests that this Court "grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF*

USA], if [*SKF USA*] remains the final Court decision after all appeals have been exhausted." *See id.* at 4.

Despite the above request for recalculation, Customs asserts that both Customs and the ITC complied with *SKF USA* when they issued their remand results. *See id.* Customs argues that when reviewing whether Customs' or the ITC's interpretation and application of the CDSOA are in accordance with law, courts apply the standard of review set forth in the APA. *See id.* at 6. Customs further argues that in the APA context:

> an action must meet two requirements to be "final" pursuant to 5 U.S.C. § 704:(1) "the action must mark the 'consummation' of the agency's decision making process," *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Id.* at 178, 117 S.Ct. 1154. Because SKF only challenged the ITC's administrative determination not to add SKF to the ADP list with respect to the ball bearings from Japan antidumping investigation, the ITC has not taken any administrative action with respect to other antidumping or countervailing duty orders. Thus, there is no other action which is subject to review because neither of the requirements established in the case law are met. *See Lujan*

v. National Wildlife Federation, 497 U.S. 871, 882, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

Customs' Reb. at 7-8. Customs asserts that in the case at bar there can be no "consummation" of the decision making process as Customs has not yet made a decision upon whether to apply its overpayment provision and as there is no decision for this Court to review. *See id.* at 14. Customs asserts that a decision not to take enforcement action is immune from judicial review pursuant to 5 U.S.C. § 701(a)(2). *See id.*

Customs further contends that it complied with this Court's order in *SKF USA*, and did not err in neglecting to consider SKF's September 28, 2006 submission to the ITC in determining SKF's entitlement to CDSOA distributions as SKF was untimely in filing the materials. *See id.* at 9-11. Customs asserts that "all CDSOA certifications were due to be filed within 60 days of Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722." *Id.* at 10-11. Customs then further asserts that if SKF believed its certification contained incorrect figures, it had ten days after Customs issued its July 15, 2005 notification denying SKF certification within which to correct that certification. *Id.* at 11 (citing to 19 C.F.R. § 159.63(c)). Based on all the above arguments, Customs concludes that this Court should maintain its ruling entrusting Customs "to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory

authority at its disposal to redistribute the disbursed funds, such as 19 C.F.R. § 159.64(b)(3)." *Id.* at 15 (citing to *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366).

B. Analysis

1. Customs' Calculation Error in Calculating the Offset Distribution Amount Is *De Minimis* in Nature and Thus Does Not Warrant a Remand.

As stated *supra*, Timken contends that SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." Timken's Comm. at 3. The Government has confirmed that "Customs' remand determination contains a ministerial error in the calculation of the CDSOA distribution SKF would be entitled to receive pursuant to [*SKF USA*]." Customs' Reb. at 3. The Government further requests that "the Court grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF USA.*]" *Id.* at 4.

The remand, however, if granted, would lead to an adjustment of a mere $16.47. Despite the Government's admission of an administrative error on the part of Customs, this Court finds that the error was *de minimis* in nature and that a remand would be a waste of time, effort, and taxpayers' funds.

2. Customs' and the ITC's Remand Determinations Fully Comply with *SKF USA*.

In an APA action, such as the case at bar, courts "shall compel agency action" which is "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1)(2000). "[A]gency action includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13) (2000). This Court only possesses jurisdiction to entertain challenges to administrative actions. *See* 28 U.S.C. 1581(i)(2000). In *SKF USA*, this Court remanded the present matter "to the ITC and Customs to review their decisions denying SKF CDSOA disbursements[.]" *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1367.

In *SKF USA*, SKF requested that this Court "issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs[5], or in the alternative, just ball bearings *from Japan." SKF USA*, __ CIT at __, 451 F.Supp.2d at 1363 (emphasis added). As such, SKF further requested that this Court "order Customs to require repayment of all CDSOA funds disbursed with respect to all antidumping orders

5. AFBs are defined as "antifriction bearings, other than tapered roller bearings and parts thereof" in *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1357.

covering AFBs, or in the alternative, just ball bearings *from Japan* [.]" *Id.* (emphasis added).

Furthermore, in a letter dated July 13, 2005, SKF's attorneys requested that Customs distribute CDSOA offsets for Fiscal Year 2005 for offsets "resulting from the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). SKF's Counsel therein attached a Continued Dumping and Subsidy Offset Certification, which clearly listed the case name as "Ball Bearings from Japan." *Id.* SKF's Complaint of October 3, 2005 makes specific references to disbursements "pursuant to the CDSOA of assessed fiscal year 2005 funds pertaining to ball bearings from Japan." Complaint at p. 16. SKF additionally raises its "request for disbursement of funds and Customs' disbursement of funds collected under the antidumping order on ball bearings from Japan before December 1, 2005[.]" Complaint ¶ 15. These assertions were later put forth in SKF's amended complaint of January 3, 2006, where SKF states that it challenges the actions of both the ITC and Customs, pursuant to 19 U.S.C. 1675c, "in connection with the disbursements of funds collected under an antidumping order on ball bearings from Japan." Amended Complaint, ¶ 7. It is thereby clear to this Court that SKF was initially seeking repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan, and only from Japan.

Appendix C

As a result of this Court's decision in *SKF USA*, both the ITC and Customs filed their remand determinations. *See Customs' Reconsideration; ITC Remand Determination.* As SKF only challenged the ITC's decision not to add SKF to the list of affected domestic producers list with respect to the ball bearings from Japan antidumping investigation, the ITC did not take any administrative action with respect to other antidumping or countervailing duty orders. *See ITC Remand Determination.* As such, Customs' remand determination dealt solely with the antidumping duty order on ball bearings from Japan as well. *See Customs' Reconsideration.* By solely referencing the antidumping duty order on ball bearings from Japan both the ITC and Customs complied with this Court's decision in *SKF USA*.

As stated *supra*, under 28 U.S.C. § 1581(i) this Court only possesses jurisdiction to entertain challenges to administrative actions. This Court remanded "this matter to the ITC and Customs to review *their decision* denying SKF CDSOA disbursements in accordance with" the *SKF USA* opinion. *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1367 (emphasis added). Both the ITC and Customs properly kept their remands within the scope of "the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). Furthermore, this Court has stated that it "entrusts Customs to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit[.]" *SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366. Nothing in Customs'

remand determination makes the Court regret such a lawful entrustment. *See SKF USA*, __ CIT at __, 451 F.Supp.2d at 1366 (citing to 19 C.F.R. § 159.64(b)(3)).

3. Customs Did Not Err in Refusing to Consider SKF's filings of September 28, 2006.

As stated *supra*, SKF claims that Customs erred in refusing to consider an amended filing made on September 28, 2006 for disbursements under the antidumping order against ball bearing from Japan, which also included certifications for seven other countries. Pl.'s Comm. at 6.

Pursuant to statute, Customs must publish a notice of intent to distribute ("Notice of Intent to Distribute") at least 30 days before making CDSOA distributions. *See* 19 U.S.C. § 1675c (d)(2) (2000). After publication of the Notice of Intent to Distribute, Customs' regulations state that claimants, such as SKF, have 60 days in which to file certification to obtain a CDSOA distribution. *See* 19 C.F.R. § 159.63(a). The timely filing of certifications is important as the "distribution of funds from duties assessed each fiscal year must be distributed not later than 60 days after the end of that fiscal year." *Cathedral Candle Co. v. United States International Trade Comm'n*, 400 F.3d 1352, 1358 (quoting 19 U.S.C. § 1675c(c)).

As per the above analysis, CDSOA certifications in the case at bar were due to be filed within 60 days of

Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed.Reg. 44,722. As September 28, 2006 is more than 60 days after July 3, 2005, SKF failed to timely file its amended certification, and Customs thereby did not err in its refusal to consider said documentation.

C. Conclusion

Upon review of the record and the arguments presented by the parties on remand, the *Remand Determinations* are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

JUDGMENT

This Court, having received and reviewed the Bureau of Customs and Border Protection's ("Customs") *Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*") filed on December 8, 2006, the remand determination filed by the United States International Trade Commission ("ITC") on December 11, 2006 ("*ITC Remand Determination*") (*Customs' Reconsideration* and the *ITC Remand Determination*, collectively, the "*Remand Determinations*"), comments and rebuttal comments of SKF USA Inc., Timken U.S. Corporation, Customs and the ITC, and all other papers filed herein, holds that both Customs and the ITC duly complied with this Court's remand order in *SKF USA Inc. v. United States*, __ CIT __, 451 F.Supp.2d 1355 (2006), and it is hereby

ORDERED that the *Remand Determinations* are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, DATED SEPTEMBER 12, 2006

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 06-139.
Court No. 05-00542.

Sept. 12, 2006.

SKF USA INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, United States Customs and Border Protection, Robert C. Bonner (Commissioner, United States Customs and Border Protection), United States International Trade Commission, and Stephen Koplan (Chairman, United States International Trade Commission),

Defendants,

and

Timken U.S. Corporation,

Defendant-Intervenor.

Appendix D

OPINION

TSOUCALAS, Senior Judge.

Plaintiff, SKF USA Inc. ("SKF"), moves pursuant to USCIT R. 56.1 for summary judgment on the agency record challenging Defendants, the Bureau of Customs and Border Protection's ("Customs' ") and the International Trade Commission's ("ITC's") (collectively, the "Government's") determination that SKF is not an "affected domestic producer" under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") and thus not eligible to receive CDSOA distributions. SKF specifically challenges the constitutionality of the CDSOA on First Amendment, Due Process and Equal Protection grounds. The Government responds that the CDSOA is constitutional and that it correctly denied SKF "affected domestic producer" status. Defendant-Intervenor, Timken U.S. Corporation ("Timken") also responds that the CDSOA is constitutional and that SKF is not entitled to any relief.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

STANDARD OF REVIEW

In matters arising under 28 U.S.C. § 1581(i), the Court will review the matter as provided in 5 U.S.C.

§ 706. *See* 28 U.S.C. § 2640(e). Under the Administrative Procedures Act, *i.e.* Title 5 of the United States Code, the Court "shall . . . interpret constitutional and statutory provisions . . .". 5 U.S.C. § 706. The Court reviews the constitutionality of a statute *de novo. See Princess Cruises, Inc. v. United States,* 201 F.3d 1352, 1357 (Fed.Cir.2000).

Under a R. 56.1 motion for judgment upon the agency record, the Court is reviewing an agency's decision based on the facts in the administrative record. *See* USCIT R. 56.1. In addition, an agency's determination must be "in accordance with law." 5 U.S.C. § 706(2)(A). Finally, while persuasive and informative, the Court is not bound by decisions of parallel courts. *See e.g., Corus Group PLC v. Bush,* 26 CIT 937, 939 n. 4, 217 F.Supp.2d 1347, 1350 n. 4 (2002).

STATUTORY BACKGROUND

In 2000, Congress amended Title VII of the Tariff Act of 1930 by adding section 754, the CDSOA, commonly known as the Byrd Amendment. *See* Pub.L. No. 106-387, § 1001 *et. seq.,* 114 Stat. 1549A-72 to 75 (2000), codified as 19 U.S.C. § 1675c (2000). Under the CDSOA, Customs collects duties pursuant to antidumping duty orders and places the monies in special accounts within the United States Treasury. *See* 19 U.S.C. § 1675c(e). Each antidumping duty order is given its own special account. *See id.* Customs then disburses the money to certain "affected domestic producers" who have submitted a certification attesting that they have

incurred enumerated qualifying expenditures. *See* 19 U.S.C. § 1675c(b) & (d). The ITC determines which entities qualify as "affected domestic producers," as defined by the CDSOA, and forwards the list of eligible entities to Customs. *See* 19 U.S.C. § 1675c(d). An "affected domestic producer" is defined as any manufacturer, producer, farmer, rancher, or worker representative . . . that—

> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.

19 U.S.C. § 1675c(b)(1). Disbursements are made on a yearly basis and the initial disbursements were made in 2001 based on all existing antidumping duty orders at that time. See 19 U.S.C. § 1675c(d)(3); 114 Stat. 1549A-75.

In 2006, Congress repealed the CDSOA, however, the repeal is not effective until October 1, 2007. *See* Deficit Reduction Act of 2005, Pub.L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). SKF is challenging the 2005 fiscal year CDSOA disbursements, thus, justiciable issues remain here.

Appendix D

FACTUAL BACKGROUND

The facts are undisputed and briefly included here. In 1988, Commerce initiated an antidumping investigation of antifriction bearings, other than tapered roller bearings and parts thereof, ("AFBs") from Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See* Br. Supp. Pl. SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Br.") at 4; Def.'s Resp. Pl.'s Mot. J. Upon Agency R. ("Customs' Resp.") at 6. The ITC also launched material injury investigations. *See id.;* Customs' Resp. at 6. SKF was an interested party and a participant in both the original Commerce and ITC investigations and indicated that it opposed the petition in its questionnaire responses. *See id.* at 5; Customs' Resp. at 6. The ITC found material injury to the domestic industry, which SKF was a part of, by reason of imports from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* (*"USITC Pub. No. 2185"*), USITC Pub. No. 2185, Inv. Nos. 303-TA-19 & 20, 731-TA-391-399 (Final) (May 1989).[1] Commerce then determined that there were sales at less-than-fair value resulting in an antidumping duty order, which in relevant part remains in effect. *See Antidumping Duty Orders for Ball*

1. *USITC Pub. No. 2185* is located at SKF's Br. at Ex. 5 and the ITC's final determination is published under the same name at 54 Fed.Reg. 21,488 (ITC May 18, 1989).

Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan, Inv. No. A-588-804, 54 Fed.Reg. 20,904 (Dep't Commerce May 15,1989). Following the enactment of the CDSOA, the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not included. *See* Customs' Resp. at 7.

On April 20, 2005, the ITC denied SKF's request to amend its list of eligible domestic producers to obtain CDSOA distributions with respect to duties collected pursuant to the antidumping duty order covering *USITC Pub. No. 2185. See* SKF's Br. at Ex. 1 & 2. The ITC stated that it denied SKF's request because SKF had opposed the petition in its questionnaire response in the original investigation. *See* SKF's Br. at Ex. 2. On July 13, 2005, SKF then submitted a certification to Customs requesting CDSOA disbursements in the amount of $115,033,000 for qualifying expenditures incurred. *See* SKF's Br. at Ex. 3. Customs denied SKF's claim on July 15, 2005, stating that SKF was not on the ITC list of affected domestic producers. *See* SKF's Br. at Ex. 4. This action followed.

Appendix D

DISCUSSION

I. As Applied Here, the CDSOA Violates the Equal Protection Clause

A. Parties' Contentions

SKF argues that the CDSOA is unconstitutional because it violates the Equal Protection doctrine by discriminating between similarly situated domestic producers. *See* SKF's Br. at 12. Specifically, SKF states that the CDSOA creates separate classifications for domestic producers between those that expressed support for an antidumping petition and those that did not support or took no position. *See id.* at 12-13. Only domestic producers that supported a petition are then eligible for CDSOA disbursements. *See id.* SKF advances that there is no rational basis between the classification of eligible and ineligible domestic producers and a legitimate government objective. *See id.* at 13. Furthermore, the separate classifications are unreasonable and conflict with the purpose of the antidumping law. *See id.* at 13-15. In enacting the CDSOA, SKF argues that Congress amended the antidumping law, not to alter the overall purpose of the law, but to strengthen its remedial effect. *See* Reply Br. Supp. Pl. SKF USA Inc.'s R. 56.1 Mot. J. Upon Agency R. ("SKF's Reply") at 9. SKF states that the purpose of the antidumping law is to equalize trade and prevent injury to domestic industries. *See* SKF's Br. at 14. The antidumping law, however, is not intended to aid any individual company. *See id.* Therefore, SKF reasons that

because the CDSOA benefits certain individual companies and not domestic industries as a whole, it is contrary to the overall statutory purpose. *See id.* at 15. The CDSOA also furthers no legitimate purpose in benefitting a mere subsection of a domestic industry, when the entire domestic industry is found to be injured by the ITC. *See id.* SKF argues that neither the plain language of the CDSOA nor the legislative history connects " injured domestic industries" with "petition supporting domestic companies." *Id.* at 17. Thus, SKF concludes that the CDSOA definition for "affected domestic producer" is discriminatory with no rational basis in support. *See id.* at 17-19. SKF also points out that petition-supporting producers are not the only companies that are injured domestic producers and that there is no basis in differentiating between injured domestic companies as being "more deserving" or incurring more injury than another. *See id.* at 19. Moreover, SKF states "whether a producer believes itself to be injured by reason of imports and therefore supports a petition has nothing to do with whether the ITC actually determines injury to exist for an industry." *Id.* at 21. Finally, SKF also argues that the purported purpose of the CDSOA is inconsistent with the actual results of CDSOA disbursements. *See* SKF's Reply at 10-11. SKF also argues that whereas Defendants contend that the CDSOA is a thorough and deliberated piece of legislation, in reality, the CDSOA was passed quickly without significant debate or committee review. *See id.* at 11-12. SKF reasons that such a hasty enactment hardly merits the substantial weight argued by Defendants in reviewing it. *See id.*

The Government responds that the classifications established in the CDSOA do not violate the Equal Protection Clause. *See* Customs' Resp. at 18.[2] As an economic policy decision, the Government argues that the CDSOA is rationally related to a legitimate government purpose and thus must be affirmed. *See id.* at 19. The Government also argues that SKF's argument that the CDSOA conflicts with the antidumping law is unsupported. *See id.* at 19-20. Rather, the Government asserts that the CDSOA enhances the antidumping statute's remedial nature. *See id.* at 20. The Government contends that the requirement in the CDSOA that a producer support an antidumping petition to then be eligible for funds is rational. *See id.* at 21. Since the method in the CDSOA is a "rough accommodation" for achieving the purpose of helping the domestic industry, the Government asserts it must stand. *See id.* at 22. The Government argues that the "affected domestic producer" requirements are a "logical, objective, and efficient method for Congress to further its rational policy of strengthening remedies for unfair trade conditions by compensating those who are being most harmed by injurious dumping." *Id.* at 23. Moreover, the Government maintains that the CDSOA meets the overall goals of "restoring free trade and remedying the ill-affects of foreign dumping and subsidization. . . ." *Id.* at 24. Thus, under the broad

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2. The International Trade Commission's response brief states its "full support for the arguments made by" Customs. *See* Def. United States Int'l Trade Comm'n's Resp. Pl.'s Mot. J. Upon Agency R. at 1.

rational basis review of statutes in the areas of social and economic policy, the Government contends the CDSOA is constitutional. *See id.* at 24.

Timken also responds that under a rational basis review, the CDSOA does not violate the Equal Protection Clause. *See* Resp. Br. Timken U.S. Corp. SKF USA's Br. Supp. Its Mot. J. Agency R. ("Timken's Resp.") at 7. Timken argues that SKF, not the Government, has the burden to illustrate that there is no rational basis for the CDSOA, which SKF failed to demonstrate. *See id.* at 8-9. Moreover, since the CDSOA is a statute involving economic policy scrutinized under the rational basis standard, it is reviewed with judicial restraint. *See id.* at 9. Thus, Timken argues that it is at least debatable "whether collected antidumping and countervailing duties ought to be distributed to some producers and not others. . . ." *Id.* at 10. Timken states that the cases cited by SKF to support a heightened scrutiny to be applied here are cases involving classifications based on sexual orientation, disability and legitimacy, all inapposite to matters of economic policy. *See id.* Timken further argues that the CDSOA's eligibility requirement is reasonable and rationally related to a legitimate government purpose. *See id.* at 13-16. Timken advances that Congress has rationally provided for a separate definition of "affected domestic producers," which is distinct from the injured industry protected by the antidumping statute. *See id.* at 15-16. Timken reasons that Congress could rationally conclude that producers who supported a petition are affected by continued dumping in a way that other producers

are not. *See id.* at 16. Thus, the classification in the CDSOA is rationally based and the statute should be affirmed. *See id.*

B. Analysis

Congress has the authority to enact the CDSOA under the broad authority granted by either the Spending Clause or the Commerce Clause of the Constitution. It is the constitutional limits to that authority and the scope of those limits where the CDSOA fails constitutional muster. The Fourteenth Amendment to the Constitution of the United States provides, *inter alia,* that no state shall deny any person the "equal protection of the laws." CONSTITUTION Amend. XIV. Known as the Equal Protection Clause, the Supreme Court has held *1439 that it applies to the federal government pursuant to the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

1. Standard of Review Under the Equal Protection Clause

In the CDSOA, Congress has drawn a distinction between entities who may be "affected domestic producers" based on whether the entity supported the original antidumping petition or either did not support or took no position in the petition. *See* 19 U.S.C. § 1675c(b)(1) ("a petitioner or interested party in support of the petition"). As the CDSOA is applied here, similarly situated entities, *i.e.* SKF and Timken, are treated

differently and thus, do not stand equal before the law. In areas of social and economic policy, however, a "statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld" against an Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (citations omitted). As such, the Court must review the CDSOA under this rational basis standard. Even under a rational basis review, however, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law". *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 181, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring). In addition, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole [antidumping] Act." *NTN Bearing Corp. of Am. v. United States,* 26 CIT 53, 102-03, 186 F.Supp.2d 1257, 1303 (2002) (citations omitted). Rather, "each part or section of a statute should be construed

in connection with every other part or section so as to produce a harmonious whole...." *Id.* (citing *In re Nantucket, Inc.,* 677 F.2d 95, 98 (Cust. & Pat.App.1982)).

2. No Rational Basis for Classification in CDSOA

The Trade Agreements Act of 1979 added the countervailing and antidumping duty provisions to the Tariff Act of 1930. *See* Pub.L. No. 96-39, § 101, 93 Stat. 150 (1979). In enacting the Trade Agreements Act of 1979, Congress stated that the purposes were to, *inter alia,* "foster the growth and maintenance of an open world trading system" and "to expand opportunities for the commerce of the United States in international trade." Pub.L. No. 96-39, § 1, 93 Stat. 146, codified as 19 U.S.C. § 2502. In 2000, Congress again amended the Tariff Act of 1930 adding the CDSOA. *See* Pub.L. No. 106-387, § 1003, 114 Stat. 1549A-73 (2000). In enacting the CDSOA, Congress made the following findings:

> (1) . . . injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized.
>
> . . . . .
>
> (4) Where dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . .
>
> (5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

114 Stat. 1549A-72 to 73 (emphasis added). The purpose of the antidumping law, as a whole, has always been to "equalize competitive conditions between foreign exporters and domestic *industries* affected by dumping." *Huaiyin Foreign Trade Corp. v. United States,* 322 F.3d 1369, 1379 (Fed.Cir.2003) (emphasis added); *see, e.g., Or. Steel Mills Inc. v. United States,* 862 F.2d 1541, 1545 (Fed.Cir.1988) ("the purpose of an antidumping duty order is to aid an industry, not an individual company . . .").

The Court based on the record before it, the statutory language and the legislative history, cannot find a rational basis nor is able to find any conceivable basis for the classification-distinguishing between those entities who supported a petition and those who either took no position or opposed the petition-and the purpose of the CDSOA. The antidumping statute is designed to ensure that domestic *industries,* not any individual *company* can compete in the marketplace. *See Or. Steel Mills,* 862 F.2d at 1545. Congress itself has defined the term "industry" as "producers as a whole of a domestic like product . . ." in charging the ITC to determine whether a domestic industry is injured by reason of imports. 19 U.S.C. § 1677(4)(A). To make a distinction between individual producers within an industry is incongruous with the fundamental purpose of the antidumping statute, that is to remedy the injurious affects of dumping to the domestic *industry as a whole.* Furthermore, Congress stated that the CDSOA was enacted to counter the continued dumping and subsidies affecting competition in the marketplace and to further

effectively neutralize the injury to the domestic industries. *See* 114 Stat. 1549A-72 to 73.

The Government and Timken argue that Congress has made a policy choice in determining that entities who supported an antidumping petition are those most harmed by injurious dumping. *See* Customs' Resp. at 23; Timken's Resp. at 15-16. The Court finds this argument unpersuasive. The plain language of the CDSOA fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry. Even if, however, in passing the CDSOA Congress intended to help entities that suffered more injury than others, the Court cannot find a connection between that purpose and then to identify the gravely injured as only the ones who supported an antidumping petition. Importantly, there are three options an entity can take in an antidumping investigation: 1) support the petition, 2) oppose the petition, and 3) take no position. *See PS Chez Sidney, L.L.C. v. United States*, 30 CIT __, __, 442 F.Supp.2d 1329, 1337-39 (Wallach, J. July 13, 2006). The Court cannot discern a reasonable correlation between an entity's decision to support a petition and the gravity of the entity's injury. The classification is simply too broad because there are a multitude of reasons why an entity might decide to support, oppose, or take no position in an antidumping investigation. While the Court acknowledges that an overbroad statute may survive rational basis scrutiny, the breadth cannot

brush upon reasons that can conceivably infringe upon other constitutional protections, for example an expression of political belief on an antidumping petition. *Cf. City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Again, the focus of an antidumping investigation is whether the domestic industry, as a whole, is being injured, not just the petition supporters. *See* 19 U.S.C. § 1677(4)(A); *Or. Steel Mills,* 862 F.2d at 1545.

Furthermore, the legislative history of both the Trade Agreements Act of 1979 and the CDSOA emphasize the purpose of remediation of injury caused by dumping and subsidies to the entire domestic industry. *See e.g.,* H. Rep. No. 96-317 at 44 (1979) ("antidumping duties may be imposed . . . when an industry in the importing country producing a like product is materially injured"); S.Rep. No. 96-249 at 16 (1979) ("ITC determines that an industry in the United States is materially injured"). Most relevantly, Congress states as part of its Congressional findings preceding the CDSOA that "injurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized" and that "[w]here dumping or subsidization continues, *domestic producers* will be reluctant to reinvest or rehire . . ." so therefore, the "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." 114 Stat. 1549A-72 to 73 (emphasis added). Congress refers to the domestic industry and domestic producers in the CDSOA, as Congress has done consistently throughout the antidumping law, without preference or bias to only

those entities that supported an antidumping petition. The CDSOA is an amendment to the Tariff Act of 1930 and should be read in congruity with the other provisions therein. *See NTN Bearing Corp.*, 26 CIT at 102-03, 186 F.Supp.2d at 1303. Inclusive in the purpose of the entire antidumping statute, *i.e.* Tariff Act of 1930 with the amendments of the Trade Agreements Act of 1979 and the CDSOA, is the remedy of injury to the domestic industry. *See e.g., Or. Steel Mills*, 862 F.2d at 1545.

Here, SKF and Timken are both members of the domestic AFB industry. *See USITC Pub. No. 2185* at 42. Both entities participated in the original antidumping investigation in 1988, with SKF opposing the petition and Torrington supporting it. *See* Corrected Admin. R. at Ex. 1 & 2. In the investigation, the ITC concluded that the entire domestic AFB industry was materially injured by reason of imports from multiple countries, including Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed.Reg. at 21,488-89. Timken is classified as an "affected domestic producer" and received CDSOA disbursements only because it acquired Torrington in 2003. *See* SKF's Reply at 25. SKF submitted a request to the ITC to be included on the "affected domestic producer" list for the 2005 CDSOA disbursements. *See* SKF's Br. at Ex. 1. SKF also submitted a claim listing its qualifying expenditures for CDSOA disbursements to Customs. *See* SKF's Br. at Ex. 3. Both agencies denied SKF's request stating only

that SKF was not an "affected domestic producer" because it did not support the original 1988 antidumping petition. *See* SKF's Br. at Ex. 2 & 4. As the CDSOA is applied here, SKF is not receiving Equal Protection under the laws because it is treated differently than a similarly situated party, *i.e.* Timken, on the sole basis of expressing opposition to an antidumping petition. For the aforementioned reasons, such a classification is arbitrary and is not rationally connected to any legitimate objective. Therefore, the CDSOA, specifically the provision which defines "affected domestic producer," is unconstitutional as applied here. Having found that the CDSOA is unconstitutional, the Court finds it unnecessary to address SKF's other constitutional challenges and proceeds to remedies.

II. Remedies

A. Parties' Contentions

SKF requests that the Court issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan. *See* SKF's Br. at 40. SKF also requests that the Court order Customs to require repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan and deposited in the general treasury. *See id.* SKF argues that a balancing of the four factors required for a permanent

injunction support its issuance. *See* SKF's Reply at 13. SKF asserts that it has suffered irreparable economic harm to its competitive position as a result of being denied CDSOA disbursements while its competition received the funds. *See id.* at 14. SKF also asserts that the balancing of hardships weigh in its favor and that the public interest would be served by a permanent injunction. *See id.* at 16-18. SKF further argues that the Court has the authority to order Customs to recollect disbursed CDSOA monies under 19 C.F.R. § 159.64(b)(3). *See* SKF's Reply at 18. SKF points out that the Government's current position is contrary to its assurances to the Court when it argued against SKF's preliminary injunction motion. *See id.* at 18-19. Furthermore, inapposite to the Government's arguments, SKF argues that there is no discretionary agency action at issue here. *See id.* at 19. Rather, SKF is asking the Court to order Customs to seek repayment of unconstitutional disbursements. *See id.* Moreover, Customs' regulations indicate that it anticipates that it is required to seek repayment if an overpayment has been made as determined by court action. *See id.* at 20. SKF also asserts that severing the statute as suggested by Timken will not remedy SKF's injury. *See id.* at 21. Rather, SKF advances that its constitutional harms could be remedied if the CDSOA read so that all domestic producers were eligible for disbursements as "affected domestic producers," *i.e.*, severing both 19 U.S.C. § 1675c(b)(1)(A) & (d)(1). *See id.* at 22-23. Finally, SKF argues that Timken's doctrine of laches defense is without merit and does not bar its claim. *See id.* at 23-25.

The Government responds that SKF has not met the burden necessary for a permanent injunction and also inappropriately requests an order compelling agency enforcement. *See* Customs' Resp. at 45. Of the four factors enumerated by the Supreme Court for a permanent injunction, the Government argues that SKF has not demonstrated that it will be irreparably injured and that the public interest would be served. *See id.* at 45-47. The Government states that it has the authority to redistribute CDSOA funds that are found to be improperly distributed, which removes SKF's irreparable injury claim. *See id.* at 46. Therefore, a permanent injunction would be inappropriate. *See id.* at 47. The Government also argues that the Court is not empowered to order Customs to initiate collection of disbursed CDSOA monies. *See id.* Such an order, the Government asserts, is an intrusion upon agency discretion and an attempt by Customs to recoup CDSOA distributions "would require Customs to *enforce* its overpayment regulation and, thus, be an enforcement action." *Id.* (emphasis retained). Since the APA governs this matter, the Government states that only action legally required can be compelled of the agency. *See id.* at 47-48 (citing 5 U.S.C. § 706(1)). The Government states that Customs' enforcement regulation, 19 C.F.R. § 159.64(b), is a discretionary regulation. *See id.* at 50-52. Therefore, the Government argues that it is premature for the Court to order it to compel disgorgement because it has not yet made a decision as to whether or not to enforce 19 C.F.R. § 159.64(b), thus there is no agency decision for judicial review. *See id.* Furthermore, the Government argues that the CDSOA

does not place an affirmative obligation upon it to initiate an enforcement action, thus the Court has no basis upon which to order Customs to do so. *See id.* at 52. Finally, the Government argues that even if the Court were empowered to order Customs to take an enforcement action, there is no final agency action to enforce here. *See id.* at 52-53.

Timken also responds that SKF has failed to establish that it is entitled to any relief. *See* Timken's Resp. at 38. Timken argues that SKF has failed to rebut the presumption that any unconstitutional language can be severed from the CDSOA rather than automatically invalidating the entire statute. *See id.* at 39. Timken states that assuming the Court finds that the supporting the petition requirement is unconstitutional, that portion can be severed from the definition of "affected domestic producer." *See id.* at 40-41. In doing so, the Congressional intent behind the CDSOA is still preserved and the CDSOA is still operable. *See id.* Timken also argues that the doctrine of laches bars SKF to any forms of equitable relief. *See id.* at 42. Timken states that SKF did not challenge the constitutionality of the CDSOA in 2001, but rather unreasonably waited until after four annual CDSOA distributions had been made before filing this action. *See id.* Thus, Timken asserts that repayment of CDSOA disbursements here would prejudice the CDSOA recipients by imposing a sizeable unexpected financial burden on those entities who reasonably relied on CDSOA disbursements. *See id.* at 43. Finally, Timken argues that SKF has not demonstrated that it is entitled to restitution or

repayment, which is an equitable remedy premised in contract and inapplicable to a legislative policy choice. *See id.* at 43-44.

B. Analysis

1. The Constitutionally Offensive Language Can Be Stricken From the CDSOA

Since the definition of an "affected domestic producer" in the CDSOA is unconstitutional as applied here, the Court must determine whether the offending portions of the statute are severable or whether the entire statute is invalidated. *See Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion) ("a court should refrain from invalidating more of the statute than is necessary."); *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Supreme Court has reiterated that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Ne. Ry. Co. v. Gutierrez,* 215 U.S. 87, 96, 30 S.Ct. 21, 54 L.Ed. 106 (1909). Also material in "evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress". *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (emphasis retained). "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.*

Here, the Court finds that the offending portion of the statute is easily severable from the rest of the CDSOA and will not render the statute useless. The CDSOA defines an "affected domestic producer" as "a petitioner or interested party in *support of* the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." 19 U.S.C. § 1675c(b)(1)(A) (emphasis added). The Court has found that the classifying language, *i.e.* "support of," creates an unconstitutional distinction among similarly situated domestic producers. Therefore, the words "support of" should be stricken from the definition of an "affected domestic producer." In doing so, the Court recommends that an acceptable definition of an "affected domestic producer" should read

> (A) was a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered . . .

19 U.S.C. § 1675c(b)(1)(A)(as modified). The CDSOA would then include *all* domestic producers as eligible entities to receive CDSOA funds so long as they participated in an antidumping investigation resulting in an order. The CDSOA also refers to the "in support of" requirement in a separate subsection, 19 U.S.C. § 1675c(d)(1), when outlining the ITC's duties to forward the list of eligible "affected domestic producers" to Customs. *See* 19 U.S.C. § 1675c(d)(1). In accordance with

the aforementioned permissible definition of "affected domestic producer," the words "indicate support of" should be stricken from 19 U.S.C. § 1675c(d)(1) and replaced with "participated in" so that 19 U.S.C. § 1675c(d)(1) should read:

> The Commission shall forward to the Commissioner . . . a list of petitioners and persons with respect to each order and finding and a list of persons that *participated in* the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those *who participated in* a petition, the Commission shall consult with the administrating authority to determine the identity of the petitioner and those domestic parties. . . .

19 U.S.C. § 1675c(d)(1) (underlined portions indicating changes).

The constitutionally acceptable definition of "affected domestic producer" allows the CDSOA to function in a manner more consistent with Congress' intent to provide relief for the entire domestic industry, as expressed in its Congressional findings and with the intent and purpose behind the overall antidumping law. *See* 114 Stat. 1549A-72 to 73; *Alaska Airlines,* 480 U.S. at 685, 107 S.Ct. 1476. Congress charges the ITC to determine in an antidumping investigation whether a

domestic industry is materially injured or threatened to be injured by reason of imports of the subject merchandise. *See* 19 U.S.C. § 1673. An affirmative determination by the ITC indicates that it has determined as such. *See id.* Under the constitutionally acceptable definition of "affected domestic producer," CDSOA disbursements are now available to the entire injured domestic industry. In doing so, the CDSOA can be administered in the same way, merely without the unconstitutional classification of eligible recipients.

2. Customs and the ITC Are to Reexamine Their Negative Decision and Determine SKF's Eligibility for CDSOA Disbursements

Customs and the ITC denied SKF CDSOA disbursements for the 2005 fiscal year stating that SKF was not an "affected domestic producer," as defined in the CDSOA. *See* SKF's Br. at Ex. 2 & 4. For the foregoing reasons, the Court finds that Customs' and the ITC's determination was made under an impermissible classification. With the petition support requirement removed from the definition of "affected domestic producer," Customs' and the ITC's reason for denying SKF CDSOA disbursement would no longer exist. SKF is an eligible entity to be included on the ITC's list of "affected domestic producers" because it participated in the relevant antidumping investigation that resulted in an affirmative determination. *See* USITC Pub. No. 2185. As such, SKF's request for a permanent injunction is moot. Since the ITC and Customs denied SKF's requests solely based on the fact that SKF was not an

"affected domestic producer," the Court remands this matter back to the agencies for the ITC to first determine if SKF qualifies as an eligible "affected domestic producer" for the 2005 fiscal year CDSOA disbursements in accordance with this decision. If the ITC so determines, then Customs is to determine whether SKF's claim submitted for CDSOA disbursements is sufficient and if so, to then include SKF among the 2005 CDSOA recipients to receive its pro rata share. The Court determines that because Customs has yet to determine the sufficiency of SKF's claim, the issue of whether the Court is empowered to order Customs to disgorge CDSOA monies already paid is not yet ripe for review. Based on the administrative posture of this case, the Court hesitates to preempt any agency action here. Rather if SKF qualifies, the Court entrusts Customs to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory authority at its disposal to redistribute the disbursed funds, such as 19 C.F.R. § 159.64(b)(3).

CONCLUSION

The Court holds that the requirement that an entity had to "support" an antidumping petition to be included as an "affected domestic producer" as defined in the CDSOA, 19 U.S.C. § 1675c(b)(1)(A), is a violation of the Equal Protection guarantees under the Fifth Amendment to the Constitution. The classification treats similarly situated domestic producers differently and is not rationally related to a legitimate government

objective. The Court further finds that the classifying language "support of" is severable from the CDSOA. Therefore, the definition of "affected domestic producer" should read as "a petitioner or interested party in a petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered." The Court finds all other arguments unpersuasive. Since SKF was denied "affected domestic producer" eligibility under the unconstitutional definition, the Court remands this matter to the ITC and Customs to review their decisions denying SKF CDSOA disbursements in accordance with this opinion. An order will be entered accordingly.

APPENDIX E — LETTER FROM U.S. CUSTOMS AND BORDER PROTECTION, DATED JULY 15, 2005

U.S. CUSTOMS AND BORDER PROTECTION

SKF USA Inc.
Attn: Mr. Timothy D. Gifford
1111 Adams Avenue
Norristown, PA 19403

Dear Mr. Gifford:

U.S. Customs and Border Protection (CBP) has completed its review of your certifications for case(s) A-588-804, which were submitted for disbursements pursuant to the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000, codified at 19 U.S.C. § 1675c (2002). Due to the reason stated below, we are denying your claims for Fiscal Year 2005 (FY 2005) disbursements.

According to the CDSOA, the U.S. International Trade Commission (ITC) is responsible for providing CBP with a list of potentially eligible affected domestic producers [hereinafter referred to as the "ITC list"]. Pursuant to 19 U.S.C. § 1675c(d)(1), the "Commission shall forward to the Commissioner . . . a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." The ITC list was published in the Federal Register on June 1, 2005, and

SKF USA Inc. was not on the list. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31566 (June 1, 2005). Further, subsequent to the publication of the ITC list, we confirmed with the ITC that SKF USA Inc. was not on the ITC list of affected domestic producers. Therefore, CBP must deny SKF USA Inc.'s claims for FY 2005 disbursements under the CDSOA.

If you have any further questions regarding these cases, please contact Ms. Leigh Redelman at (317) 614-4462.

Sincerely,

s/ Leigh Redelman
for W. David Sims
Branch Chief, Revenue Division

APPENDIX F — LETTER FROM UNITED STATES INTERNATIONAL TRADE COMMISSION, DATED APRIL 20, 2005

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, DC 20436

April 20, 2005

Herbert C. Shelley
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036

> Re: Your March 24, 2005 Request for a Revision of the Commission's List of Petitioners and other Entities Supporting Petition–Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan[1]

Dear Mr. Shelley:

The Commission does not concur with your request that your client, SKF USA, Inc., be added to the list of firms expressing public support for the petition in the investigation on antifriction bearings from Japan, because your client had indicated that it opposed the petition in its questionnaire response in the original

1. Commission investigation No. 731-TA-394-A-B-C; Commerce investigation No. A-588-804.

investigation. The Continued Dumping and Subsidy Offset Act allows for adding only those potentially eligible producers that indicated support of the petition by letter or through questionnaire response during the original investigation. 19 U.S.C. § 1675e(d)(1).

Sincerely,

s/ Stephen Koplan
Stephen Koplan

APPENDIX G — CONTINUED DUMPING AND OFFSET ACT OF 2000, PUB. L. NO. 106-387, TITLE X, 114 STAT. 1549A-72 (2000)

TITLE X—CONTINUED DUMPING AND SUBSIDY OFFSET

SEC. 1001. SHORT TITLE.

This title may be cited as the 'Continued Dumping and Subsidy Offset Act of 2000'.

SEC. 1002. FINDINGS OF CONGRESS.

Congress makes the following findings:

(1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.

(2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.

(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

(4) Where dumping or subsidization 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. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.

(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

SEC. 1003. AMENDMENTS TO THE TARIFF ACT OF 1930.

(a) IN GENERAL—Title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) is amended by inserting after section 753 following new section:

'SEC. 754. CONTINUED DUMPING AND SUBSIDY OFFSET.

'(a) IN GENERAL—Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the 'continued dumping and subsidy offset'.

'(b) DEFINITIONS—As used in this section:

'(1) AFFECTED DOMESTIC PRODUCER- The term 'affected domestic producer' means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

'(A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and

'(B) remains in operation.

Companies, businesses, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.

'(2) COMMISSIONER—The term 'Commissioner' means the Commissioner of Customs.

(3) COMMISSION—The term 'Commission' means the United States International Trade Commission.

(4) QUALIFYING EXPENDITURE—The term 'qualifying expenditure' means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:

'(A) Manufacturing facilities.

'(B) Equipment.

'(C) Research and development.

'(D) Personnel training.

'(E) Acquisition of technology.

'(F) Health care benefits to employees paid for by the employer.

'(G) Pension benefits to employees paid for by the employer.

'(H) Environmental equipment, training, or technology.

'(I) Acquisition of raw materials and other inputs.

'(J) Working capital or other funds needed to maintain production.

'(5) RELATED TO—A company, business, or person shall be considered to be 'related to' another company, business, or person if—

'(A) the company, business, or person directly or indirectly controls or is controlled by the other company, business, or person,

'(B) a third party directly or indirectly controls both companies, businesses, or persons,

'(C) both companies, businesses, or persons directly or indirectly control a third party and there is reason to believe that the relationship causes the first company, business, or persons to act differently than a nonrelated party.

For purposes of this paragraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

'(c) DISTRIBUTION PROCEDURES—The Commissioner shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section. Such distribution shall be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year.

Appendix G

(d) PARTIES ELIGIBLE FOR DISTRIBUTION OF ANTIDUMPING AND COUNTERVAILING DUTIES ASSESSED—

'(1) LIST OF AFFECTED DOMESTIC PRODUCERS—The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 751.

'(2) PUBLICATION OF LIST; CERTIFICATION—The Commissioner shall publish in the Federal Register at least 30 days before the distribution of a continued dumping and subsidy offset, a notice of intention to

distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1). The Commissioner shall request a certification from each potentially eligible affected domestic producer—

'(A) that the producer desires to receive a distribution;

'(B) that the producer is eligible to receive the distribution as an affected domestic producer; and

'(C) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution under this section has not previously been made.

'(3) DISTRIBUTION OF FUNDS—The Commissioner shall distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2). The distributions shall be made on a pro rata basis based on new and remaining qualifying expenditures.

'(e) SPECIAL ACCOUNTS—

'(1) ESTABLISHMENTS—Within 14 days after the effective date of this section, with respect to antidumping duty orders and findings and countervailing duty orders notified under subsection (d)(1), and within 14 days after the date an antidumping duty order or finding or countervailing duty order issued after the effective date takes effect, the Commissioner shall establish in the Treasury of the United States a special account with respect to each such order or finding.

'(2) DEPOSITS INTO ACCOUNTS—The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including interest earned on such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

'(3) TIME AND MANNER OF DISTRIBUTIONS—Consistent with the requirements of subsections (c) and (d), the Commissioner shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.

'(4) TERMINATION—A special account shall terminate after—

'(A) the order or finding with respect to which the account was established has terminated;

'(B) all entries relating to the order or finding are liquidated and duties assessed collected;

'(C) the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c); and

'(D) 90 days has elapsed from the date of the notice described in subparagraph (C).

Amounts not claimed within 90 days of the date of the notice described in subparagraph (C), shall be deposited into the general fund of the Treasury.'.

(b) CONFORMING AMENDMENT—The table of contents for title VII of the Tariff Act of 1930 is amended by inserting the following new item after the item relating to section 753:

'SEC. 754. Continued dumping and subsidy offset.'.

(c) EFFECTIVE DATE—The amendments made by this section shall apply with respect to all antidumping and countervailing duty assessments made on or after October 1, 2000.

APPENDIX H — DEFICIT REDUCTION ACT OF 2005, § 7601, PUB. L. NO. 109-171, 120 STAT. 154 (2006)

Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006).

Subtitle F—Repeal of Continued Dumping and Subsidy Offset

SEC. 7601. REPEAL OF CONTINUED DUMPING AND SUBSIDY OFFSET.

(a) REPEAL.—Effective upon the date of enactment of this Act, section 754 of the Tariff Act of 1930 (19 U.S.C. 1675c), and the item relating to section 754 in the table of contents of title VII of that Act, are repealed.

(b) DISTRIBUTIONS ON CERTAIN ENTRIES.—All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).