No. 10-1439

IN THE

Supreme Court of the United States

NUCOR CORPORATION,

Petitioner,

v.

UNITED STATES AND TATA STEEL IJMUIDEN BV F/K/A CORUS STAAL BV,

Respondents.

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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner in this case is Nucor Corporation ("Nucor"). Nucor has no parent company, and no publicly held company or privately held entity owns 10% or more of Nucor's stock.

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MISCELLANEOUS

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The Facts On File Dictionary of Mathematics (3d ed. 1999) 7

The HarperCollins Dictionary of Mathematics (1991) 7

U.S. Continues Fight to Preserve Zeroing in Doha Despite New Proposal, Inside U.S. Trade (Jan. 6, 2011) 9

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REPLY BRIEF FOR PETITIONER

The question presented here is one of major national importance because it has substantial consequences for our country's international trade policy and the effectiveness of our antidumping laws. The decision below injures not only the steel industry, including its workers, but numerous other industries engaged in international trade, as shown in the Petitions in this case and in No. 10-1433 and the amicus briefs filed in support thereof. Although Respondents disagree with Petitioners and their Amici about the proper reading of the statute, there has been no doubt cast upon the importance of the issue presented and thus the proposition that this case is worthy of a grant of certiorari.

In particular, the question presented is one of statutory construction that hinges upon the meaning of the term "exceeds" in the definition of "dumping margin." 19 U.S.C. § 1677(35). There is no dispute that the plain dictionary meaning of this term is "greater than." Indeed, the court below has acknowledged this point. *See Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004).

As Nucor explained in its Petition, giving "exceeds" its plain meaning is supported by the text, structure, and purpose of the Tariff Act. Respondents argue that "exceeds" should be interpreted to mean "greater than or less than." Such a definition defies logic; it makes no sense to define a word to take the meaning of its antonym. Respondents' nontextual arguments in support of this novel and idiosyncratic definition of "exceeds" serve only to confirm that this statutory term must be given its plain meaning.

This interpretive question carries with it great importance because Respondents' counter-textual definition of "exceeds" is the basis for the Commerce Department's shift to a policy of offsetting dumped sales with non-dumped sales in determining whether and at what level to impose antidumping duties on foreign manufacturers. Offsetting has caused and will continue to cause grave harm to American industry and labor.

One need look no further than this very case to understand the magnitude of the harm from offsetting. Offsetting necessitated a recalculation of the antidumping duty imposed on Respondent Tata as a result of its dumping of steel products in the United States. Commerce had previously imposed a duty of 2.59% on Tata. But recalculation completely wiped out this duty, reducing it to zero, and thereby allowing Tata to avoid any duty whatsoever—notwithstanding the undisputed fact that Tata had engaged in dumping that was found to have materially injured the American steel industry.

And this is just the tip of the iceberg. Commerce's shift to offsetting resulted in the revocation of numerous antidumping duties in several industries, again allowing foreign manufacturers to materially injure American industry. *See Implementation of the Findings of the WTO Panel in U.S. Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (May 4, 2007) ("*Revocation Orders*").

As this Court has emphasized, the fundamental purpose of our antidumping laws is to "protect our

industries and labor against a now common species of commercial warfare of dumping goods on our markets ... until our industries are destroyed." *United States v. Eurodif S.A.*, 129 S. Ct. 878, 884 (2009) (citations omitted). Allowing offsetting runs directly counter to this purpose by leaving widespread and injurious dumping unremedied and future injurious dumping undeterred.

This is clearly a question of national importance worthy of this Court's review, *see* S. Ct. Rule 10(c), and because it rests within the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit there is no possibility of a circuit split or further percolation in other lower courts. A grant of certiorari is warranted.

I. The Briefs In Opposition Confirm That Review By This Court Is Necessary To Reverse An Impossible Construction Of The Tariff Act.

As explained in the Petition, the Tariff Act unambiguously precludes the Commerce Department from offsetting; that is, the Act prohibits Commerce from using above-fair-value sales to offset dumped sales in determining a "weighted average dumping margin." *See* Nucor Petition for Certiorari at 24-32 ("Nucor Pet."). The term "exceeds" in the statutory definition of "dumping margin"—"the amount by which the normal value exceeds the export price," 19 U.S.C. § 1677(35)(A)—means "greater than." Nucor Pet. at 27-28. Normal value "exceeds" or is "greater than" export price only where there is dumping, *i.e.*, only where goods are sold "at less than fair value." 19 U.S.C. § 1677(34). Thus, the statutory definition of "dumping margin" includes only dumped sales. So too the statutory definition of "weighted average

dumping margin," which is a function of "aggregate[d] dumping margins." *Id.* § 1677(35)(B).

Respondents agree that the question presented hinges upon the meaning of the word "exceeds" in the statutory definition of "dumping margin." *See* Brief in Opposition of the United States at 15 ("USA"); Brief in Opposition of Tata Steel Ijmuiden at 10 ("Tata"). As explained in the Petition, the term "exceeds" takes its plain meaning "greater than," which is set out in countless dictionary definitions. Nucor Pet. at 27. The Federal Circuit itself has acknowledged the plain meaning of "exceeds." *See Timken*, 354 F.3d at 1341.

While acknowledging that the plain meaning of the term "exceeds" is "greater than," *e.g.*, Tata at 10, Respondents argue that the term "exceeds" should be construed to mean either "greater than or less than," Tata at 12. To state Respondents' position—that a word takes its natural plain meaning *and also its opposite*—is to prove its illogic. Naturally, neither Respondent cites a single dictionary definition in support of their preferred meaning. This is unsurprising, as dictionaries generally do not define words to take the meaning of their antonyms.

As Nucor illustrated in its Petition, the plain meaning of "exceeds" ("greater than") is supported by the structure of the Act. *See* Nucor Pet. at 26-27. The definitions of "dumping" and "dumping margin" must be read *in pari materia*. Congress placed these terms back to back in the Tariff Act, *see* 19 U.S.C. § 1677(34), (35), and defined them both by reference to the same guideposts—normal or fair value and export price. *Compare id.* § 1677(34) *with id.* § 1677(35). Congress thus clearly intended for these

definitions to map onto each other, and they do so when "exceeds" takes its plain and ordinary meaning: "greater than."[1] By giving "exceeds" its plain meaning, there is a "dumping margin"—that is, an amount "by which normal value exceeds [is greater than] the export price"—only where "dumping" has occurred. This makes eminent sense; it would be illogical to have a dumping margin where there is no dumping.[2]

Further structural support for this plain meaning construction exists throughout the Tariff Act. As highlighted in the Petition, Congress gave this term its plain meaning in several other places in the Tariff Act. *See* Nucor Pet. at 29-30. In fact, Congress used the term "exceed" dozens of times in the Tariff Act, and in

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1. The United States argues that because "dumping" and "dumping margin" are separately defined terms, these terms are entirely unrelated to one another. USA at 13 (citing *Burgess v. United States*, 553 U.S. 124 (2008)). But this makes no sense given the interrelatedness of these two statutory definitions. *See Burgess*, 553 U.S. at 131 n.3 (noting that "it is reasonable to assume that Congress wanted courts to read the phrase 'debtor's principal residence' in light of the separate definition of 'debtor'" because "debtor's principal residence" is "incomplete on its face" without the word "debtor's").

2. Giving the term "exceeds" its plain meaning best fulfills the purpose of the Act. Only by construing "exceeds" to mean "greater than" can Commerce fully enforce the antidumping protections enacted by Congress. To interpret the statute otherwise destroys this protection; indeed, Commerce's shift to offsetting has *eliminated* antidumping orders entirely, *see infra* Section II, despite the fact that injurious dumping has occurred and that "[t]he purpose of the Act is to prevent dumping." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994).

no instance does the term stray from its plain meaning.[3] Respondents' request to give "exceeds" an alternative construction thus runs contrary to the "standard principle of statutory construction [that] provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

Cognizant of this basic rule of statutory construction, Respondents attempt to avoid its necessary result in this case by stating that the rule need not apply in all cases. *See* USA at 16 (discussing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997)). But the Court allows such inconsistency "only where the context clearly requires it." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949). Indeed, *Robinson*—the case relied upon by Respondents—ascribed different meanings to the same statutory term only because the statute unambiguously gave the same term two different meanings. *See* 519 U.S. at 342-43.

Here, neither Respondent offers any evidence that Congress intended to give the term "exceeds" different meanings in different parts of the Tariff Act. Nor could they. As highlighted above, Congress used the term "exceed" dozens of times in the Tariff Act, each time in such a way as to take its plain meaning "greater than."

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3. *See, e.g.*, 19 U.S.C. § 1671b(b)(4)(B) (stating that "a countervailable subsidy is de minimis if ... the aggregate of the net countervailable subsidies does not *exceed* 2 percent ad valorem"); *see also id.* § 1671c(d)(2); *id.* § 1673a(a)(2).

Respondents attempt to overcome this plain meaning by relying on the Federal Circuit's decision in *Timken*, which was the basis for the court's decision in this case. Tata at 10-11. In *Timken*, Commerce argued that the Tariff Act "unambiguously requires" the construction advanced by Petitioner here. Brief for United States, *Timken Co. v. United States*, No. 03-1098, 2003 WL 24305310, at 16 (Fed. Cir. filed May 19, 2003). The *Timken* Court—despite acknowledging that the established dictionary definition of "exceeds" is "greater than"—nakedly asserted that "in a mathematical context, 'exceeds' does not unambiguously preclude the calculation of a negative dumping margin" because "the word 'exceeds' could arguably allow for negative dumping margins because it guides the manner in which to set up the mathematical equation—x 'exceeds' y = x-y." *Timken*, 354 F.3d at 1341-42.

The *Timken* Court cited no support for this passing, nontextual reading of the term "exceeds." In fact, the court's naked assertion that "exceeds" is capable of meaning "less than" in the mathematical context is the sum total of its reasoning on the issue. Mere *ipse dixit* cannot overcome the plain meaning of the word "exceeds." Say-so is not a legitimate form of statutory construction.

Moreover, the *Timken* Court was wrong as a matter of mathematics. Mathematical dictionaries do not define "exceeds" to mean "greater than or less than." In fact, they do not define the term *at all. See, e.g.*, *The Concise Oxford Dictionary of Mathematics* 160-61 (4th ed. 2009); *The Facts On File Dictionary of Mathematics* 72 (3d ed. 1999); *Mathematics Dictionary* 156 (5th ed. 1992); *The HarperCollins Dictionary of Mathematics* 206 (1991). Thus, the term "exceeds" is not a term of art

in mathematics that takes some unusual meaning, much less a meaning directly opposed to its ordinary meaning "greater than."

Last, Tata argues that Commerce's interpretation of "exceeds" to mean "greater than or less than" must be correct because every Federal Circuit judge save one has endorsed it, implying that the unanimity of the Federal Circuit on the question presented is a reason not to grant certiorari. Tata at 9. But the opposite is true. As an initial matter, the unanimity of the Federal Circuit does not make that court's jurisprudence correct. As Petitioner's textual analysis demonstrates, the Federal Circuit is in fact incorrect. And the *Timken* opinion itself hints that the Federal Circuit had less than full confidence in its own reasoning, as the court stated that the term "exceeds" "could arguably" mean "greater than or less than" and described the issue as a "close question." *Timken*, 354 F.3d at 1342.

More importantly, the Federal Circuit has exclusive jurisdiction in this arena. Thus, the unanimity of the Federal Circuit (coupled with the court's refusal to consider the issue *en banc*) demonstrates that Commerce's impossible construction of the statute—which is the national rule—will remain indefinitely if not reviewed by this Court.

II. The Briefs In Opposition Confirm That This Case Presents An Important Question Of Federal Law.

The United States fails even to address whether this case presents an important question of federal law, focusing exclusively on the merits of the case and thus

effectively conceding its importance.[4] This effective concession is unsurprising given the serious and negative impact that offsetting has had—and will continue to have—on American industry and labor. Petitioners and their Amici have extensively documented how offsetting will cause great harm to American industry and eliminate American jobs, thus damaging an already-weakened U.S. economy. *See* Nucor Pet. at 15-24; U.S. Steel Petition for Certiorari at 21-25; Southern Shrimp Alliance & Coalition of Fair Lumber Imports Br. at 3-16; United Steelworkers Br. at 21-25.

Despite the fact that offsetting seriously undermines Commerce's ability to police and halt injurious dumping, Tata suggests that the question presented is unimportant because Commerce continues to enforce the antidumping laws. Citing the revocation orders issued by Commerce following its decision to implement offsetting,[5] Tata argues that "[u]pon recalculation of the investigation margins, without zeroing, [Commerce] revoked only two antidumping duty orders; the other 10 antidumping duty orders stayed in place, at least in part." Tata at 4. That

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4. Indeed, in practical recognition of the importance of the issue presented, the United States has recently fought "to change [WTO] rules in order to permit the use of zeroing in all contexts in the Doha round" of international trade negotiations among the WTO membership. *U.S. Continues Fight to Preserve Zeroing in Doha Despite New Proposal*, Inside U.S. Trade (Jan. 6, 2011).

5. *See Revocation Orders*, 72 Fed. Reg. 25,261; *Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy*, 72 Fed. Reg. 54,640 (Sept. 26, 2007) ("*Italy Steel Revocation Order*").

the shift to offsetting has resulted in the total revocation of antidumping orders—including the order in this case—itself illustrates the importance of the question presented. It demonstrates that Commerce's construction of the statute can lead to *zero* antidumping enforcement in instances where there is demonstrated dumping that is materially injuring American industries—despite the fact that "[t]he purpose of the Act is to prevent dumping." *Lasko Metal Prods., Inc.*, 43 F.3d at 1446.

Moreover, Tata grossly understates the effect of Commerce's recalculations. Commerce decreased the dumping margins on *almost every* recalculated antidumping order. As a result, Commerce *revoked* antidumping orders regarding: Hot-Rolled Carbon Steel from the Netherlands; Stainless Steel Bar from France; Stainless Steel Bar from Germany; Stainless Steel Bar from Italy; Stainless Steel Bar from the United Kingdom; and Stainless Steel Wire Rod from Sweden. For example, after recalculating an antidumping order regarding Italian steel, Commerce decreased the antidumping duty "from 7.07 percent to zero," and thus "revok[ed] the [antidumping] order." *Revocation Orders*, 72 Fed. Reg. at 25,262-63. *See also id.* at 25,262 ("The margin for Corus decreases from 2.59 percent to zero.... [W]e are now revoking this order."); *id.* ("The margin for UGITECH decreases from 3.9 percent to zero. We are now revoking this order."); *id.* ("The margin for Einsal decreases from 4.17 percent to de minimis. We are now revoking this order."); *id.* at 25,262-63 ("The margin for Acciaiera Valbruna S.p.A. decreases from 2.50 percent to zero. We are now revoking this order.... The margin for Rodacciai S.p.A. decreases from 3.83 percent to zero. We are now revoking this order."); *id.* at 25,263 ("The margin for Corus Engineering Steels Ltd. decreases from 4.48

percent to zero. We are now revoking this order."); *id.* ("The margin for Fagersta Stainless AB decreases from 5.71 percent to zero.... [W]e are now revoking this order.").

And in many instances the antidumping orders were not revoked only because the previous margins were so high that they survived the drastic reductions resulting from offsetting. *See, e.g., id.* at 25,262 ("The margin for BGH decreases from 13.63 percent to 2.59 percent." (steel from Germany)); *Italy Steel Revocation Order*, 72 Fed. Reg. at 54,641 ("The margin for TKAST decreases from 11.23 percent to 2.11 percent." (steel from Italy)). In short, these decisions provide strong evidence that Commerce's shift to offsetting enables foreign manufacturers to engage in widespread and injurious dumping to the serious detriment of American industry and labor.

Tata separately argues that the Court should deny certiorari because "to disturb the decision would be to cause political turmoil for the United States in the international trade arena." Tata at 16. But if this were a legitimate governmental concern, certainly the United States would have raised this point in its opposition. It made no such objection. In any event, Commerce is expressly prohibited from implementing WTO rulings that conflict with federal law. *See* 19 U.S.C. § 3512(a)(2) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."). And this Court does not ignore statutory terms in the name of expediency. *See Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1944) ("The natural meaning of words cannot be displaced by reference to difficulties in administration.").

CONCLUSION

For the foregoing reasons and those set out in the petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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