No. 13-___

IN THE

Supreme Court of the United States

ASHLEY FURNITURE INDUSTRIES, INC., ETHAN ALLEN GLOBAL, INC., AND ETHAN ALLEN OPERATIONS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

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

Kristin H. Mowry
Jeffrey S. Grimson
Jill A. Cramer
MOWRY & GRIMSON, PLLC
5335 Wisconsin Ave., NW,
Suite 810
Washington, DC 20015

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
kr@goldsteinrussell.com

QUESTIONS PRESENTED

When foreign companies sell products in the United States below fair market value, the Government may impose antidumping duties on the products to eliminate the unfair advantage. The Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003(a), 114 Stat. 1549, requires that certain antidumping duties be distributed to domestic companies affected by the dumping. However, as interpreted and applied by the Government, the statute allows distributions only to those affected companies that expressed support for the imposition of the duties in answering a questionnaire distributed as part of the Government's investigation into the dumping allegations. The Federal Circuit held that this viewpoint discrimination is subject to, and survives, the intermediate scrutiny applied to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

The questions presented are:

1. Whether a statute that denies a government benefit based on a recipient's failure to express support for a proposed course of government action, is subject to, and survives, strict scrutiny under the First Amendment.

2. Whether, to successfully defend a viewpoint-discriminatory statute subject to intermediate scrutiny under *Central Hudson*, the Government must prove that non-discriminatory measures would fail to satisfy the Government's interests.

PARTIES TO THE PROCEEDINGS

This consolidated petition arises from the Federal Circuit's decision resolving two appeals in related, but separate cases.

1. In No. 2012-1196, the plaintiff-appellant below and petitioner here is:

Ashley Furniture Industries, Inc.

The defendants-appellees below and respondents here are:

The United States of America

The United States International Trade Commission

American Furniture Manufacturers Committee for Legal Trade

Kincaid Furniture Co., Inc.

L. & J.G. Stickley, Inc.

Sandberg Furniture Manufacturing Company, Inc.

Stanley Furniture Company, Inc.

T. Copeland and Sons, Inc.

Vaughan-Bassett Furniture Company, Inc.

2. In No. 2012-1200, the plaintiffs-appellants below and petitioners here are:

Ethan Allen Global, Inc.

Ethan Allen Operations, Inc.

The defendants-appellees below and respondents here are:

The United States of America

The United States International Trade Commission

United States Customs and Border Protection

Kincaid Furniture Co., Inc.

L. & J.G. Stickley, Inc.

Sandberg Furniture Manufacturing Company, Inc.

Stanley Furniture Company, Inc.

T. Copeland and Sons, Inc.

Vaughan-Bassett Furniture Company, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

Petitioner Ethan Allen Operations, Inc.'s parent company is Ethan Allen Global, Inc.

Petitioner Ethan Allen Global, Inc.'s parent company is Ethan Allen Interiors, Inc.

Ethan Allen Interiors, Inc. is a publicly held company that owns 10 percent or more of the stock of Ethan Allen Global, Inc. As noted, Ethan Allen Operations, Inc. is a wholly owned subsidiary of Ethan Allen Global, Inc.

Petitioner Ashley Furniture Industries, Inc. has no parent corporation, nor is there any publicly held corporation that owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ashley Furniture Industries, Inc. (Ashley), and Ethan Allen Global, Inc. and Ethan Allen Operations, Inc. (collectively, Ethan Allen) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-24a) is published at 734 F.3d 1306. The opinions of the Court of International Trade (Pet. App. 25a-62a, 63a-89a) are reported at 816 F. Supp. 2d 1330 and 818 F. Supp. 2d 1355.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2013. Pet. App. 3a. The court of appeals denied petitioners' timely petitions for rehearing on January 3, 2014. Pet. App. 90a-92a, 93a-95a. On March 13, 2014, the Chief Justice extended the time to file this petition through May 2, 2014. No. 13A927. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right

> of the people peaceably to assemble, and to petition the government for a redress of grievances.

The appendix to this brief reproduces the relevant portions of the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003(a), 114 Stat. 1549 (2000).

STATEMENT OF THE CASE

This case presents a First Amendment question of surpassing practical importance to multiple domestic manufacturing and agricultural industries: may the Government deny federal funding to an otherwise qualified recipient because the recipient failed to express support for a particular policy position? Specifically, petitioners challenge a provision of the Continued Dumping and Subsidy Offset Act (CDSOA), Pub. L. No. 106-387, § 1003(a), 114 Stat. 1549 (2000), which, as interpreted and applied by the Government, distributes antidumping duties to domestic producers affected by the dumping, but only if they expressed support for the imposition of the duties in answering a Government questionnaire. The statute thus applied discriminates between otherwise identically situated domestic producers based solely on their position on a question of public concern. The Federal Circuit nonetheless declined to apply strict scrutiny under the First Amendment, instead concluding that the statute's viewpoint discrimination was subject to, and survived, intermediate scrutiny under the test for commercial speech.

I. Legal Background

A. Statutory Regime

1. The Tariff Act of 1930, as amended, authorizes imposition of antidumping duties when foreign merchandise is sold in the United States at less than its fair value, resulting in (or threatening) material injury to domestic industry. *See* 19 U.S.C. § 1673(1)-(2).

While the Department of Commerce (Commerce) can initiate antidumping investigations itself, it more commonly does so at the behest of domestic businesses that file a petition requesting an investigation. *See id.* § 1673a(a)-(b). Upon confirming that the petition is filed on behalf of the industry,[1] Commerce conducts an investigation to determine whether dumping has occurred. *See id.* §§ 1673a, 1673b(b), 1673d(a).

The International Trade Commission (ITC) simultaneously conducts a parallel investigation to determine whether the dumping has materially injured, or threatens material injury to, domestic industry. *Id.* § 1673d(b). As part of its investigation, the ITC sends preliminary and final questionnaires to domestic producers of the relevant commodities, asking for detailed business and market information.

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[1] In order to prompt an investigation, the petition must be filed "on behalf of an industry," *id*. § 1673a(b)(1), defined to require support from at least 25 percent of the entire domestic industry and at least 50 percent of that portion of the domestic industry that expresses a view on the petition, *id.* § 1673a(c)(4)(A).

See id. § 1333. Producers are compelled by law to respond. *See id*. § 1333(a); 19 C.F.R. § 207.8.

The ITC questionnaires also include the question "Do you support or oppose the petition?" Pet. App. 7a. The ITC considers the answers in deciding whether the dumping has caused, or is threatening, material injury. Pet. App. 14a.[2]

If Commerce and the ITC each determine that the statutory requirements are satisfied, Commerce issues an antidumping order and directs U.S. Customs and Border Protection (Customs) to levy duties on the relevant goods. 19 U.S.C. § 1673e.

2. Originally, the duties collected were placed in the U.S. Treasury's general revenue fund. But in 2000, Congress enacted the CDSOA as a last-minute amendment to an appropriations bill.[3] Also known as the "Byrd Amendment" because it was proposed by Senator Robert Byrd of West Virginia, the CDSOA required that all collected antidumping duties be distributed to the "affected domestic producers" to help defray the costs of manufacturing facilities,

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[2] The ITC questionnaire is not used to determine whether the petition enjoys the industry support required by Section 1673a(c)(4)(A). *See supra* n. 1. If necessary, Commerce conducts its own polling to decide that question. *See* 19 U.S.C. § 1673a(c)(4)(D).

[3] *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 106-387, §§ 1001-03, 114 Stat. 1549, 1549A-72-75 (2000).

equipment, research and development, personnel, and other costs. 19 U.S.C. §§ 1675c(a), (b)(4).[4]

The CDSOA did not, however, authorize distributions to all domestic producers injured by the dumping. Instead, the statute directed the ITC to create a list of the petitioners who initiated the investigation and "persons that *indicate support of the petition by letter or through questionnaire response*." 19 U.S.C. § 1675(d)(1) (emphasis added). Those who satisfy this so-called "petition support requirement," may then certify that they "desire[] to receive a distribution" and document the qualifying expenditures for which they seek reimbursement. *Id*. § 1675(d)(2). Collected duties are then distributed annually based on those certifications, on a pro rata basis. *Id*. § 1675(d)(3).

3. Congress repealed the CDSOA in 2005, but declined to make the repeal retroactive.[5] Instead, the legislation provided that duties collected on entries of goods made and filed before October 1, 2007, would continue to be distributed in accordance with the CDSOA regime. 19 U.S.C. § 7601(b). Accordingly, as Customs has explained, "the distribution process will continue for an undetermined period,"[6] as the

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[4] The relevant provisions of the CDSOA are reproduced in Appendix F to this petition.

[5] *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006).

[6] *See* U.S. Customs & Border Prot., *How Will the Repeal of CDSOA by Section 7601(a) of the Deficit Reduction Act of 2005 Affect Future CDSOA Disbursements?,* http://www.cbp.gov/faqs/

Government collects duties under old orders, liquidates entries, and resolves legal and administrative disputes. In FY2012 alone – seven years after the CDSOA was repealed – the statute governed the disbursement of more than $118 million (collected under more than 250 orders) to thousands of companies in industries ranging from seafood to computer components, pasta to steel.[7] In addition, Commerce has identified thirty accounts as subject to ongoing litigation over the constitutionality of the CDSOA for prior years.[8] In this case alone, over $100 million is at stake for the domestic furniture industry.

B. The Federal Circuit's Internal Divisions Regarding The Application And Constitutionality Of The Petition Support Requirement

The CDSOA's petition support requirement has been the subject of divided and conflicting decisions

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how-will-repeal-cdsoa-section-7601a-deficit-reduction-act-2005-affect-future-cdsoa.

[7] *See* U.S. Customs & Border Prot., FY 2012 CDSOA Annual Disbursement Report, *available at* http://www.cbp.gov/sites/default/files/documents/section1.pdf. The orders are for both antidumping and countervailing duty cases. The instant case only relates to antidumping duties, but the CDSOA applies equally to both proceedings.

[8] *See* U.S. Customs & Border Prot., *Explanation of Funds Withheld in Special Accounts as of 11/7/2013*, U.S. Customs and Border Prot., *available at* http://www.cbp.gov/sites/default/files/documents/Funds%20Withheld%20in%20Special%20Account_110713.pdf.

within the Federal Circuit, culminating in the decision in this case, holding that the statute constitutionally precludes distributions in any case in which a company fails to express abstract support for a petition by marking the "support" box on an ITC questionnaire.

1. SKF USA

The Federal Circuit first considered a First Amendment challenge to the CDSOA in *SKF USA, Inc. v. U.S. Customs & Border Protection.*, 556 F.3d 1337 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 3273 (2010).

a. In that case, the Federal Circuit upheld the petition support requirement on its face and as applied to a domestic manufacturer of antifriction bearings that had opposed an antidumping petition. *See* 556 F.3d at 1360. The court did not "doubt that SKF's opposition to the antidumping petition here is protected First Amendment activity." *Id*. at 1354. It further did not doubt that viewpoint discriminatory statutes are ordinarily subject to, and fail, strict scrutiny. *Id*. at 1350. But the court nonetheless concluded that strict scrutiny was not required and that the statute's discrimination was constitutional, for several reasons.

First, the court believed that because "the statute does not *prohibit* particular speech," but instead withholds a benefit, cases applying strict scrutiny to content-based bans "are of little assistance in determining the constitutionality of" the CDSOA. *Id*. at 1350 (emphasis added); *see also id.* at 1352.

Second, the court reasoned that in "considering limited provisions that do not ban speech entirely,

the purpose of the statute is important." *Id.* at 1350. In this case, the court concluded, the statute could be viewed as intended "to reward injured parties who assisted government enforcement of the antidumping laws." *Id*. at 1352. The court recognized that the only "assistance" seemingly required by the statute was an abstract expression of support for an antidumping petition: on its face, the statute authorized distributions to companies that do nothing more than "indicate support of the petition by letter or through questionnaire response," 19 U.S.C. § 1675c(d)(1). The court acknowledged that applying the statute as written would raise serious First Amendment questions because it would "reward a mere abstract expression of support." 556 F.3d at 1353. Accordingly, the court held that the statute must be construed to reward only those "who actively supported the petition" by "respond[ing] to an ITC questionnaire and thus participat[ing] actively in the proceeding." *Id*. 1353 n.26. For that reason, it held the support-by-letter provision unenforceable. *Id*.

SKF, however, argued that denying it a distribution created the same viewpoint-based discrimination in reverse: because SKF had provided "active support" for the provision under the new definition (as it, too, had filled out an ITC questionnaire), the only basis for denying it a distribution was because of its abstract *opposition* to the petition. *Id*. at 1358.

To decide whether that discrimination rendered the statute unconstitutional, the Federal Circuit applied the intermediate scrutiny test applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S.

557 (1980). *See* 556 F.3d at 1354-55. The court reasoned that this test had been applied to "activities of a commercial nature," and believed 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*. at 1355. Accordingly, the "well established *Central Hudson* test seem[ed] appropriate." *Id*.

Applying that test, the court held that "preventing dumping is a substantial government interest" that the CDSOA "directly advances . . . by rewarding parties who assist in this enforcement." *Id*. The court noted the "long history" of providing rewards to qui tam relators and attorney's fees to successful plaintiffs in civil rights and other cases. *Id*. at 1356. And it concluded that CDSOA petition supporters played a similar role because answering the ITC questionnaires provides valuable practical assistance to the Government in its enforcement efforts. *Id*. at 1358.

The court further rejected the claim that the statute was "overly broad" in rewarding companies that provided this active assistance only if they expressed abstract support for the petition as well. *Id*. at 1357. In the case before it, the court noted, in addition to expressing abstract opposition, SKF "undertook a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case" because it actively participated in the ITC proceedings. *Id*. at 1358-59. The court further stated that 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." *Id*. at 1359. And given that neutral witnesses are not awarded attorney's fees or qui tam awards, the court thought it "rational for Congress to conclude that those who did not support the petition should not be rewarded," *id*., even if Congress chose to reward other neutral parties that expressed abstract support for the petition.

b. Judge Linn dissented at length. *See id*. 1360-1381. Among other things, he viewed as settled law that a statute "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." *Id*. at 1376 (discussing, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593 (1972)). In this case, it was clear that "the petition support requirement is viewpoint discriminatory" and "affects political speech" in a public forum. *Id*. And it was equally clear, he believed, that even if the Government had a compelling interest in promoting cooperation with antidumping investigations, the petition support requirement was not narrowly tailored to that interest. *Id*. at 1378. Indeed, the fit between the purported Government interest and the statute was so poor, Judge Linn concluded, it would not satisfy *Central Hudson* because the Government could promote cooperation through means that do not discriminate on the basis of speech, such as subpoenaing parties that fail to answer questionnaires or reimbursing parties for the expense of providing responses. *Id*. at 1373.

Finally, Judge Linn explained that the majority decision conflicted with the Sixth Circuit's ruling in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999), in which that court applied strict scrutiny to an ordinance giving preference for casino licenses to developers who had promoted the ballot initiative that legalized casino gambling in the city. *Id*. at 1377-78.

c. Four judges dissented from denial of rehearing en banc. *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 583 F.3d 1340 (Fed. Cir. 2009) . "This case is simply too important," the dissenters concluded, "to allow the majority's incorrect First Amendment analysis to stand." *Id*. at 1343 (Linn, J., dissenting). Although they recognized that the CDSOA had been repealed, the dissenters noted it would continue to govern distribution of hundreds of millions of dollars well into the future. *Id*. In addition, they viewed the majority opinion as establishing a dangerous precedent for First Amendment cases more generally. "The negative consequences" of that precedent, the dissenters warned, "should not be understated." *Id*.

2. PS Chez Sidney

A different panel next considered the petition support requirement in *PS Chez Sidney, L.L.C. v. U.S. International Trade Commission*, 684 F.3d 1374 (Fed. Cir. 2012). There, a company checked the "support" box on a preliminary ITC questionnaire, but changed its mind and indicated "no position" on the final questionnaire. Like petitioners, although it did not express abstract support for the petition in

the end, Chez Sidney nonetheless provided all the information the ITC requested. And like petitioners, Chez Sidney took no further action in the case. 684 F.3d at 1377.

Because Chez Sidney failed to indicate support for the petition in the final ITC questionnaire, it was denied a distribution. A new Federal Circuit panel held the denial improper. The panel first rejected the Government's assertion that a producer may satisfy the petition support requirement only it if checks the "support" box on the ITC questionnaire. The panel concluded that "the statute's plain language does not require that producers indicate an expression of support other than through a letter or by filing a response – it states that supporting producers are those who submit letters or responses." *Id*. at 1380. Treating those responses as sufficient "support" for the petition would make sense, the court reasoned, because the information provided "is essential to allow the ITC to successfully complete its investigations." *Id*.

The panel further explained that tying distributions to expressions of abstract support or opposition would raise significant First Amendment concerns. *Id*. at 1380-81. Finding "support" in a producer's response to an ITC questionnaire avoided that constitutional difficulty by "concentrating on the activities of supporters" rather than their "mere abstract expression of support." *Id.* at 1381 (quoting *SKF*, 556 F.3d at 1353). Accordingly, the panel "construed the Byrd Amendment not to reward or penalize abstract expression by itself." *Id*.

The panel explained that this interpretation was consistent with the result in *SKF* because the

producer in that case was denied a distribution because its "other *actions* in opposition to the petition outweighed the assistance it provided by responding to the questionnaire." *Id.* at 1381 (citing *SKF*, 556 F.3d at 1359) (emphasis added). The panel thus summed up its holding:

> We hold that when a U.S. producer assists investigation by responding to questionnaires but takes no other *action* probative of support or opposition, the producer has supported the petition under § 1675c(d) and is eligible for distributions if it can otherwise make the required certification that it has been injured.

Id. at 1382 (emphasis added). Because Chez Sidney had provided "support" for the petition by answering the questionnaire, and had taken no other "action" to negate that support (because it did not further participate in the ITC proceedings), it was entitled to a distribution. *Id*. at 1382-83.

II. Factual And Procedural Background To This Case.

Like Chez Sidney, the petitioners supported a Government antidumping investigation by providing answers to an ITC questionnaire, but took no further part in the ITC proceedings. And like Chez Sidney, petitioners declined to express abstract support for the petition by marking the "support" box on a final ITC questionnaire. But the Federal Circuit panel hearing their appeal nonetheless held that the denial was appropriate under the statute and permitted by the First Amendment.

A. The Dumping Investigation

In October, 2003, a group of American furniture manufacturers and labor unions filed a petition with the ITC and Commerce alleging that Chinese companies were dumping wooden bedroom furniture at less than fair value into United States' market. *See* Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058, USITC Pub. 3743 (Dec. 2004) (Final).[9]

The petition proved highly controversial within the domestic furniture industry. One industry observer wrote at the time that the petition "is literally tearing the furniture industry apart."[10] The disagreements focused on some of the most essential political and economic debates of our times. For a number of years, globalization forced the domestic industry to face increased competition from manufacturers in other countries – including China, Taiwan, India, and Indonesia – with plentiful low-cost labor. American firms took different approaches to that challenge. Some responded by seeking increased barriers to foreign imports, including by seeking the antidumping duties at issue in this case. Others feared that imposition of duties could trigger a wider trade war with China, to the overall

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[9] A public version of the report, with certain proprietary information redacted, is available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2003/wooden_bedroom_furniture/final/PDF/woodenbedroomfurniturefinal.pdf.

[10] Rich Christianson, *Furniture Industry in Turmoil*, WOOD & WOOD PRODUCTS, Dec. 2003.

detriment to the domestic industry and general economy.[11]

Domestic producers also had reason to be concerned that supporting the petition would impair relationships with their retail partners, who strongly opposed it.[12] A Government report found that "many U.S. furniture manufacturers in support of the investigation speculated that the cost of lost business from U.S. retailers in retaliation for their support may well exceed the combined benefit of the [antidumping] order and CDSOA disbursements."[13]

Petitioners were among those companies that declined to support the petition when asked in the ITC questionnaire. Ethan Allen checked the box indicating "Take no position," while Ashley marked "Oppose." Pet. App. 7a. Petitioners nonetheless responded fully to the questionnaires, *id.*, at significant expense. Ashley, for example, reported

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[11] *See* Stefan Wille, *Antidumping Petition Against the Chinese Furniture Industry: An Economist's Point of View*, WOOD & WOOD PRODUCTS, Oct. 2006.

[12] *See* Susan Lorimor, *Furniture Manufacturers and Retailers Face Off*, WOOD & WOOD PRODUCTS, Dec. 2003.

[13] JEANNE J. GRIMMETT & VIVIAN C. JONES, CONG. RESEARCH SERV., THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT ("BYRD AMENDMENT") 24 (Dec. 19, 2005), *available at http://digital.library.unt.edu/ark:/67531/metacrs8238/m1/1/high_res_d/*.

that filling out the questionnaires took approximately 160 hours of employee time.[14]

Commerce ultimately found that Chinese companies were, in fact, dumping wooden bedroom furniture into United States' markets, and the ITC found that the dumping was causing an injury to domestic producers.[15] Because they did not check the "support" box on their questionnaires, the ITC refused to include petitioners on the list of domestic producers eligible to receive a portion of the antidumping duties subsequently imposed. *See* Pet. App. 88a. Other domestic furniture companies, like Oakwood Interiors, received distributions because although they, like petitioners, did nothing more in the case than answer the ITC questionnaire, they had checked the "support" box. *Id.* 22a (Clevenger, J., dissenting).

B. Court of International Trade Proceedings

Petitioners independently filed suit in the Court of International Trade (CIT), challenging the denial of distributions. Petitioners argued, among other things, that they qualified for distributions under a proper saving construction of the petition support

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[14] Ashley Furniture Indus., Inc. Producers' Questionnaire (Prelim.) at 2 (C.A. J.A. 208); Ashley Furniture Indus., Inc. Producers' Questionnaire (Final) at 2 (C.A. J.A. 210).

[15] *See* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China, 70 Fed. Reg. 329-01 (Jan. 4, 2005).

requirement and that if the statute were construed to deny them distributions based on their honest answers to the questionnaire, the provision was unconstitutional as applied, in violation of the First Amendment. Pet. App. 8a. The CIT dismissed both cases. *Id*.

C. Federal Circuit Proceedings

A divided panel of the Federal Circuit affirmed. Pet. App. 7a.

1. The panel rejected petitioners' claim that they were petition supporters under the saving construction of *SKF* and *Chez Sidney*. The panel held that "under the plain meaning of the Byrd Amendment," Pet. App. 12a, a producer cannot be a petition supporter without checking the "support" box on the ITC questionnaire, *id*. 12a-13a. The court distinguished *Chez Sidney* on the ground that the producer in that case had indicated support in a preliminary questionnaire response, even though it subsequently withdrew that support in the final questionnaire. *Id*.

The panel further rejected petitioners' claim that if the statute were construed to deny them distributions, it was unconstitutional as applied. That argument, the panel concluded, was precluded by *SKF*. *Id*. 12a. The panel acknowledged petitioners' argument that *SKF*'s analytical foundations had been undermined by subsequent decisions of this Court. But it concluded, without further explanation that to "the extent that [petitioners] argue that recent Supreme Court precedent overruled our *SKF* holding, we do not agree." *Id.*

The panel likewise rejected petitioners' argument that their case was different from *SKF* because, unlike the producer in that case, petitioners had not engaged in active opposition to the petition, such that they were denied distributions "solely on the basis of abstract expression." *Id.* 12a. The panel stated that the Government relies on answers to the petition support question to decide whether the statutory prerequisites – including industry support and material injury – have been satisfied. *Id*. 14a. Honestly opposing, or failing to support, a petition thus "can contribute to the petition's defeat." *Id*. Although federal law precludes imposing antidumping duties based on a petition that does not enjoy sufficient industry support or in the absence of a threat of material injury, the panel nonetheless concluded that any answer that could preclude imposition of duties under that policy amounted to an effort to "prevent[] the ITC and Customs from 'successfully enforce[ing] government policy.'" *Id*. (citation omitted).

2. Judge Clevenger dissented. In his view, *SKF* had never "suggest[ed] that it is appropriate to distinguish between domestic producers based solely on the basis of on their response to the support/oppose question." Pet. App. 19a. Instead, he believed that *Chez Sidney* had properly understood *SKF* to authorize distributions so long as a producer "actively supported" a petition by submitting questionnaire responses and did not contradict that active support by, for example, actively opposing the petition as SKF had done. *Id*. 19a-20a. The majority's contrary view of the statutory regime, under which the CDSOA "penalized the mere

expression of opposition to a dumping investigation," would "raise serious First Amendment concerns." *Id*. 22a; *see also id*. 23a.

3. The Federal Circuit denied petitioners' separate petitions for rehearing en banc. *See* Pet. App. 90a-92a, 93a-95a.

REASONS FOR GRANTING THE WRIT

The only distinction between petitioners, who have been denied distributions under the CDSOA, and many other companies that received them, is the content of their speech on a question of public concern and political controversy. The Federal Circuit's decision upholding that viewpoint discrimination cannot be reconciled with this Court's First Amendment precedents, including its recent decisions in *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), and *Sorrell v. IMS Health, Inc*., 131 S. Ct. 2653 (2011). Those decisions make clear that the Government may not condition receipt of a federal benefit on a recipients' expression of support for a particular policy position (*AID*) and that such viewpoint discriminatory statutes fail even commercial speech scrutiny when, as here, the Government fails to show that non-discriminatory measures cannot satisfy the government's interests (*Sorrell*). Yet the panel in this case refused even to discuss either recent decision.

Because challenges to the constitutionality of the CDSOA fall within the exclusive jurisdiction of the Federal Circuit, the lack of a direct circuit conflict is no barrier to review. Nonetheless, the need for review is enhanced because the decision below rests

on principles of First Amendment law that conflict starkly with the law of other circuits. Moreover, although the statute has been repealed prospectively, it continues to govern the distribution of tens of millions of dollars in antidumping duties to affected domestic companies every year, distorting competition by bestowing huge subsidies on the basis of individual companies' speech. And unless this Court intervenes, the effect of the erroneous principles of First Amendment law adopted by the Federal Circuit will endure long after the Government distributes the last CDSOA dollar.

I. The Federal Circuit's Rulings Conflict With The Decisions Of This Court.

The petition support requirement bears all the hallmarks of constitutionally suspect legislation properly subject to strict scrutiny: in distributing an important government benefit, it discriminates on the basis of viewpoint regarding a matter of intense public concern and political controversy. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.") (citations omitted); *see also Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("The Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.") (citations and internal quotation marks omitted).

As Judge Clevenger noted in his dissent, there can be no dispute that the CDSOA as applied in this case discriminates on the basis of viewpoint – the Government provided distributions to other furniture companies, like Oakwood Interiors, that are materially indistinguishable from petitioners (*i.e.*, they also answered ITC questionnaires but took no further steps to support or oppose the antidumping petition in the administrative proceedings) with the sole exception of the content of their speech (Oakwood Interiors checked the "support" box on the ITC questionnaire). Pet. App. 22a. Nor can there be any reasonable dispute that the subject matter of the speech is entitled to the highest degree of First Amendment protection. Whether the federal government should impose trade sanctions on the nation's largest trading partner is a question of "public concern" that is "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (citations and internal quotation marks omitted); *see also id*. at 1216.

"In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 131 S. Ct. at 2667. The Government has never argued that the viewpoint discrimination effected by the petition support requirement is narrowly tailored to serving any compelling government interest. Nor could it. Even if the Government has a compelling interest in encouraging cooperation with antidumping investigations, the viewpoint discrimination of the petition support requirement does not serve it – petitioners provided exactly the same degree of practical assistance in answering the ITC

questionnaire as others, like Oakwood Interiors, that were awarded distributions.

The Federal Circuit upheld that discrimination only because it believed that the statute was properly subjected to, and satisfied, the lesser scrutiny applicable to commercial speech. Neither conclusion can be squared with this Court's precedents.

1. The court in *SKF* reasoned that the CDSOA could be seen as "[r]ewarding parties" in a way that 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*. at 1355. The court thus assumed that when the Government pays individuals and organizations to assist in implementing a government program, it may discriminate among potential partners by requiring funding recipients to voice support for a particular policy.

This Court, however, subsequently made clear that this assumption was mistaken. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), the Court considered a statute that, like the CDSOA, provided federal funding to those who assist in the implementation of a federal program, but only if they expressed public support for a particular policy position. Specifically, the statute offered funding to private organizations to help implement the United States' global strategy to combat the spread of HIV/AIDS, but withheld funding from any recipient that failed to adopt a policy opposing prostitution. *Id*. at 2326. The Court held that requirement unconstitutional.

The Court recognized that the statute only withheld government funds, rather than banning speech outright. *Id*. at 2327. But unlike the Federal Circuit in *SKF*, this Court recognized that the distinction did not justify a relaxed standard of scrutiny. *Id*. at 2328. The Court explained that the Government may regulate funding recipients' speech as part of a program that uses federal funds to promote a message (as it does, for example, when prohibiting discussion of abortion as part of a federally funded family planning program). *Id*. at 2328-29. But, it held, Congress may not "leverage funding to regulate speech outside the contours" of such a program. *Id*. at 2329.

Critically, the Court then held that Congress *necessarily* transgresses that boundary when it requires that "funding recipients adopt – as their own – the Government's view on an issue of public concern." *Id*. at 2330. Contrary to *SKF*, this Court held that it made no difference that the recipient could attempt to disavow the policy in other contexts. *Compare id*. *with* 556 F.3d at 1351-52. The Court explained that a "recipient cannot avow the belief dictated" by the law "and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id*. at 2330.

In this case, the CDSOA requires exactly what *AID* held unconstitutional. Unless petitioners publicly adopt a particular position on a politically controversial question of national trade policy, they are denied federal funds, even though they provided the exact same assistance to the government's law enforcement efforts as companies that received

distributions. Requiring petitioners to espouse support for imposing trade sanctions on China in order to qualify for federal funds necessarily violates the First Amendment because petitioners can express support for sanctions in their questionnaire responses, then turn around and claim to oppose them in other contexts, "only at the price of evident hypocrisy." *Id*. at 2331. Petitioners could not, for example, check the petition support box and then credibly claim to their angry retail customers (who strongly objected to the petition, *see supra* p. 15) that they did not really mean it. Indeed, doing so could expose them to criminal liability, as the companies must sign a certification swearing that the ITC questionnaire responses are true and correct.[16]

2. Even if *SKF* were right to apply the lesser scrutiny of the *Central Hudson* test, its application of that test cannot be reconciled with this Court's intervening decision in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

In *SKF*, the court acknowledged the poor fit between the CDSOA's purported purpose (rewarding active litigation assistance for government enforcement efforts) and the viewpoint discrimination SKF challenged. It did not deny that parties like petitioners provided *exactly* the same amount of active assistance to the Government as did other parties, like Oakwood Interiors, because all filled out ITC questionnaires while taking no further

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[16] *See, e.g.*, C.A. J.A. 210 (Ashley Furniture Indus., Inc. Producers' Questionnaire (Final)); 18 U.S.C. § 1001(a).

part in the proceedings. But the court concluded that it was nonetheless "rational" for Congress to think that it could discriminate between those providing identical assistance on the basis of their expressed viewpoint, 556 F.3d at 1359, because "the *Central Hudson* test does not require perfect correspondence of means and ends," *id*. at 1358.

In *Sorrell*, however, the Court held that a statute will fail even commercial speech scrutiny if the government "offers no explanation why remedies other than content-based rules would be inadequate" to fulfill its interests. 131 S. Ct. at 2669. The Government has never offered such an explanation in this case and none is available. *See supra* pp. 21-22.

The panel majority below suggested that petitioners' failure to express abstract support for imposition of duties amounted to active interference with enforcement of government policy. Pet. App. 14a-15a. That assertion is inexplicable on two levels. First, the panel itself recognized in the very same paragraph that it is United States' policy *not* to impose antidumping duties based on an industry petition unless the petition enjoys sufficient industry support and unless the dumping has caused material injury or threat thereof, which the ITC determines based in part on the responses to the petition support question. *Id*. 14a. The Government thus cannot enforce federal trade law without honest answers to the petition support question. Accordingly, far from interfering with government trade policy, petitioners' truthful questionnaire responses advanced that policy as much as the statements of support from companies that received distributions. If anything, it is the Federal Circuit's interpretation of the statute –

which, the panel frankly acknowledged, "may create incentives for domestic producers to indicate support for a petition even when they may believe that an antidumping duty order is unwarranted," Pet. App. 15a – that interferes with accurate implementation of the nation's trade policy.

In any event, the panel erred in presuming that Congress may bootstrap its way out of a First Amendment problem by basing government decisions on citizens' political speech. There should be no question, for example, that the First Amendment would prohibit a government from denying tax relief to those who opposed a referendum to reduce property taxes.

3. Nothing in the Federal Circuit's analogies to rewards for qui tam relators and attorney's fees for successful civil rights plaintiffs supports its stark deviation from this Court's standard First Amendment analysis.

First, the analogy is simply inapt. The CDSOA does not limit distributions to the companies that initiated the antidumping investigation or participated in the administrative proceedings. It provides them to every domestic producer that asks for funds and can document qualifying expenditures, so long as the company also expressed abstract support for the petition in a questionnaire response. *See* 19 U.S.C. § 1675(d)(2). Indeed, under the plain text of the statute, a producer need not even answer the questionnaire – it is enough that it expressed support for the petition "by letter." *Id*. § 1675(d)(1). But even with that provision excised, and the Federal Circuit's "active support" requirement substituted in its stead, a company need do nothing even remotely

comparable to bringing a lawsuit or acting as a "private attorney general" to qualify for a distribution. The distributions thus do not serve to provide incentives for companies to bring trade violations to the government's attention or reimburse them for the cost of prosecuting a meritorious claim before an administrative body.

Instead of acting like prevailing plaintiffs in litigation, parties that earn distributions by providing the Government useful data through questionnaire responses are much more akin to federal contractors who assist in the implementation of a federal program. Indeed, the *SKF* panel itself believed that "[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function." 556 F.3d at 1355. This case is thus much more like *AID*, in which organizations were paid to help implement a government program (combatting HIV/AIDS), but were disqualified from obtaining federal funds unless they first publicly embraced a particular policy position. *See* 133 S. Ct. at 2325.

Second, even if the litigation analogy may have held some appeal in *SKF* itself – where SKF arguably played a "role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case," 556 F.3d at 1358-59 – the analogy falls apart when applied to companies like petitioners that simply answered the ITC questionnaire and took no further part in the proceedings. *SKF* acknowledged that, at best, such parties can be compared to "neutral parties" – or, more aptly,

witnesses – who "must reluctantly respond to interrogatories or other discovery." *Id*. at 1359.

That analogy poses the question whether Congress could offer financial benefits to neutral witnesses in a case, but only if they expressed support for the winning side in the litigation. The answer is "obviously no," since such viewpoint discrimination does not even arguably serve any legitimate (much less important or compelling) government interest. Indeed, as the panel in this case acknowledged, offering such discriminatory incentives *undermines* the interest they purportedly serve by skewing the truth-finding function of the proceedings. Pet. App. 15a.

The *SKF* panel reached the opposite conclusion only by ignoring the actual question presented by the analogy. It reasoned that because Congress does not award attorney's fees to neutral parties (or witnesses), it was "rational" for Congress to conclude that it need not provide distributions to domestic producers who likewise failed to express support for an antidumping petition. But the court ignored that Congress *did* authorize awards for *some* neutral parties (those who marked the "support" box), but withheld them from petitioners solely on the basis of their viewpoint on a question of public concern. It is that *discrimination* between witness-like producers that must be justified. *See Sorrell*, at 131 S. Ct. at 2669. Because nothing in our litigation-related traditions countenances discrimination among witnesses or neutral parties based on viewpoint, the litigation analogy provides no support for the Federal Circuit's decisions.

II. The Divided Decisions Of The Federal Circuit Are In Conflict With The First Amendment Precedents Of Other Courts Of Appeals.

No circuit conflict over the constitutionality of the CDSOA's petition support requirement is possible – any challenge to the statute must be brought in the Court of International Trade, over which the Federal Circuit has exclusive jurisdiction. *See* 28 U.S.C. § 1581(i)(4); 28 U.S.C. § 1295(a)(5). As a consequence, the Circuit's departure from this Court's precedents (*supra* § I), and the practical importance of the circuit's decisions (*infra* § III) are sufficient to warrant review.

The need for review is enhanced, however, by the enduring divisions within the Federal Circuit and the Circuit's refusal to exercise its responsibility to maintain an intelligible coherence among its decisions. *Cf.* Pet. App. 18a-20a (Clevenger, J., dissenting) (explaining that the panel decision below is irreconcilable with prior decision in *Chez Sidney*). The fate of affected producers and the continuing distribution of tens of millions of dollars annually should not depend on the happenstance of what panel is assigned to resolve any particular case.

Certiorari is further warranted because the First Amendment principles adopted by the Federal Circuit cannot be reconciled with the decisions of other circuits faced with similar questions.

A. The Circuits Are Divided Over The Proper First Amendment Test For Statutes That Provide Government Benefits Only To Those Who Support A Particular Policy Position.

1. As Judge Linn noted, the decision in *SKF* cannot be squared with the Sixth Circuit's decision in similar circumstances in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999).

In that case, Detroit enacted an ordinance giving preference for casino licenses to any company that "actively promot[ed] and significantly support[ed] a state initiative authorizing gaming." *Id*. at 410 (citation omitted). The defendants argued that the provision did not discriminate on the basis of speech, but rather provided an economic incentive, *id.* at 409, in much the same way the defendants in this case have defended CDSOA distributions as providing a reward for assisting a government enforcement program. But unlike the Federal Circuit, the Sixth Circuit recognized that whatever the label or analogy, a provision that provides a government benefit on the basis of a company's support for a proposed course of government action constitutes viewpoint discrimination subject to strict scrutiny under the First Amendment. "The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue." *Id*. Accordingly, the court concluded that the ordinance was "content-based and [was] therefore subject to strict scrutiny." *Id*. at 409-10. After a remand to allow the trial court to apply strict scrutiny in the first instance, the Sixth Circuit

held the ordinance unconstitutional. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002).

There should be no question that if this case had arisen in the Sixth Circuit, *Lac Vieux* would have compelled the conclusion that the CDSOA is subject to strict scrutiny, which no one in this case has ever argued the statute could survive. To be sure, the speech in *Lac Vieux* took the form of supporting a legislative initiative, rather than answering a government questionnaire. *See SKF*, 556 F.3d at 1356 n.32. But nothing in the Sixth Circuit's decision turned on that fact – the court unambiguously applied strict scrutiny because the statute discriminated "on the basis of the content of their political speech," 172 F.3d at 409, without reference to the forum in which the companies spoke. The court explained that "[w]hen speech is regulated because of its content, that regulation will be subject to strict scrutiny review. . . ." *Id*; *see also id*. at 409-10 (finding that the ordinance was "content-based and is *therefore* subject to strict scrutiny") (emphasis added).

The Sixth Circuit's decision also directly conflicts with the present Federal Circuit panel's holding that the government's reliance on political speech in choosing a course of action eliminates the need for strict scrutiny of any resulting viewpoint discrimination. Pet. App. 14a-15a. As in this case, the defendants in *Lac Vieux* argued that the favored speakers' political speech played a role in bringing about the economic benefits the government then distributed – in *Lac Vieux*, the favored speakers had

supported a ballot initiative that led to the authorization of casino gaming in Detroit; in this case, by expressing abstract support for imposing antidumping duties, the panel concluded, companies like Oakwood Interiors helped bring about the imposition of antidumping duties. Pet. App. 14a. But while the Federal Circuit thought this was a reason to relax First Amendment vigilance, the Sixth Circuit recognized that "[b]arring 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." 276 F.3d at 880.

2. The Federal Circuit's reliance on a litigation analogy also cannot be squared with the Fifth Circuit's decision in *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998). In that case, the court considered a state law that denied government funding to pay salaries to any state employee "who is retained as or serves as an expert witness or consultant in litigation against the state." *Id*. at 223 (citation omitted). Like the CDSOA (as viewed through the Federal Circuit's litigation analogy), the Texas statute thus denied government funds to a class of witnesses if they failed to support a particular side in a case (the state's). In conflict with *SKF*, however, the Fifth Circuit rejected the claim that such discrimination was subject to review under *Central Hudson*, *see id*. at 225, and held instead that because the statute discriminated on the basis of the content of witnesses' speech, it was subject to, and failed, strict scrutiny, *id*. at 227.

B. The Circuits Are Divided Over The Proper Treatment Of Content Or Viewpoint Discrimination Under The *Central Hudson* Test For Commercial Speech.

Even assuming the Federal Circuit correctly subjected the CDSOA to intermediate scrutiny under *Central Hudson*, its application of the test cannot be reconciled with the precedents of other circuits.

The *SKF* majority did not dispute the dissent's showing that the Government could easily satisfy any need to encourage cooperation with investigations through means that did not discriminate on the basis of speech. *See* 556 F.3d at 1373 (Linn, J., dissenting). But it concluded that the statute nonetheless met the tailoring requirement of *Central Hudson* because the test "does not require perfect correspondence of means and ends." *Id*. at 1358.

Other circuits, however, have held that even under *Central Hudson*, the government may not engage in viewpoint or content-based discrimination if non-discriminatory measures would satisfy its interests just as well. Judge Fisher on the Ninth Circuit, for example, recently explained that a "statute that discriminates on the basis of content may be more extensive than necessary to advance the government's interest," and therefore violate *Central Hudson*'s tailoring requirement, "if there is no valid reason for the discrimination." *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (citation and internal quotation marks omitted). Thus, "where there is no reason related to the government's asserted interest for distinguishing based on content,

a content-based law restricts more speech than necessary" and violates the First Amendment. *Id.*; *see also ACLU v. Alvarez*, 679 F.3d 583, 604-05 (7th Cir. 2012) (explaining that "intermediate-scrutiny standards," including *Central Hudson*, "all require . . . content neutrality" and that "content-based regulations are presumptively invalid").

III. The Questions Presented Are Recurring And Important.

Certiorari is further warranted given the recurring importance of the questions presented.

1. The Federal Circuit's misapprehension of this Court's First Amendment jurisprudence is of enormous doctrinal and practical importance. As four Federal Circuit judges have pointed out, the First Amendment precedent established in *SKF* poses a threat far beyond the confines of federal antidumping law. 583 F.3d at 1343 (Linn, J., dissenting). Moreover, the validity of the petition support requirement will determine the distribution of hundreds of millions of dollars to domestic companies injured by illegal dumping. In this case, over $100 million is at stake for the domestic furniture industry alone, not to mention the millions of dollars in thirty other accounts Customs has identified as being subject to ongoing litigation. *See supra* p. 6.

The practical consequences for affected companies denied distributions are substantial and ongoing. The discriminatory distribution of CDSOA benefits compounds the injuries already suffered from unfair international competition by providing a subsidy to petitioners' domestic competitors. The

effect of that subsidy on competition cannot be underestimated. In years past, it has meant the difference between some companies turning a profit or recording a loss.[17] Moreover, companies receive CDSOA distributions based on investments in equipment, personnel, training, and technology, *see* 19 U.S.C. § 1675c(b)(4), which secure the subsidized firms long-term competitive advantages. Accordingly, petitioners will suffer competitive injury for years to come for having honestly responded to a question federal law required them to answer.

3. The repeal of the statute thus provides no basis to deny review. This Court regularly grants certiorari to resolve the application or constitutionality of repealed statutes, particularly when, as here, the statute has continuing practical consequences and the decision below has broader doctrinal significance. *See, e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 479, 480-81 (2011) (reviewing agency implementation of repealed statutory provision, when provision continued to apply to deportation proceedings against individuals convicted of certain crimes prior to the repeal); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 874, 876 (2011) (deciding application of repealed regulation); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 & n.1 (1996) (deciding

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[17] For example, in FY2012, Stanley Furniture Company received nearly $40 million in CDSOA distributions. *See* Stanley Furniture Co., 2012 Annual Report 13, *available at* http://www.stanleyfurniture.com/media/document/2012AnnualReportFinal.pdf. As a result, it was able to record a $30 million profit; without the payment, it would have suffered a $9 million loss. *Id*.

constitutionality of tax provision that was repealed, when repeal was not made retroactive).

Here, because Congress did not make the repeal retroactive, Customs has explained that "the distribution process will continue for an undetermined period."[18] As this case illustrates, the Government continues to enforce the statute in distributing tens of millions of dollars each year, almost a decade after the repeal. *See supra* p. 6. Moreover, long after the last distribution has been made, the harmful and erroneous First Amendment precedent established by this case and *SKF* will continue to govern future cases absent intervention by this Court.

4. Petitioners recognize that the Court denied review in *SKF* itself. *See* 560 U.S. 903 (2010). But that denial should not affect the Court's disposition of this case, for three reasons.

First, the scope of the viewpoint discrimination permitted by Federal Circuit precedent was not yet clear when this Court denied the petition in *SKF*. The Court would have been justified in believing – as did the panel members in *Chez Sidney* and the dissent in this case – that *SKF* established the much more limited proposition that the distributions could be denied to companies, like SKF, that actively opposed imposition of duties by playing a role comparable to an unsuccessful defendant in

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[18] *See* U.S. Customs and Border Prot., http://www.cbp.gov/faqs/how-will-repeal-cdsoa-section-7601a-deficit-reduction-act-2005-affect-future-cdsoa.

litigation. Even if wrong, such a ruling would have applied to only a small number of companies, diminishing the importance of the precedent. It was not until the decision in this case that the Federal Circuit made unambiguously clear that it viewed the statute as constitutionally denying distributions based solely on speech and not actions.

Second, there was a very significant vehicle problem in *SKF*. Prior to reaching the First Amendment question in that case, the Federal Circuit had first considered at length the Government argument that SKF's suit was jurisdictionally time-barred. *See* 556 F.3d at 1347-49. Accordingly, as the Government pointed out in its opposition, in order to reach the First Amendment question in that case, the Court would be compelled to first resolve the statute of limitations question (or at least decide whether the limitations period was jurisdictional). *See* Brief for the Federal Respondents in Opposition, at 18, *SKF*, 556 F.3d 1337 (2009) (No. 09-767), 2010 WL 1513109. And if it held the claim time-barred, it never would have reached the First Amendment question the petition presented. *Id.* No such problem exists in this case.

Third, the Government's claim in its *SKF* opposition that CDSOA's constitutionality was an issue of "limited prospective significance," *Id.* at 16, has not been borne out. Nearly a decade after its repeal, the statute continues to require the Government to engage in harmful viewpoint discrimination in the distribution of tens of millions of dollars each year.

5. Finally, the Federal Circuit's failure to give due consideration to this Court's recent precedents

provides an additional reason for review. The panel in this case made literally no effort to reconcile *SKF* and its own decision with this Court's precedents in *AID* and *Sorrell*, even though petitioners discussed *Sorrell* at length in their briefs and filed Rule 28(j) letters as soon as *AID* was decided. That inexplicable failure to account for a recent, relevant decision of this Court is itself a basis for certiorari. *See, e.g.*, *Webster v. Cooper*, 130 S. Ct. 456 (2009) (granting petition, vacating, and remanding for reconsideration in light of recent decision from this Court that the panel had failed to address); *see also id*. at 457 (Scalia, J., dissenting) (noting that this was "not, of course, the first time the Court has GVR'd on the basis of a case decided long before the Court of Appeals ruled"); *Walker v. True*, 546 U.S. 1086 (2006) (same); *Valensia v. United States*, 532 U.S. 901 (2001) (same); *Stutson v. United States*, 516 U.S. 193, 194-95 (1996) (GVR for reconsideration in light of recent decision from this Court where relevance of case was briefed by the parties, but not discussed by the court of appeals); *see also Schweninger v. Minnesota*, 525 U.S. 802 (1998) (same where lower court discussed recent decision, *see In re: Schweninger*, No. C1-96-362, 1997 WL 613670 (Oct. 7, 1997 Minn. Ct. App. Oct. 7, 1997)).

CONCLUSION

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

Respectfully submitted,

Kristin H. Mowry
Jeffrey S. Grimson
Jill A. Cramer
MOWRY & GRIMSON, PLLC
5335 Wisconsin Ave., NW,
Suite 810
Washington, DC 20015

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
kr@goldsteinrussell.com

May 2, 2014

APPENDIX A

United States Court of Appeals
for the Federal Circuit

ASHLEY FURNITURE INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES
Defendant-Appellee,

AND

UNITED STATES INTERNATIONAL TRADE COMMISSION,
Defendant-Appellee,

AND

AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., T. COPELAND AND SONS, INC., AND VAUGHAN-BASSETT FURNITURE COMPANY, INC.,
Defendants-Appellees.

2012-1196

Appeal from the United States Court of International Trade in No. 10-CV-0081, Judges Gregory W. Carman, Leo M. Gordon, and Timothy C. Stanceu.

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ETHAN ALLEN GLOBAL, INC. AND ETHAN ALLEN OPERATIONS, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES AND UNITED STATES CUSTOMS AND BORDER PROTECTION,
Defendants-Appellees,

AND

INTERNATIONAL TRADE COMMISSION,
Defendant-Appellee,

AND

KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., T. COPELAND

AND SONS, INC., AND VAUGHAN-BASSETT FURNITURE COMPANY, INC.,
Defendants-Appellees.

2012-1200

Appeal from the United States Court of International Trade in No. 08-CV-0302, Judges Gregory W. Carman, Leo M. Gordon, and Timothy C. Stanceu.

Decided: August 19, 2013

KEVIN RUSSELL, Goldstein & Russell, P.C., of Washington, DC, argued for plaintiff-appellant Ashley Furniture Industries, Inc., et al in appeal no. 2012-1196. With him on the brief were KRISTIN H. MOWRY, JEFFREY S. GRIMSON, JILL A. CRAMER, SUSAN LEHMAN BROOKS and SARAH M. WYSS, Mowry & Grimson, PLLC, of Washington, DC.

FRANKLIN E. WHITE, JR., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee United States. With him on the brief were STUART F. DELERY, Acting Assistant Attorney General, JEANNE E. DAVIDSON, Director, and JESSICA R. TOPLIN, Trial Attorney. Of counsel were COURTNEY SHEEHAN MCNAMARA, Trail Attorney.

PATRICK V. GALLAGHER, JR., Attorney, Office of General Counsel, United States International Trade Commission, of Washington, DC, argued of defendant-appellee United States International Trade Commission. With him on the brief were DOMINIC L. BIANCHI, Acting General Counsel, NEAL J. REYNOLDS, Assistant General Counsel for Litigation.

ASHLEY C. PARRISH, King & Spalding LLP, of Washington, DC, argued for defendants-appellees American Furniture Manufacturers Committee for Legal Trade, et al. With her on the brief were JOSEPH W. DORN, and JEFFREY M. TELEP. Of counsel on the brief was RICHARD H. FALLON, of Cambridge, Massachusetts.

HERBERT C. SHELLEY, Steptoe & Johnson, LP, of Washington DC for amici curiae, SKF USA, Inc., et al. With him on the brief was MICHAEL T. GERSHBERG. Of counsel on the brief were JOHN M. GURLEY, NANCY A. NOONAN and DIANA DIMITRIUC-QUAIA, Arent Fox LLP, of Washington DC.

DAVID W. DEBRUIN, Jenner & Block, LLP, of Washington, DC, for amicus curiae Furniture Brands International, et al. With him on the brief was MATTHEW E. PRICE.

TERENCE P. STEWART, Stewart and Stewart of Washington, DC, for amici curiae Timken Company, et al. With him on the brief were GEERT DE PREST and PATRICK J. MCDONOUGH. Of counsel on the brief were ROY T. ENGLERT, JR., Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, of Washington, DC

CHRISTOPHER T. HANDMAN, Hogan Lovells US LLP, of Washington, DC, argued for plaintiffs-appellants Ethan Allen Global, Inc., et al., in appeal no. 2012 1200. With him on the brief were CRAIG A. LEWIS and JONATHAN T. STOEL.

FRANKLIN E. WHITE, JR., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee United States, et al. With him on the brief were STUART F. DELERY, Acting Assistant Attorney General, JEANNE E. DAVIDSON, Director, and JESSICA R. TOPLIN, Trial Attorney. Of counsel was COURTNEY SHEEHAN MCNAMARA, Trial Attorney.

PATRICK V. GALLAGHER, JR., Attorney, Office of General Counsel, United States International Trade Commission, of Washington, DC, argued for defendant-appellee International Trade Commission. With him on the brief were DOMINIC L. BIANCHI, Acting General Counsel, NEAL J. REYNOLDS, Assistant General Counsel for Litigation, and GEOFFREY S. CARLSON, Attorney.

ASHLEY C. PARRISH, King & Spalding, LLP, of Washington, DC, argued for defendants-appellees Kincaid Furniture Co., Inc., et al. With her on the brief were JOSEPH W. DORN, and JEFFREY M. TELEP. Of counsel on the brief was RICHARD H. FALLON, of Cambridge, Massachusetts.

HERBERT C. SHELLEY, Steptoe & Johnson, LP, of Washington, DC, for amici curiae SKF USA, Inc., et al. With him on the brief was MICHAEL T.

GERSHBERG. Of counsel on the brief were JOHN M. GURLEY, NANCY A. NOONAN and DIANA DIMITRIUC-QUAIA, Arent Fox, LLP, of Washington, DC.

DAVID W. DEBRUIN, Jenner & Block, LLP, of Washington, DC, for amicus curiae Furniture Brands International, Inc., et al. With him on the brief was MATTHEW E. PRICE.

TERENCE P. STEWART, Stewart and Stewart of Washington, DC, for amici curiae Timken Company, et al. With him on the brief were GEERT DE PREST and PATRICK J. MCDONOUGH. Of counsel on the brief were ROY ENGLERT, JR., Robbins, Russell, Englert, Orseck, Untereiner and Sauber, LLP, of Washington, DC.

Before PROST, CLEVENGER and MOORE, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MOORE.

Dissenting opinion filed by *Circuit Judge* CLEVENGER.

MOORE, *Circuit Judge.*

Ashley Furniture, Inc., Ethan Allen Global, Inc., and Ethan Allen Operations, Inc. (Appellants) appeal from the decisions of the Court of International Trade (CIT) dismissing Appellants' complaints seeking compensation pursuant to the

Continued Dumping and Subsidy Offset Act (the Byrd Amendment) for failure to state a claim for relief. Because the CIT correctly concluded that Appellants are not Affected Domestic Producers (ADPs) within the meaning of the Byrd Amendment and thus do not qualify for the requested relief, we *affirm*.

BACKGROUND

Appellants are domestic producers of wooden bedroom furniture. In 2003, the Department of Commerce (Commerce) initiated an antidumping investigation of Chinese wooden bedroom furniture manufacturers pursuant to a petition filed by an association of U.S. furniture manufacturers and several labor unions. In parallel, the International

Trade Commission (ITC) investigated whether the domestic industry had been materially injured by dumped imports from China. To aid in the investigation, the ITC distributed questionnaires to all known domestic wooden bedroom furniture producers, seeking sales data and other information. Producers are required by law to respond to the questionnaires, and the Appellants duly responded. One of the questions asked, simply, "Do you support or oppose the petition?" and gave respondents the choice to answer "Support," "Oppose," or "Take no position." Ashley answered "Oppose" and Ethan Allen answered "Take no position."

The ITC subsequently determined dumping and injury to the domestic industry and issued an antidumping duty order. Pursuant to the order,

Commerce directed the U.S. Customs and Border Patrol (Customs) to collect duties on entries of Chinese wooden bedroom furniture. The ITC prepared a list of ADPs eligible under the Byrd Amendment to receive a share of the antidumping duties. *See* 19 U.S.C. § 1675c(a), (d)(1) (2000) (*repealed by* Deficit Reduction Act of 2005, Pub L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007)). The ITC did not include Appellants because it determined that they were not "interested part[ies] in support of the petition" and therefore not ADPs. *Id.* § 1675c(b)(1)(A); *see also id.* § 1675c(d)(1). Accordingly, Customs denied Byrd Amendment distributions to Appellants.

Appellants sued the ITC, Customs, and domestic producers who received Byrd Amendment funds in the CIT. Although the Byrd Amendment has long since been repealed, Appellants sought their share of the funds for the several fiscal years when it was still in effect. Appellants contended that they supported the petition within the meaning of the Byrd Amendment and, in the alternative, that the Byrd Amendment violated the First Amendment of the Constitution. The CIT dismissed both Appellants' complaints, holding that our decision in *SKF USA, Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009), foreclosed their claims for relief. *Ashley Furniture Indus., Inc. v. United States*, 818 F. Supp. 2d 1355 (Ct. Int'l Trade 2012); *Ethan Allen Global, Inc. v. United States*, 816 F. Supp. 2d 1330 (Ct. Int'l Trade 2012).

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's dismissal for failure to state a claim *de novo*. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1049 (Fed. Cir. 2012). "We review statutory interpretation by the CIT without deference. Constitutional interpretation is also a question of law, which we review *de novo*." *U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1381 (Fed. Cir. 2002) (citations omitted).

The CIT reasoned that *SKF*, where we held that the Byrd Amendment's petition support requirement is not facially unconstitutional, disposed of Appellants' facial First Amendment challenges. The CIT also rejected Appellants' as-applied challenges because it found that *SKF* was not distinguishable. The court explained that *SKF* made clear that the government did not violate the First Amendment when it rewarded only those producers who supported the petition and denied distributions to those who were opposed to or neutral to it. *Ashley Furniture*, 818 F. Supp. 2d at 1366; *Ethan Allen*, 816 F. Supp. 2d at 1337–38 (citing *SKF*, 556 F.3d at 1359). Finally, the CIT held that the plain language of the Byrd Amendment prevented Appellants from obtaining relief. *Ashley Furniture*, 818 F. Supp. 2d at 1361; *Ethan Allen*, 816 F. Supp. 2d at 1336.

Appellants argue that the CIT's dismissal of their complaints must be reversed under *PS Chez Sidney, L.L.C. v. U.S. International Trade*

Commission, 684 F.3d 1374 (Fed. Cir. 2012), a case decided after the CIT's rulings at issue in these appeals. Appellants contend that they, like the producer in *Chez Sidney*, should be awarded Byrd Amendment distributions. Appellants acknowledge that the producer in *Chez Sidney* indicated support for a petition in the preliminary questionnaire and answered "Take no position" in the final questionnaire. They contend that *Chez Sidney's* holding rests not on the producer's initial expression of support in the *preliminary* questionnaire, but on the fact that it filled out the *final* questionnaire and took no action to oppose the petition. Appellants argue that their conduct is closer to that of Chez Sidney than that of SKF because SKF took action in opposition to the petition that outweighed the assistance it provided by responding to the questionnaire. Ashley contends that even an "Oppose" answer supports the petition in the sense that it enables Customs to determine the extent of injury caused by dumping. Ethan Allen contends that it, like Chez Sidney, answered "Take no position" in the final questionnaire and should therefore qualify for a distribution. Appellants also contend that intervening Supreme Court cases have undermined *SKF*, rendering the Byrd Amendment unconstitutional on its face or at least as applied to them.

Appellees counter that allowing a domestic producer who marked "Oppose" or "Take no position" to qualify as a "supporter" of the petition would contravene the plain language of the statute. They contend that Appellants do not qualify for

distributions because, even though they filled out the questionnaires, they failed to provide any statement of support for the petition. Appellees contend that *Chez Sidney* is distinguishable. They argue that answering "Oppose" or "Take no position" in the final questionnaire is not merely abstract expression, but a significant statement indicating that a producer does not wish an antidumping duty order to issue. Appellees contend that *Chez Sidney* could not—and did not—overrule *SKF*'s holding that parties "opposing (or not supporting)" the petition "should not be rewarded." *SKF*, 556 F.3d at 1359. They argue that the fact that Chez Sidney indicated support for the investigation in the preliminary questionnaire was critical to our decision in that case. Thus, Appellees contend that *Chez Sidney* supports the conclusion that a producer who never declared support for a petition does not qualify for a distribution.

With regard to Appellants' First Amendment challenges, Appellees contend that we are bound to follow *SKF*'s holding that the Byrd Amendment is constitutional. They contend that the Byrd Amendment does not discriminate on the basis of a viewpoint, but simply provides relief to producers who request it by indicating support for the antidumping petition. Appellees argue that *SKF* settled the First Amendment challenges to the Byrd Amendment, and contend that we cannot revisit those holdings.

We agree with Appellees that the CIT properly dismissed the Appellants' complaints. *SKF* resolved

the facial First Amendment challenge presented in these cases. We are bound to follow this precedent and are not free to revisit the First Amendment arguments that were before the *SKF* panel. To the extent that Appellants argue that recent Supreme Court precedent overruled our *SKF* holding, we do not agree. We also reject the Appellants' as-applied First Amendment challenges because, as explained below, the government did not deny Byrd Amendment distributions to Appellants solely on the basis of abstract expression.

We note that the Byrd Amendment was repealed several years ago and the government informs us that only a small number of cases remain to be resolved. *SKF*, *Chez Sidney*, and the appeals before us provide three factual scenarios for evaluating the Byrd Amendment cases that remain. On one side is *SKF*, where the producer indicated opposition to the petition in a questionnaire and actively opposed the petition—and failed to qualify for a distribution. On the opposite side is *Chez Sidney*, where the producer indicated support for the petition through a questionnaire response and did not actively oppose the petition—and received a Byrd Amendment distribution. The appeals before us fall between these two extremes. Here, Appellants did not indicate support for the petition in a questionnaire and did not actively oppose the petition. We hold that Appellants have not supported the petition under the plain meaning of the Byrd Amendment.

It is not enough, as Appellants contend, merely to supply the answers to the questionnaires. Both

SKF and Chez Sidney provided such answers, yet only one was held to be a supporter. The plain language of the statute requires "support of the petition" in order to obtain a distribution. 19 U.S.C. § 1675c(b)(1)(A). A producer meets that requirement when it "indicate[s] support . . . by letter or through questionnaire response." *Id.* § 1675c(d)(1). Appellants' arguments lead to the incongruous conclusion that a producer who indicates only opposition to the petition in questionnaires—the polar opposite of support—is nevertheless a supporter. The conclusion that a producer who indicates that it "takes no position" in a questionnaire is a supporter is also incongruous because such a producer has not "indicated support." Because Congress could not have intended the odd construction of the Byrd Amendment advocated by Appellants, we hold that a producer who never indicates support for the petition by letter or through questionnaire response cannot be an ADP. The language of this statute is straightforward. This interpretation is consistent with both *SKF* and *Chez Sidney*. No doubt a skilled advocate could pluck out-of-context statements from these cases to argue in a client's favor, but we must decide this case on its facts. We conclude that the domestic producers in these cases are not entitled to Byrd Amendment distributions.[1]

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[1] The dissent would find entitlement to a distribution

This analysis is consistent with *SKF*, which explained that a producer's "bare statement that it was a supporter" is a necessary (though not a sufficient) condition to obtain ADP status. *SKF*, 556 F.3d at 1354 n.26. Chez Sidney provided such a statement, but Appellants did not. This is not a case about standalone abstract expression. Appellants submitted official questionnaires that could have prevented the ITC and Customs from "successfully enforc[ing] government policy." *SKF*, 556 F.3d at 1357. As *SKF* explained, the Byrd Amendment does not reward neutral or opposing parties because filling out the questionnaire without indicating support for the petition can contribute to the petition's defeat. *Id.* at 1357–59. Indeed, the ITC takes the level of support of the petition into account in its determination of material injury, and the petition cannot be considered as filed "on behalf of the industry" unless at least 25% of the domestic producers in the relevant industry sector indicate support. *See id.* at 1376–77 (citing 19 U.S.C.

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based simply on filling out a questionnaire and not actively opposing the petition. Dissent at 6. But the Byrd Amendment does not say "not actively oppose"—it says the producer must "indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). Neither of the Appellants here indicated support in any letter or through questionnaire response. The simple act of filling out the questionnaire is not an indication of support through questionnaire response.

§ 1673a(c)(4)(A)(i)-(ii)) (Linn, J., dissenting). While we recognize that this framework may create incentives for domestic producers to indicate support for a petition even when they may believe that an antidumping duty order is unwarranted, it is not our task to pass on Congress's wisdom in enacting the Byrd Amendment. We find nothing in *Chez Sidney* that precludes this conclusion. *Chez Sidney* repeatedly referred to the fact that the producer expressed affirmative support for the petition *at one point—i.e.*, in the preliminary questionnaire. *See id.* at 1379–80, 1381–83. In doing so, Chez Sidney "indicate[d] support of the petition . . . through questionnaire response" within the meaning of the Byrd Amendment. 19 U.S.C. § 1675c(d)(1).

CONCLUSION

We have considered the parties' remaining arguments and do not find them to be persuasive. Because Appellants failed to state a claim upon which relief can be granted, we *affirm*.

AFFIRMED

COSTS

No costs.

CLEVENGER, *Circuit Judge*, dissenting.

The majority concludes that the "plain meaning" of the Byrd Amendment allows the International Trade Commission (ITC) to determine who qualifies as an affected domestic producer[1] based solely on the producer's response to the ITC's support/oppose question.[2] Maj. Op. at 9. This is incorrect. Nothing in the history of the Byrd Amendment, the support/oppose question, or our case law, requires a domestic producer to check a certain box in order to qualify for Byrd distributions.

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[1] 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 . . ." Id. § 1675c(b)(1)(A). An affected domestic producer meets the "in support of the petition" requirement by "indicat[ing] support of the petition by letter or through questionnaire response." Id. § 1675c(d)(1).

[2] ITC questionnaires include the question "Petition support.--Do you support or oppose the petition?" In response to this question, the respondent may check one of three boxes: "Support," "Oppose," or "Take no position." See U.S. Int'l Trade Comm'n, GENERIC U.S. PRODUCER QUESTIONNAIRE at 2, available at http://www.usitc.gov/trade_remedy/documents/USProducerQuestionnaire.pdf.

I

The support/oppose question found on the ITC questionnaires has been a part of the ITC questionnaires at least since 1987, well before the 2000 Byrd Amendment, and "is not designed solely to determine eligibility for Byrd Amendment distributions." *SKF USA v. U.S. Customs and Border Prot.*, 556 F.3d 1337, 1357-58 (Fed. Cir. 2009) (*SKF*). It served then, as it does now, a purpose unrelated to whether a domestic producer has supported an antidumping investigation.

The purpose of the support/oppose question is to allow the Department of Commerce to confirm that an antidumping petition "has been filed by or on behalf of the domestic industry." 19 U.S.C. § 1673a(c)(1)(A)(ii). Commerce must ensure that "the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product" and "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). If the petition alone does not establish domestic industry support, Commerce must poll the industry to determine if the petition has the requisite support. § 1673a(c)(4)(D)(i).

When the Byrd Amendment was enacted, there was no mention of using the support/oppose question in the ITC's questionnaires as the basis for determining which domestic producers could receive Byrd Amendment distributions. *See*, *e.g.*, 146 CONG. REC. S10669-01 (daily ed. Oct. 18, 2000) (statement of Sen. William Roth) ("[C]ash payment will not be made to the whole domestic industry. Instead, only those who supported the filing of the antidumping petition will be paid. Differentiating between different parts of a domestic industry in this way is unprecedented in our trade policy and completely unwarranted."); *id.* (statement of Sen. Robert Byrd) ("My provision simply provides a mechanism to help injured U.S. industries recover from the harmful effects of illegal foreign dumping and subsidies."); 146 CONG. REC. H9,681-03 (daily ed. Oct. 11, 2000) (statement of Rep. Jim Kolbe) ("Under the amendment adopted in the Agriculture Appropriations conference report, antidumping and countervailing duties which are currently paid by the importing industry would be transferred from the U.S. Treasury Department directly in the petitioning company."). The same was true when U.S. Customs developed regulations implementing the Byrd Amendment. *See* Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 66 Fed. Reg. 33,920 (proposed June 26, 2001) (to be codified at 19 C.F.R. pt. 159); 66 Fed. Reg. 48,546 (Sept. 21, 2001) (final rule).

II

There has been no apparent Congressional intent to link Commerce's polling question to the Byrd Amendment. Nonetheless, the ITC has used the support/oppose question as a litmus test for determining whether a domestic producer can receive Byrd Amendment distributions. *See PS Chez Sidney, L.L.C. v. U.S. Int'l. Trade Comm'n,* 684 F.3d 1374, 1382 (Fed. Cir. 2012) (*Chez Sidney*). This court now endorses this practice. Neither *SKF* nor *Chez Sidney* suggest that it is appropriate to distinguish between domestic producers solely on the basis of their response to the support/oppose question; in fact, we have already rejected this position as "unreasonable." *Id*.

In *Chez Sidney* we held that "when a U.S. producer assists investigation by [1] responding to questionnaires but [2] takes no other action probative of support or opposition the producer has supported the petition under 19 U.S.C. § 1675c(d). . . ." 684 F.3d at 1382. *Chez Sidney's* holding is derived from a similar statement in *SKF* where we concluded that the Byrd Amendment "only permit[s] 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)." 556 F.3d at 1353 n.26 (emphasis added).

Taken together, *SKF* and *Chez Sidney* set up a two-step test to determine who qualifies for Byrd

Amendment distributions. First, the producer must have responded to the ITC questionnaires. Because the questionnaires are mandatory, all producers in the industry should pass this step. *See* 19 U.S.C. § 1333(a); *see also SKF USA Inc., v. U.S. Customs and Border Prot.*, 583 F.3d 1340, 1342-43 (Fed. Cir. 2009) (Linn, J., dissenting from denial of rehearing en banc). Second, the producer must have "actively supported" the petition and "take[n] no other action probative of support or opposition." To determine if the producer has taken "other action probative of support or opposition" we consider the "surrounding circumstances." *Chez Sidney*, 684 F.3d at 1382-83. The relevant factors include (1) whether the producer participated in the investigation by providing supporting information in a questionnaire response, (2) whether the producer provided supporting arguments in its responses, (3) whether the producer engaged in activity in opposition to the petition, and (4) whether the producer expressed opposition to the petition. *Id*. at 1383.

III

Applying our holdings in *SKF* and *Chez Sidney* to the cases before us today, I conclude that both Ethan Allen and Ashley Furniture are "interested parties in support of a petition" and may qualify for Byrd Amendment distributions. Both clearly satisfy the statutory test, which states that a domestic producer meets the "in support of the petition" requirement when it "indicate[s] support . . . by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1).

A. ETHAN ALLEN

Ethan Allen meets both elements of the *Chez Sidney* test. Ethan Allen responded to the ITC questionnaires sent during the Wooden Bedroom Furniture Investigation and checked the "Take no position" box on both questionnaires. Evaluating the "surrounding circumstances," Ethan Allen provided supporting data to the ITC in the form of sales and production data, did not express opposition to the petition, and did not engage in any activity in opposition to the petition. *See Chez Sidney*, 684 F.3d at 1382-83. Because we have already decided that the Byrd Amendment does not require producers to make "an affirmative declaration of support for the petition," *id.* at 1380, Ethan Allen must qualify as an affected domestic producer in support of the petition.

B. ASHLEY FURNITURE

Our prior cases also resolve Ashley Furniture's case. As with Ethan Allen, Ashley Furniture responded to both ITC questionnaires. Maj. Op. at 6. Ashley Furniture provided important sales and production data to the ITC, assisting the ITC in determining if the wooden bedroom furniture industry was injured by dumping. Ashley Furniture also did not take any action—such as appearing at hearings or submitting testimony—against the petition. Ashley Furniture did, however, express its opinion about the wisdom of the investigation by checking the "oppose" box on both questionnaire responses.

By merely checking the "oppose" box, Ashley Furniture did not transform itself into a party who "actively opposed" the petition. The majority's bare conclusion that "the government did not deny Byrd Amendment distributions to Appellants solely on the basis of abstract expression," Maj. Op. at 9, is flatly contradicted by the fact that Oakwood Interiors, a producer who received Byrd distributions, participated in the investigation in the exact same manner as Ashley Furniture, differing only in its answer to the support/oppose question. Ashley Br. At 15.

As we recognized in *SKF*, if the Byrd Amendment penalized the mere expression of opposition to a dumping investigation, it would raise serious First Amendment concerns. 556 F.3d at 1351. Instead, we concluded that the Byrd Amendment's purpose was "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *Id.* at 1352, 1353 n.25. We then limited the statute's "support" requirement to require active support, and not a mere abstract expression of support. *See Chez Sidney*, 684 F.3d at 1381. For the same reasons, the ITC cannot use a mere expression of opposition to substitute for *active* opposition in denying Byrd Amendment distributions.

The majority elides these warnings by interpreting dictum in a footnote in *SKF* to reason that "a producer's 'bare statement that it was a supporter' is a *necessary* (though not a sufficient) condition to obtain ADP status." Maj. Op. at 11

(emphasis added). The majority errs. Nothing in *SKF* states that a producer must check the "support" box, and *Chez Sidney* actually rejects this proposition outright. *Chez Sidney*, 684 F.3d at 1380 ("Both the ITC and Customs, however, contend that § 1675c(d) requires not just the submission of letters or responses, but also the inclusion of an affirmative declaration of support for the petition. *But the statute's plain language does not require that producers indicate an expression of support other than through* a letter or by *filing a response*—it states that supporting producers are those who submit letters or responses.") (emphasis added).

In this case, Ashley Furniture expressed its abstract opposition to the petition, but its only "action" in the investigation, providing questionnaire responses, assisted the government by providing data the government needed to determine if dumping existed and if the dumping materially injured a domestic industry. Ashley Furniture should be considered an "interested party in support of the petition," as were Oakwood Industries or Chez Sidney, and not a party in opposition to the petition, as was SKF.

IV

The court's endorsement of ITC's choice to use the support/oppose question as a shortcut for classifying domestic producers, thus mandating the expression of a point of view to distinguish between similarly situated producers, invites a serious First Amendment problem. The court in *SKF* recognized

this problem when it noted that if the Byrd Amendment penalized the mere expression of opposition to a dumping investigation, it "might well render the statute unconstitutional . . . ." *SKF*, 556 F.3d at 1351. Just as the court in *SKF* heeded the counsel that we should, where possible, interpret the law to avoid constitutional conflict, we should do the same when deciding whether the answer to the support/oppose question can dictate whether a particular domestic producer is or is not "in support of the petition." I would follow our prior decisions and conclude that both Ethan Allen and Ashley Furniture may be entitled to Byrd Amendment distributions if they can show the requisite injury. Because the majority does not agree with me, I respectfully dissent.

APPENDIX B

Slip Op. 12-14

UNITED STATES COURT OF INTERNATIONAL TRADE

ASHLEY FURNITURE INDUSTRIES, INC.,
Plaintiffs,

v.

UNITED STATES,
Defendants,

And

AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., T. COPELAND AND SONS, INC., and VAUGHAN-BASSETT FURNITURE COMPANY, INC.,
Defendant-Intervenors.

Before: **Gregory W. Carman, Judge**
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge

Consol. Court No. 07-00323

OPINION

[Dismissing the action for failure to state a claim upon which relief can be granted]

Dated: January 31, 2012

Kristen H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan E. Lehman*, and *Sarah Wyss*, Mowry & Grimson, PLLC, of Washington, DC and *Kevin Russell*, Goldstein, Howe & Russell, P.C., of Bethesda, MD, for plaintiff.

Jessica R. Toplin, *David S. Silverbrand*, and *Courtney S. McNamara*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the briefs were *Andrew G. Jones* and *Joseph Barbato*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Jeffrey M. Telep, *Joseph W. Dorn*, *Taryn Koball Williams*, and *Steven R. Keener*, King & Spalding

LLP, of Washington, DC, for defendant-intervenors the American Furniture Manufacturers Committee for Legal Trade, Kincaid Furniture Co., Inc., L. & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan Bassett Furniture Company, Inc.

Stanceu, Judge: Plaintiff Ashley Furniture Industries, Inc. ("Ashley"), a domestic furniture manufacturer, brought three similar actions (now consolidated)[1] during the period of September 4, 2007 through March 4, 2010, all stemming from certain administrative determinations of the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"). The ITC denied Ashley status as an "affected domestic producer" ("ADP") under the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA" or "Byrd Amendment"), Pub. L. No. 106-387, §§ 1001-03, 114 Stat. 1549, 1549A-72-75 (codified at 19 U.S.C.

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[1] Due to the presence of common issues, the court, on February 15, 2011, consolidated plaintiff's three actions under Consol. Court No. 07-00323. Order (Feb. 15, 2011), ECF No. 51. Consolidated with *Ashley Furniture Industries, Inc. v. United States* under Consol. Court No. 07-00323 are *Ashley Furniture Industries, Inc. v. United States*, Court No. 09-00025 and *Ashley Furniture Industries, Inc. v. United States*, Court No. 10-00081.

§ 1675c (2000)),[2] *repealed by* Deficit Reduction Act of 2005, Pub. L. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). ADP status potentially would have qualified Ashley for annual monetary distributions by Customs of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China. *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*"). The ITC construed the "petition support requirement" of the CDSOA, under which distributions are limited to petitioners and parties in support of a petition, to disqualify Ashley from ADP status because Ashley indicated to the ITC that it opposed the antidumping duty petition on Chinese wooden bedroom furniture.

Plaintiff claims that the administrative actions of the two agencies were inconsistent with the CDSOA, were not supported by substantial evidence, and were otherwise not in accordance with law. Plaintiff also brings constitutional challenges grounded in the

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[2] Citations are to the codified version of the Continued Dumping and Subsidy Offset Act ("CDSOA"), 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

First Amendment, the Fifth Amendment equal protection guarantee, and the Fifth Amendment due process guarantee.

Before the court is Ashley's motion for a preliminary injunction, filed January 11, 2012. Pl.'s Mot. for Prelim. Inj. (Jan 11, 2012), ECF No. 95. Ashley seeks to halt, pending a final disposition of this litigation, including all appeals and remands, CBP's pending distribution of certain collected antidumping duties to domestic parties recognized as ADPs by the Commission, including the defendant intervenors in this case. *Id.* at 1. The distribution was scheduled to occur on or after January 31, 2012.[3] Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 60. Customs withheld these funds from distribution pending the resolution of various lawsuits, including plaintiff's, challenging the constitutionality of the CDSOA.

Also before the court are three motions to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defendant-intervenors American Furniture

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[3] Defendants represent that distribution is now scheduled to take place on or after March 9, 2012. Def.'s Mot. for an Extension of Time for all Defs. To File Their Resps. in Opp'n to Pl.'s Mot. for Prelim. Inj. 2 (Jan. 19, 2012), ECF No. 97.

Manufacturers Committee for Legal Trade, Kincaid Furniture Co., Inc., L. & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc. moved under Rules 12(b)(5), and also Rule 12(c), on February 23, 2011. Def.-intervenors' Mot. to Dismiss & for J. on the Pleadings (Feb. 23, 2011), ECF No. 55 ("Def.-intervenors' Mot."). Defendants ITC and Customs moved to dismiss under Rule 12(b)(5) on May 2, 2011. Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 80 ("ITC's Mot."); Def. U.S. Customs & Border Protection's Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 81 ("Customs' Mot.").

The court rules that plaintiff does not satisfy the standards for obtaining the injunction it seeks. The court concludes that relief is not available on plaintiff's claims challenging the administration of the CDSOA by the two agencies. We also conclude that no relief can be granted on Ashley's claims challenging the CDSOA on First Amendment and Fifth Amendment equal protection grounds. Plaintiff lacks standing to assert the claims it bases on Fifth Amendment due process grounds. The court will enter judgment dismissing this action.

I. BACKGROUND

During a 2003 ITC investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material

injury to the domestic industry, *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,231 (Dec. 17, 2003), Ashley responded to the ITC's questionnaires, indicating that it opposed the issuance of an antidumping duty order. *See*, *e.g.*, First Amended Compl. ¶ 19 (Feb. 9, 2011), ECF No. 50. Based on the affirmative ITC injury determination, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued the antidumping duty order on imports of wooden bedroom furniture from China in 2005. *Antidumping Duty Order*, 70 Fed. Reg. at 329. Determining that Ashley did not qualify for CDSOA benefits, ITC declined to designate Ashley an ADP with respect to this order for Fiscal Years 2007 through 2010. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,622-23 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,236-37 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,855-56 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,571-72 (June 1, 2010).

Plaintiff filed actions contesting the government's refusal to provide it CDSOA distributions of antidumping duties collected during Fiscal Years 2007 (Court No. 07-00323), 2008 (Court No. 09-00025), and 2009-2010 (Court No. 10-00081).

The court stayed the three actions pending a final resolution of other litigation raising the same or similar issues.[4] *See*, *e.g.*, Order (Oct. 23, 2007), ECF No. 13.

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed legal questions that are also present in this case, the court issued an order directing Ashley to show why these actions should not be dismissed and lifted the stay for the purposes of allowing any brief, response, or reply described in that order. *See*, *e.g.*, Order (Jan. 3, 2011), ECF No. 38. On January 24, 2011, plaintiff responded to the court's order and moved for a partial lift of the stay to allow amendment of the complaints as a matter of course to add an additional count challenging the CDSOA under the First Amendment as applied to Ashley. Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 39; Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 23 (Court No. 09-00025);

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[4] The court's order stayed the action "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States International Trade Commission*, Consol. Court No. 06-00290, that is, when all appeals have been exhausted." Order (Oct. 23, 2007), ECF No. 13.

Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 21 (Court No. 10-00081).

The court lifted the stay for all purposes on February 9, 2011. *See*, *e.g.*, Order (Feb. 9, 2011), ECF No. 45. The same day, plaintiff filed notices of amended complaints in all three cases. First Amended Compl.; First Amended Compl., ECF No. 32 (Court No. 09-00025); First Amended Compl., ECF No. 30 (Court No. 10-00081). Defendant-intervenors filed their motion to dismiss and for judgment on the pleadings on February 23, 2011. Def.-Intervenors' Mot. The ITC and Customs filed their motions to dismiss on May 2, 2011. ITC's Mot.; Customs' Mot.

In July 2011, plaintiff filed a notice of supplemental authority highlighting recent decisions by the U.S. Supreme Court, which, according to plaintiff, are "relevant to the pending motions to dismiss Ashley's as-applied First Amendment challenge to the government's implementation of the [CDSOA]." Notice of Supp. Authority 1 (July 7, 2011), ECF No. 90 ("Pl.'s Notice of Supp. Authority") (citing *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653 (2011); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2086 (2011); *Citizens United v. Federal Election Comm'n,,* 130 S. Ct. 876 (2010)). Defendants addressed the supplemental authority question in their reply briefs and defendant-intervenors filed a letter in reply. United States & U.S. Customs & Border Protection's Reply in Supp. of their Mot. to Dismiss for Failure to State a Claim (July 14, 2011), ECF No. 92; Def. U.S. Int'l Trade Comm'n's Reply to Pl.'s Br. in Opp'n to Mot. to

Dismiss for Failure to State a Claim (July 14, 2011), ECF No. 93; Def.-intervenor's Resp. to Pl.'s Notice of Supplemental Authority (July 22, 2011), ECF No. 94.

Ashley filed its motion for a preliminary injunction on January 11, 2012, seeking to prevent the pending CBP distribution. Pl.'s Mot. for Prelim. Inj.; Pl.'s Mem. of Points & Authorities in Supp. of Mot. for Prelim. Inj. (Jan. 11, 2012), ECF No. 95.

II. DISCUSSION

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which provides the Court of International Trade jurisdiction of civil actions arising out of any law of the United States, such as the CDSOA, providing for administration with respect to duties (including antidumping duties) on the importation of merchandise for reasons other than the raising of revenue. *See Furniture Brands Int'l v. United States*, 35 CIT __, __, Slip Op. 11-132, at 9-15 (Oct. 20, 2011) ("*Furniture Brands*").

The CDSOA amended the Tariff Act of 1930 ("Tariff Act") to provide for the distribution of funds from assessed antidumping and countervailing duties to persons with ADP status, which is limited to petitioners, and interested parties in support of

petitions, with respect to which antidumping duty and countervailing duty orders are entered.[5] 19 U.S.C. § 1675c(a)-(d).[6] The statute directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of "petitioners and persons with respect to each order and finding and a list of persons that indicate

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[5] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111-291, § 822, 124 Stat. 3064, 3163 (2010).

[6] The CDSOA provided that:

> 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.

19 U.S.C. § 1675c(b)(1) (emphasis added).

support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1).[7] The CDSOA directed Customs to publish in the Federal Register lists of ADPs potentially eligible for distributions of a "continuing dumping and subsidy offset" that are based on the lists obtained from the Commission. *Id.* § 1675c(d)(2). The CDSOA also directed Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to an ADP annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

In February 2009, approximately one and a half years after plaintiff filed suit, the Court of Appeals decided *SKF*, upholding the CDSOA against constitutional challenges brought on First

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[7] Additionally, the CDSOA directed the U.S. International Trade Commission to forward to U.S. Customs and Border Protection a list identifying affected domestic producers "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . . ." 19 U.S.C. § 1675c(d)(1). The antidumping duty order at issue in this case was not in effect on that date.

Amendment and Fifth Amendment equal protection grounds. 556 F.3d at 1360. *SKF* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

We address below plaintiff's motion for an injunction and the motions to dismiss, basing our rulings on the claims stated in plaintiff's First Amended Complaints.[8] In Count 1 of the amended

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[8] In its motions to partially lift the stay on February 1, 2011, plaintiff asserted a right to amend its complaints as a matter of course because "[d]efendant has not yet filed its answer nor has it filed a motion to dismiss under Rule 12(b), (e), or (f)." *See, e.g.*, Mot. For Partial Lifting of Stay (Jan. 24, 2011), ECF No. 39. Under the current Rules of this Court, "a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." USCIT R. 15(a) (effective Jan. 1, 2011). Under the previous Rule 15(a), a party could amend its pleading "before being served with a responsive pleading." Because plaintiff filed its notices of amended complaints just over one month after the effective date of the change in Rule 15(a), and because the other parties to this case have addressed the complaint in amended form in their dispositive motions, the court exercises its discretion under USCIT Rule 89 to accept plaintiff's First Amended Complaints. USCIT R. 89 ("These rules and any amendments take effect at the time specified by the court. They govern: . . . proceedings

complaints, plaintiff claims that defendants' actions were unlawful under the CDSOA and not supported by substantial evidence. First Amended Compl. ¶¶ 39-40.[9] In Counts 2 and 5, plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support requirement") on constitutional First Amendment grounds. *Id*. ¶¶ 41-43, 49-50. In Count 3, plaintiff brings a challenge to the petition support requirement on Fifth Amendment equal protection grounds. *Id*. ¶¶ 44-46. In Count 4, plaintiff challenges the petition support requirement on Fifth Amendment due process grounds, claiming that the CDSOA is impermissibly retroactive. *Id*. ¶¶ 47-48.

A. Plaintiff's Motion for an Injunction Will Be Denied

Plaintiff's January 11, 2012, motion seeks what plaintiff terms a "preliminary injunction" under which defendants would be enjoined from disbursing any funds "that are currently being withheld by CBP for Ashley for FY2007-FY2010 . . . for the pendency of

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after that date in a case then pending unless: (A) the court specifies otherwise").

[9] Plaintiff's three First Amended Complaints are essentially identical but directed to CDSOA distributions for the different Fiscal Years, *i.e.*, 2007, 2008, 2009, and 2010. In its citations to the claims in this consolidated action, the court will cite to the First Amended Complaint as filed in *Ashley Furniture Industries, Inc. v. United States*, Court No. 07-00323.

this litigation, including all relevant appeals and remands, until such time as a final court decision is rendered in this case." Pl.'s Mot. for Prelim. Inj. 1. A preliminary injunction normally dissolves upon the entry of judgment. *See Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988) ("[A]lthough a preliminary injunction is usually not subject to a fixed time limitation, it is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause.") (internal quotation marks omitted); 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure, § 2947 (2d ed. 2010) (the principal purpose of preliminary injunctive relief is to preserve the court's power to render a meaningful decision pursuant to a trial on the merits). Because our decision today will conclude this action, the question of a preliminary injunction to prevent irreparable harm during the pendency of this case is moot.

By attempting to enjoin distribution through all remands and appeals, plaintiff's January 11, 2012 motion seeks equitable relief beyond a preliminary injunction. Additionally, plaintiff seeks as a remedy that the court order the ITC to declare Ashley an ADP and order Customs to "disburse to Ashley pursuant to the CDSOA a pro rata portion of the assessed antidumping duties on wooden bedroom furniture from China . . . ." First Amended Compl. ¶ 51 (Prayer for Relief). In summary, Ashley seeks to prevent Customs from paying to other CDSOA claimants what Ashley claims is its share of the withheld distributions and seeks affirmative injunctions against both agencies so that Ashley will

receive those distributions. In these respects, plaintiff is seeking permanent equitable relief both as a provisional measure pending a possible appeal and as a remedy on its claims. We conclude, however, that Ashley does not qualify for permanent equitable relief.

Ashley is required to show for a permanent injunction that it has suffered an irreparable injury, that the remedies available at law are inadequate to compensate for that injury, that, considering the balance of hardships between the parties, a remedy in equity is warranted, and that the public interest would not be disserved by a permanent injunction. *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, we conclude that there are no "remedies available at law" and that no "remedy in equity is warranted," based on our analysis of plaintiff's claims. We presume, without deciding, that plaintiff would be irreparably harmed were Customs to distribute to other parties what Ashley claims is its share of the withheld distributions. With respect to the balance of hardships, Ashley would be prejudiced by such a distribution, but defendant-intervenors also will be prejudiced by further delay in obtaining what they claim to be their lawful CDSOA disbursements. The public interest favors an orderly and lawful distribution of the withheld funds. But even if we presume that the factors of irreparable harm, balance of hardships, and public interest are in plaintiff's favor, we still conclude that an injunction is unwarranted. The controlling factor is that neither a remedy at law nor a remedy in equity is appropriate in the circumstances of this case. For the reasons

discussed in this opinion, we conclude that the appropriate disposition is the dismissal of this action.

B. No Relief Can Be Granted on the Claims in Counts 1, 2, 3, and 5 of the Amended Complaints

In ruling on motions to dismiss made under USCIT Rule 12(b)(5), we dismiss complaints that do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the reasons discussed below, we conclude that plaintiff has failed to plead facts on which we could conclude that it could obtain a remedy on any of the claims asserted in Counts 1, 2, 3, and 5 of the amended complaints. In brief summary, plaintiff's claims that the actions by the two agencies were not supported by substantial evidence and were otherwise not in accordance with law must be dismissed because Ashley admits a fact establishing its disqualification from receiving CDSOA distributions and presents no other facts from which the court reach a conclusion that those actions must be set aside. Relief on Ashley's constitutional claims under the First Amendment and the equal protection guarantee of the Fifth Amendment is foreclosed by the binding precedent established by *SKF*, which upheld the CDSOA

against constitutional challenges brought on First Amendment and equal protection grounds. In the following, we address Counts 1 through 3, and Count 5, in further detail.[10]

1. Count 1 Fails to State a Claim upon which Relief Can Be Granted

In Count 1, plaintiff claims that "[t]he Commission's determination not to include Ashley on its list of affected domestic producers for the antidumping order covering wooden bedroom furniture from China and Customs' failure to accept Ashley's . . . CDSOA Certification[s] for distributions, were not supported by substantial evidence and were otherwise not in accordance with law." First Amended Compl. ¶¶ 39-40. We conclude that Count 1 fails to state a claim upon which relief can be granted and, therefore, must be dismissed.

Plaintiff alleges that "[d]uring the injury phase of the antidumping investigation covering wooden bedroom furniture from China, Ashley filed timely and complete questionnaire responses to the

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[10] Although relief on the Fifth Amendment due process claims that plaintiff bases on retroactivity, which are stated in Count 4 of its amended complaints, is not foreclosed by binding precedent, we conclude in Part II(C) of this opinion that Ashley has no standing to bring these claims.

Commission's domestic producer and importer questionnaires." *Id*. ¶ 19. The CDSOA language pertinent to the issue raised by Count 1 is the directive that the ITC, in providing its lists to Customs, include "a list of persons that *indicate support of the petition* by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (emphasis added). Ashley's filing of questionnaire responses without an indication of support for the petition does not satisfy the petition support requirement. Moreover, plaintiff admits that "[in] its questionnaire responses, Ashley indicated that it opposed the petition." First Amended Compl. ¶ 19. Doing so disqualified Ashley from receiving CDSOA distributions.

In opposing dismissal of Count 1, plaintiff argues that "[in] *SKF*, the Federal Circuit adopted a saving construction of the CDSOA that could otherwise have violated the First Amendment by conditioning receipt of CDSOA payments on the content of a domestic producer's speech." Pl.'s Resp. to Def.'s May 2, 2011 Mot. to Dismiss 9 (Jun. 6, 2011), ECF No. 86 ("Pl.'s Resp."). Plaintiff submits that, due to this saving construction, *SKF* does not support dismissal here but rather "makes clear that Ashley is entitled to disbursements under the statute, constitutionally construed." *Id.* (footnote omitted). Plaintiff views *SKF* to hold "that the CDSOA 'only permit[s] 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 10 (quoting

SKF, 556 F.3d at 1353 n.26) (alteration in original). Under this saving construction, plaintiff argues, SKF USA Inc. ("SKF"), the plaintiff in *SKF*, "was ineligible to receive distributions *not* because it opposed the petition in its responses to the ITC questionnaire, but rather because it *actively opposed* the petition in other concrete ways that placed it in 'a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case.'" *Id.* at 11 (quoting *SKF*, 556 F.3d at 1358). According to plaintiff, "[in] light of this substantial opposition, the First Amendment did not bar denying [SKF] a share in antidumping duties" but "compels the opposite result" in this case because, "[by] contrast, Ashley took no similar steps to 'impede the investigation,' nor did it express a 'refus[al] to cooperate' with the Government." *Id.* at 11-12 (quoting *SKF*, 556 F.3d at 1359) (second alteration in original).

Plaintiff's argument is based on an incorrect understanding of the holding in *SKF*. The Court of Appeals did not construe the CDSOA such that a domestic producer may express opposition to a petition in its ITC questionnaire response and still be eligible to receive CDSOA distributions, so long as the producer does not take additional steps that amount to "substantial opposition" to the petition. The opinion in *SKF* recounts the various steps SKF took in opposing an antidumping duty order that were beyond merely indicating opposition to the petition on a questionnaire response, but it did so in the context of explaining why it considered the petition support requirement not to be overly broad,

and therefore permissible, under the test established by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y*, 447 U.S. 557, 566 (1980). *SKF*, 556 F.3d at 1357-59. The Court of Appeals reasoned that in enacting the petition support requirement Congress permissibly, and rationally, could conclude that those who did not support a petition should not be rewarded. *Id*. at 1357, 1359.

Defendants' determinations denying benefits to Ashley comported with the CDSOA. Therefore, plaintiff's claims that either or both of the agencies acted unlawfully are meritless.

2. Relief on Plaintiff's First Amendment Claims Is Foreclosed by Binding Precedent

In Count 2 of the First Amended Complaints, plaintiff claims that the petition support requirement "violates the First Amendment to the Constitution." First Amended Compl. ¶ 42. Ashley claims, specifically, that "[d]efendants' application of the [CDSOA] conditions receipt of a government benefit on a private speaker['s] expressing a specific viewpoint support for an antidumping petition and, therefore, is viewpoint discrimination in contravention of the First Amendment." *Id.* ¶ 43. Count 5 of plaintiff's First Amended Complaints contains an as-applied challenge to the CDSOA that plaintiff also bases on the First Amendment. *Id*. ¶¶ 49-50. Plaintiff claims that the CDSOA violates the First Amendment as applied to Ashley "because it discriminates against Ashley based on expression of

[Ashley's] views rather than action ([Ashley's] litigation support)." *Id*. ¶ 50.

Relief on Ashley's facial First Amendment claim is precluded by the holding in *SKF*, 556 F.3d at 1360 (holding that the Byrd Amendment is "valid under the First Amendment" because it "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."). The holding in *SKF* also forecloses relief on plaintiff's as-applied First Amendment claims. The Court of Appeals held that the CDSOA did not violate constitutional First Amendment principles as applied to SKF, which expressed in its response to the ITC's questionnaire its opposition to the antidumping duty petition involved in that litigation. *See SKF*, 556 F.3d at 1343 (stating that "SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition"). Ashley, like SKF, expressed opposition to the petition in its response to the ITC's questionnaire. Plaintiff fails to plead any facts that would allow the court to conclude, notwithstanding the binding precedent of *SKF*, that the CDSOA was applied to Ashley in a manner contrary to the First Amendment. In all material respects, Ashley's expression of opposition to an antidumping duty petition was equivalent to that of SKF and properly resulted in Ashley's disqualification from receiving distributions under the CDSOA.

In support of its as-applied First Amendment claims, Ashley directs the court's attention to the Supreme Court's decisions in *Snyder v. Phelps*, 131 S.

Ct. at 1207 (2011), *Citizens United v. Federal Election Comm'n*, 130 S. Ct. at 876, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. at 2653, and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. at 2806. According to plaintiff, these recent decisions have "rendered [the] conclusion of [*SKF*] utterly untenable . . . Today, it is clear that corporate speech relating to matters such as international trade and law enforcement is entitled to the strictest First Amendment protection." Pl.'s Resp. 21. We disagree.

Snyder v. Phelps held that members of the Westboro Baptist Church who picketed near the funeral of a member of the U.S. Marine Corps killed in the line of duty in Iraq could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. 131 S. Ct. at 1213-14, 1220. Concluding that the various messages condemning the United States and its military displayed on the picketer's signs were entitled to "'special protection' under the First Amendment," *id*. at 1219, the Supreme Court held that the jury verdict holding the Westboro picketers liable on the tort claims must be set aside as an impermissible burden on protected speech, even if the picketing caused emotional distress to the mourners, *id.* at 1220. The Supreme Court cautioned that its holding was narrow and limited to the particular facts before it, having emphasized that the picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, *id.* at 1216-17, and conducted their picketing peacefully, and without interfering with the

funeral, at each of three locations the Supreme Court considered to be a public forum, *id.* at 1218-19.

Plaintiff maintains that "[in] light of the Court's decision in *Snyder*, there can be no dispute that opposition to a government antidumping investigation constitutes speech on a matter of public concern, subject to full First Amendment protection" and that to the extent that *SKF* rested on a belief that this opposition does not constitute political speech, "*Snyder* demonstrates that the Federal Circuit erred." Pl.'s Resp. 22. *Snyder*, however, resolved a First Amendment question differing from those presented by this case and by *SKF*. Ashley is not asserting First Amendment rights as a defense against civil liability for an award of monetary damages. The "burden" the CDSOA placed on Ashley's speech ineligibility for potential CDSOA distributions does not rise to a level commensurate with the burden the Supreme Court addressed by setting aside the jury verdict against the Westboro picketers. In speaking to a different First Amendment issue than the one Ashley raises, *Snyder* does not establish a principle of First Amendment law under which we may invalidate the CDSOA petition support requirement in response to Ashley's as-applied challenge.

In *Citizens United v. Federal Election Commission*, the Supreme Court struck down a federal election law imposing an "outright ban, backed by criminal sanctions" on independent expenditures by a "corporation," including "nonprofit advocacy corporations" or "unions," during the thirty-

day period preceding a primary election or the sixty-day period preceding a general election, for an "electioneering communication" or for advocacy of the election or defeat of a candidate. 130 S. Ct. at 886-87, 897. Reasoning that "political speech must prevail against laws that would suppress it, whether by design or inadvertence," the Supreme Court concluded that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id*. at 898 (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

Ashley argues that the holding in *SKF* cannot stand now that the Supreme Court has "made perfectly clear that so long as speech relates to matters of public concern, it is entitled to the highest form of constitutional protection, even if it involves corporations or 'activities of a commercial nature.'" Pl.'s Resp. 23 (quoting *SKF*, 556 F.3d at 1355). According to plaintiff, applying a lesser standard of scrutiny to the petition support requirement, as the Court of Appeals did in *SKF* based on a perceived statutory purpose of rewarding cooperation with the government, "is incompatible with *Citizens United*." *Id.* Positing that the petition support requirement as applied to entities like Ashley "is calculated to silence or at least discourage dissent against proposed antidumping actions," plaintiff argues that "[t]his sort of arm-twisting cannot withstand constitutional scrutiny after *Citizens United*." *Id.* at 24.

Citizens United does not hold that any statute affecting speech relating to matters of public concern, whether made by individuals or corporations, is to be subjected to a strict scrutiny standard. The statute struck down in *Citizens United* banned political speech, and the Supreme Court's decision to apply strict scrutiny can only be viewed properly in that context. As the Court of Appeals recognized in *SKF*, the CDSOA "does not prohibit particular speech," that "statutes prohibiting or penalizing speech are rarely sustained," and that "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." 556 F.3d. at 1350. The Court of Appeals reasoned that "[in] considering limited provisions that do not ban speech entirely, the purpose of the statute is important," and concluded that "[n]either 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." *Id.* at 1350-51. Contrary to this view, Ashley maintains that "the Supreme Court in *Citizens United* made clear that the degree of First Amendment protection afforded corporate speech on matters of public concern does not vary depending on whether the government directly prohibits speech or instead withholds benefits based on speech." Pl.'s Resp. 24 (citing *Citizens United*, 130 S. Ct. at 905). Thus, plaintiff's argument would have us consider immaterial the distinction between the CDSOA, which does not prohibit speech, and the statute struck down in *Citizens United*, which had as its purpose and effect the suppression of political

speech through an "outright ban, backed by criminal sanctions." *Citizens United*, 130 S. Ct. at 897.

Plaintiff misreads *Citizens United*. In the passage from the opinion to which plaintiff directs our attention, the Supreme Court explained that it no longer subscribes to certain reasoning expressed in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which *Citizens United* overturned. *Citizens United* signaled the Court's rejection of the notion that the special state-law advantages corporations enjoy over wealthy individuals, such as limited liability, perpetual life, and favorable treatment of accumulation and distribution of assets, can suffice to allow laws "prohibiting speech," *i.e.*, laws prohibiting corporations from speaking on matters of public concern. 130 S. Ct. at 905. Plaintiff misconstrues the Supreme Court's explanation to mean broadly that "[w]hile the government has no obligation to provide those benefits to corporations, the Court made clear that the government may not condition corporations' receipt of these benefits on corporations' foregoing full First Amendment protection for their speech." Pl.'s Resp. 24 (citing *Citizens United*, 130 S. Ct. at 905). Rather, the Supreme Court was specific in concluding that the granting of benefits to corporations under state laws "does not suffice, however, to allow laws *prohibiting* speech." *Citizens United*, 130 S. Ct. at 905 (emphasis added). Because the CDSOA is not a prohibitory statute, and because the relevant purpose of the CDSOA is to reward petitioners and those in support of petitions, we reject the argument that *Citizens United* implicitly invalidates the *SKF* analysis

upholding the CDSOA against attack on First Amendment grounds.

Plaintiff argues, next, that in the wake of the Supreme Court's decision in *Sorrell*, the conclusion that intermediate scrutiny should be applied to the CDSOA "despite the CDSOA's viewpoint discrimination" is a conclusion that "can no longer stand" and that the CDSOA now must be subjected to "heightened judicial scrutiny." Pl.'s Notice of Supp. Authority 2 (citing *Sorrell*, 131 S. Ct. at 2663-64). As we did recently in ruling on another First Amendment challenge to the CDSOA, we reject the argument that *Sorrell* implicitly overturned *SKF*. *Furniture Brands*, 35 CIT __, __, Slip Op. 11-132, at 23-25.

Sorrell struck down a Vermont statute (the "Prescription Confidentiality Law") that prohibited, subject to certain exceptions, the sale, disclosure, and use of "prescriber-identifying information," which is information obtained from pharmacy records that reveals the drug prescribing practices of individual physicians. 131 S. Ct. at 2660 (citation omitted). The statute prohibited pharmacies, health insurers, and similar entities from selling this information, or allowing such information to be used for marketing, without the prescriber's consent, and it prohibited pharmaceutical manufacturers and marketers from using such information for marketing without the prescriber's consent. *Id.* The statute authorized the Vermont attorney general to pursue civil remedies against violators. *Id*.

The Supreme Court concluded that the Prescription Confidentiality Law "enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Id.* at 2663. Under the "heightened scrutiny" the Supreme Court considered to be warranted, "the State must show at least that the statute directly advanced a substantial government interest and that the measure is drawn to achieve that interest." *Id.* at 2667-68. The Court concluded that the State of Vermont failed to make that showing. The Court considered that the stated interest of promoting medical privacy and physician confidentiality did not justify the prohibitions placed on the sale and use of the information. *Id*. at 2668. The Court noted that the law allowed wide dissemination of the information but effectively prohibited use of the information by a class of disfavored speakers ("detailers," who used the prescriber-identifying information to promote brand-name drugs on behalf of pharmaceutical manufacturers) and in effect prohibited a disfavored use, marketing. *Id*. Under the Supreme Court's analysis, the Vermont law "forbids sale" of the information "subject to exceptions based in large part on the content of a purchaser's speech," disfavors "marketing, that is, speech with a particular content," and "disfavors specific speakers, namely, pharmaceutical manufacturers." *Id.* at 2663. Another purpose the State of Vermont advanced in support of the Prescription Confidentiality Law reducing health care costs and promoting public health also failed to justify the burden on speech. *Id*. at 2668, 2670. In restraining certain speech by certain speakers, and specifically, in diminishing the

ability of detailers to influence prescription decisions, the statute sought to influence medical decisions by the impermissible means of keeping physicians from receiving the disfavored information. *Id*. 2670-71.

As we observed in our *Furniture Brands* opinion, *Sorrell* and *SKF* analyze dissimilar statutes, which vary considerably in the nature and degree of the effect on expression as well as in purpose. *Furniture Brands*, 35 CIT at __, Slip Op. 11-132, at 23. *SKF* concluded that the CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression, *SKF*, 556 F.3d at 1351-52, whereas the Vermont statute authorized civil remedies against those selling or using the prescriber-identifying information that the statute sought to suppress. *See Sorrell*, 131 S. Ct. at 2660. *Sorrell* does not require us to review the CDSOA according to a First Amendment analysis differing from that applied by the Court of Appeals in *SKF*. In analyzing the Vermont statute, the Supreme Court stated in *Sorrell* that "the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." 131 S. Ct. at 2667-68 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989); *Central Hudson*, 447 U.S. at 566). *SKF* concluded that "SKF's opposition to the antidumping petition is protected First Amendment activity," 556 F.3d at 1354, and applied a test to which it referred as the "well established *Central Hudson* test," *id.* at 1355. The Court of Appeals described this test as requiring that regulation of commercial speech be held permissible if the asserted

governmental interest is substantial, the regulation directly advances that interest, and the regulation is not more extensive than is necessary to serve that interest. *Id.* (citing *Central Hudson*, 447 U.S. at 566).

We reject plaintiff's argument that *Sorrell* requires us to apply to the CDSOA a level of scrutiny different from that applied by the Court of Appeals in *SKF*.

In *Arizona Free Enterprise*, the Supreme Court struck down an Arizona campaign finance law imposing a "matching funds scheme" that "substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment." 131 S. Ct. at 2813. Under the Arizona statute, candidates for state office who agreed to accept public funding received matching funds when the allotment of state funds to the publicly financed candidate were exceeded by an amount calculated according to the amount a privately funded candidate received in contributions (including the candidate's "contribution" of expenditures of personal funds), combined with the expenditures independent groups made in support of the privately funded candidate or in opposition to a publicly funded candidate. *Id.* at 2313-14.

According to plaintiff, "the Supreme Court's decision in *Arizona Free Enterprise* demonstrates that, contrary to the government's position, strict scrutiny applies to viewpoint discrimination that falls short of an 'outright ban'" and that "[in] *SKF*, the Federal Circuit declined to apply heightened scrutiny

even though the CDSOA has the equivalent effect, providing a subsidy to the direct economic competitors of those engaging in disfavored speech." Pl.'s Notice of Supp. Authority 3-4. Therefore, plaintiff argues, *SKF* "is no longer compatible with Supreme Court precedent." *Id*. at 4.

We do not agree that the Supreme Court's holding in *Arizona Free Enterprise* implicitly invalidates the holding in *SKF*. *Arizona Free Enterprise* is one of a line of Supreme Court cases that struck down laws affecting speech during campaigns for political office. That line of cases includes *Citizens United*, discussed *supra*, and *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), which invalidated a federal statute under which a new, asymetrical regulatory scheme of limits on campaign donations of individuals in elections for the U.S. House of Representatives was triggered when one candidate in such an election spent more than $350,000 of personal funds on the race. *Arizona Free Enterprise*, 131 S. Ct. at 2818. The Supreme Court grounded its reasoning in *Arizona Free Enterprise* partly on the principle that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id*. (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted). Stating in *Arizona Free Enterprise* that "[t]he logic of *Davis* largely controls our approach to this case," the Supreme Court found the burdens the Arizona law imposed on speech uttered during a campaign to impose an even more onerous penalty on the free speech of a privately

funded candidate than did the federal statute invalidated in *Davis* and to inflict a penalty on groups making or desiring to make independent expenditures. *Id.* at 2818-20. Under the Arizona law's scheme, "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival." *Id.* at 2821. Contrary to plaintiff's argument, the CDSOA does not bear more than a superficial resemblance to the laws invalidated in *Arizona Free Enterprise*, *Davis* (a case decided prior to *SKF*), and similar such cases, which regulated and impermissibly burdened political speech during an election by restricting campaign expenditures. Accordingly, we reject Ashley's contention that *Arizona Free Enterprise* established a new First Amendment principle requiring us to disregard the holding in *SKF* and to apply a strict scrutiny analysis to the CDSOA.

In summary, *SKF* remains binding precedent that is controlling on the disposition of plaintiff's as-applied First Amendment claims. These claims must be dismissed according to USCIT Rule 12(b)(5).

3. Relief on Plaintiff's Equal Protection Claims Is Foreclosed by Precedent

In Count 3 of the amended complaints, plaintiff claims that the petition support requirement of the CDSOA "violates the Equal Protection Clause of the Constitution because Defendants have created a classification that implicates Ashley's fundamental right of speech and Defendants' actions are not

narrowly tailored to a compelling government objective." First Amended Compl. ¶ 45. Count 3 claims, further, that defendants' application of the CDSOA to Ashley "also violates the Equal Protection Clause because it impermissibly discriminates between Ashley and other domestic parties who expressed support for the relevant antidumping petition, denying a benefit to Ashley." *Id.* ¶ 46.

Relief on these claims is foreclosed by the holding in *SKF*. The Court of Appeals held in *SKF* that the CDSOA did not violate equal protection principles as applied to plaintiff SKF. Ashley, like SKF, expressed opposition to the relevant antidumping duty petition and thus failed to satisfy the petition support requirement, 19 U.S.C. § 1675c(d)(1). *Compare* First Amended Compl. ¶ 19 ("In its questionnaire responses, Ashley indicated that it opposed the petition.") *with SKF*, 556 F.3d at 1343 ("SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Plaintiff points out that SKF "did much more than simply express abstract opposition to the petition," Pl.'s Resp. 13, but this fact does not distinguish the holding in *SKF* from the case before us. In ruling on claims that are not distinguishable from Ashley's in any material way, the Court of Appeals held that "[b]ecause it serves a substantial government interest, the Byrd Amendment is . . . clearly not violative of equal protection under the rational basis standard," *SKF*, 556 F.3d at 1360, and that "the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech," *id*. at 1360 n.38.

Because plaintiff fails to plead facts allowing the court to conclude that its equal protection claims are distinguishable from those brought, and rejected, in *SKF*, Count 3 must be dismissed for failure to state a claim upon which relief can be granted.

C. Plaintiff Lacks Standing to Bring a Fifth Amendment Retroactivity Challenge to the CDSOA

Count 4 of the amended complaints challenges the CDSOA under the Due Process guarantee of the Fifth Amendment on the ground that the statute is impermissibly retroactive. Plaintiff claims that the petition support requirement of the CDSOA "violates the Due Process Clause of the Constitution because Defendants base Ashley's eligibility for disbursements on past conduct (*i.e.*, support for a petition)." First Amended Compl. ¶ 48. According to Count 4, "[t]he Due Process Clause disfavors retroactive legislation, and Defendants' disbursements only to those companies that express support for a petition is not rationally related to a legitimate government purpose." *Id*.

We construe Ashley's retroactivity claims, which are vaguely stated, to mean that the CDSOA is impermissibly retroactive under the Fifth Amendment due process guarantee because it conditions the receipt of distributions on a decision whether or not to support an antidumping duty petition that was made before the statute went into effect, and thus before the affected party making that decision could have had notice of the consequences. *See* 19 U.S.C. § 1675c(d)(1) (directing the ITC to

forward to Customs a list identifying petitioners and parties expressing support for a petition "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . . . "). Because it applies to petition support decisions made prior to enactment, the CDSOA may be characterized as having a retroactive aspect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (considering a retroactive statute to be one that attaches "new legal consequences to events completed before its enactment"). We previously have concluded that the CDSOA is not violative of the due process guarantee because "the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds." *New Hampshire Ball Bearing Co., Inc. v. United States*, 36 CIT __, __, Slip Op. 12-2, at 14 (Jan. 3, 2012); *see also Schaeffler Grp. USA, Inc. v. United States*, 36 CIT __, __, Slip Op. 12-8, at 11-12 (Jan. 17, 2012). We conclude that Ashley's retroactivity claims, when construed in this way, must be dismissed for lack of standing.[11] Because the

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[11] It is also possible to construe Ashley's retroactivity claims, when read literally, to mean that the CDSOA is impermissibly retroactive under the due process guarantee simply because it attaches negative consequences to petition support decisions made prior to the determination of eligibility for distributions. We decline to construe the claims in this way because, according to such a construction, the CDSOA would not

CDSOA was enacted in 2000, it was not applied retroactively to Ashley, which expressed opposition to the wooden bedroom furniture petition in 2003. First Amended Comp. ¶¶ 18-19. Ashley, therefore, had the "opportunity to . . . conform [its] conduct accordingly." *Landgraf*, 511 U.S. at 265. As a consequence, plaintiff's amended complaints fail to allege an injury in fact arising from conduct predating the CDSOA's enactment. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) ("To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . .").

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be "retroactive" as the term has been recognized in case law and would be indistinguishable from any of innumerable statutes attaching a consequence to a past action of a person to whom enactment of the statute provided notice of the consequences. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Were we to adopt the alternate construction of plaintiff's retroactivity claims that we pose hypothetically, we would be compelled to dismiss such claims as ones upon which no relief could be granted.

Because the amended complaints do not allege facts from which we may conclude that Ashley has standing to bring the claims stated as Count 4, we must dismiss these claims for lack of jurisdiction pursuant to USCIT Rule 12(b)(1).

III. CONCLUSION

Because neither a remedy at law nor a remedy in equity is available on the claims stated in Counts 1, 2, 3, and 5 of the amended complaints, and because the claims in Count 4 of the amended complaints must be dismissed for lack of standing, we conclude that plaintiff is not entitled to injunctive relief that would delay the pending CBP distribution of CDSOA funds or to an affirmative injunction directing distribution of CDSOA benefits to Ashley. For the same reasons, we will grant the motions to dismiss filed by defendants and defendant-intervenors. Plaintiff already has taken the opportunity to amend its original complaints and has not indicated an intention to seek leave to amend its complaints again, and we see no reason why this action should be prolonged. Accordingly, we shall enter judgment dismissing this action.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Judge

Dated: January 31, 2012
New York, New York

APPENDIX C

Slip Op. 12-11

UNITED STATES COURT OF INTERNATIONAL TRADE

ETHAN ALLEN GLOBAL, INC. and ETHAN ALLEN OPERATIONS, INC.,
Plaintiffs,

v.

UNITED STATES,
Defendants,

And

KINCAID FURNITURE CO., INC., **L & J.G. STICKLEY, INC.**, **SANDBERG FURNITURE MANUFACTURING COMPANY, INC.**, **STANLEY FURNITURE CO., INC.**, **T. COPELAND AND SONS, INC.**, **and VAUGHAN-BASSETT FURNITURE COMPANY, INC.**,
Defendant-Intervenors.

Before: **Gregory W. Carman, Judge**
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge

Court No. 08-00302

OPINION

[Dismissing the action for failure to state a claim upon which relief can be granted]

Dated: January 20, 2012

Craig A. Lewis and *Jonathan T. Stoel*, Hogan Lovells US LLP, of Washington, DC, for plaintiffs.

Jessica R. Toplin, *David S. Silverbrand*, and *Courtney S. McNamara*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the briefs were *Andrew G. Jones* and *Joseph Barbato*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Joseph W. Dorn, *Jeffrey M. Telep*, and *Steven R. Keener*, King & Spalding LLP, of Washington, DC, for defendant-intervenors. With them on the briefs was *Taryn K. Williams*. Of counsel on the briefs was *Richard H. Fallon*, of Cambridge, MA.

Stanceu, Judge: This case arose from the actions of two agencies, the U.S. International Trade Commission (the "ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs"), that denied plaintiffs Ethan Allen Global, Inc. and Ethan Allen Operations, Inc. (collectively, "Ethan Allen") certain monetary benefits under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), Pub. L. No. 106-387, §§ 1001-03, 114 Stat. 1549, 1549A-72-75 (codified at 19 U.S.C. § 1675c (2000)),[1] *repealed by* Deficit Reduction Act of 2005, Pub. L. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). ITC denied Ethan Allen the status of an "affected domestic producer" ("ADP"), which potentially would have qualified Ethan Allen for distributions of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China ("China" or the "PRC"). *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*"). In the absence of an ITC designation of ADP

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[1] Citations are to the codified version of the Continued Dumping and Subsidy Offset Act ("CDSOA"), 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

status, Customs made no CDSOA distributions to Ethan Allen. Plaintiffs bring facial and as-applied constitutional challenges to the CDSOA and claim, further, that the various actions by the two agencies violated the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). First Amended Compl. ¶¶ 33-62 (Feb. 1, 2011), ECF No. 20.

Before the court are three motions brought under USCIT Rule 12(b)(5) to dismiss for failure to state a claim upon which relief can be granted. Defendant-intervenors Kincaid Furniture Co., Inc., L & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc. moved under Rule 12(b)(5) on February 23, 2011. Def.-intervenors' Mot. to Dismiss (Feb. 23, 2011), ECF No. 34 ("Def.-intervenors' Mot."). Defendant ITC so moved on May 2, 2011, and Customs followed with its motion on May 4, 2011. Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 60 ("ITC's Mot."); Def. U.S. Customs & Border Protection's Mot. for J. on the Pleadings (May 4, 2011), ECF No. 61 ("Customs' Mot.").[2] The court

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[2] U.S. Customs & Border Protection ("CBP" or "Customs") labels its motion as one for judgment on the pleadings (ostensibly under USCIT Rule 12(c)) but subsequently refers to it as a motion to dismiss under USCIT Rule 12(b)(5). Def. U.S. Customs & Border Protection's Mot. for J. on the Pleadings

determines that relief is not available on any of plaintiffs' claims and will enter judgment dismissing this action.

I. BACKGROUND

During a 2003 ITC investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material injury to the domestic industry, Ethan Allen responded to a "U.S. producers' questionnaire" from the ITC, indicating thereon that it "took no position on the petition." First Amended Compl. ¶ 23; *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,231 (Dec. 17, 2003). Based on an affirmative ITC injury determination, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in early 2005 issued the antidumping duty order on imports of wooden bedroom furniture from China. *Antidumping Duty Order*, 70 Fed. Reg. at 329; First Amended Compl. ¶ 26. Determining that Ethan Allen had not supported the petition, the ITC declined to designate Ethan Allen an ADP for Fiscal Years 2006 through

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(May 4, 2011), ECF No. 61. The court hereinafter refers to this motion as a motion to dismiss for failure to state a claim upon which relief can be granted.

2010, both in its lists of ADPs and, subsequently, in response to Ethan Allen's written requests. First Amended Compl. ¶¶ 27-32; *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336, 31,375-76 (June 1, 2006); *Distribution of Continued Dumping & Subsidy*

Offset to Affected Domestic Producers, 72 Fed. Reg. 29,582, 29,622-23 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,236-37 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,855-56 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,571-72 (June 1, 2010). Despite Ethan Allen's filing CDSOA certifications with Customs for the various fiscal years to request CDSOA disbursements, Customs has made no distributions to Ethan Allen. First Amended Compl. ¶¶ 30-32.

On September 12, 2008, Ethan Allen commenced this action to challenge ITC's refusal to designate Ethan Allen as an ADP and the refusal of Customs to include Ethan Allen in the CDSOA distributions for Fiscal Years 2006 through 2008 as well as future distributions. Compl. ¶ 1 (Sept. 12, 2008), ECF No. 4. The court then issued a stay of this action pending final resolution of other litigation raising the same or similar issues. Order (Oct. 7, 2008), ECF No. 10 (staying action "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States International Trade Commission*, Consol. Court No.

06-00290, that is, when all appeals have been exhausted.").

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed questions also present in this case, the court issued an order directing plaintiffs to show cause why this case should not be dismissed and lifted the stay for the purposes of allowing any brief, response, or reply described in that order. Order (Jan. 3, 2011), ECF No. 17. On February 1, 2011, plaintiffs responded to the court's order and moved for a partial lifting of the stay to allow amendment of the complaint to add factual allegations pertaining to two additional fiscal years, 2009 and 2010. Resp. to Order to Show Cause (Feb. 1, 2011), ECF No. 18 ("Pls.' Resp. to Order"); Pls.' Mot. for Partial Lifting of Stay (Feb. 1, 2011), ECF No. 19 ("Pls.' Mot.").

The court lifted the stay for all purposes on February 9, 2011. Order (Feb. 9, 2011), ECF No. 28. A motion under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted was filed by defendant-intervenors on February 23, 2011, by ITC on May 2, 2011, and by Customs on May 4,

2011. Def.-Intervenors' Mot; ITC's Mot.; Customs' Mot. Briefing on these motions is now complete.[3]

II. DISCUSSION

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act, 28 U.S.C. § 1581(i)(4), which grants jurisdiction over civil actions arising from laws of the United States, such as the CDSOA, providing for administration with respect to duties, such as antidumping duties, on the importation of merchandise for reasons other than the raising of revenue. *See Furniture Brands Int'l v. United States*, 35 CIT __, __, Slip Op. 11-132, at 9-15 (Oct. 20, 2011); *New Hampshire Ball Bearing, Inc. v. United States*, 36 CIT __, __, Slip Op. 12-02, at 4 (Jan. 3, 2012); *Schaeffler Group USA, Inc. v. United States*, 36 CIT __, __, Slip Op. 12-08, at 5 (Jan. 17, 2012).

We address below the claims stated in Ethan Allen's First Amended Complaint.[4] In ruling on

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[3] CBP has not made any distributions affecting this case and indicates that it will refrain from doing so until January 31, 2012 at the earliest. Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 37.

[4] In their motion for a partial lifting of the stay on February 1, 2011, plaintiffs asserted a right to amend their complaint as a matter of course because "[d]efendant has not yet

motions to dismiss made under USCIT Rule 12(b)(5), we dismiss a complaint that does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the reasons set forth below, we conclude that each of the claims in Plaintiffs' First Amended Complaint must be dismissed for failure to state a claim upon which relief can be granted.

The CDSOA amended the Tariff Act of 1930 ("Tariff Act") to provide for the distribution of funds

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filed its answer nor has it filed a motion to dismiss under Rule 12(b), (e), or (f)." Mot. For Partial Lifting of Stay 3-4 (Feb.1, 2011), ECF No. 19. Under USCIT Rule 15(a) as amended effective January 1, 2012, "a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." USCIT R. 15(a). Prior to this amendment, a party could amend its pleading once as a matter of course before being served with a responsive pleading. Because plaintiffs filed their notice of an amended complaint only one month after the effective date of the rule change, and because the other parties to this case have addressed in their Rule 12(b)(5) motions the complaint in amended form, the court exercises its discretion under USCIT Rule 89 to accept plaintiffs' First Amended Complaint. USCIT R. 89 ("These rules and any amendments take effect at the time specified by the court. They govern . . . proceedings after that date in a case then pending unless: (A) the court specifies otherwise . . . ").

from assessed antidumping and countervailing duties to persons with ADP status, which is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered.[5] 19 U.S.C. § 1675c(a)-(d).[6] The statute directed the ITC to

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[5] The CDSOA provided that:

> 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.

19 U.S.C. § 1675c(b)(1) (emphasis added).

[6] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111-291, § 822, 124 Stat. 3064, 3163 (2010).

forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists 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."[7] *Id.* § 1675c(d)(1). The CDSOA directed Customs to publish in the Federal Register lists of ADPs potentially eligible for distributions of a "continuing dumping and subsidy offset" that are based on the lists obtained from the Commission. *Id.* § 1675c(d)(2). The CDSOA also directed Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to an ADP annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

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[7] Additionally, the CDSOA directed the ITC to forward to Customs a list identifying affected domestic producers "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . . ." 19 U.S.C. § 1675c(d)(1). The antidumping duty order at issue in this case was not in effect on that date.

In February 2009, approximately five months after plaintiffs filed suit on their original complaint, the Court of Appeals decided *SKF*, upholding the CDSOA against constitutional challenges brought on First Amendment and Fifth Amendment equal protection grounds. 556 F.3d at 1360. *SKF* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

In Counts I and II of the amended complaint, plaintiffs challenge the "in support of the petition" requirement of the CDSOA ("petition support requirement"), both facially and as applied to Ethan Allen, on First Amendment grounds. First Amended Compl. ¶¶ 33-46. In Counts III and IV, plaintiffs challenge the petition support requirement, both facially and as applied to Ethan Allen, on Fifth Amendment equal protection grounds. *Id*. ¶¶ 47-58. Finally, in Count V, plaintiffs claim that defendants' actions violate the APA. *Id*. ¶¶ 59-62.

A. Plaintiffs' Facial Constitutional Challenges Are Foreclosed by Court of Appeals Precedent

In Count II of the First Amended Complaint, plaintiffs bring various facial challenges to the CDSOA under the First Amendment. *Id*. ¶¶ 40-46. They ground these facial challenges in the First Amendment guarantees of freedom of speech and the ability to petition for redress of grievances, *id.* ¶ 41, and claim specifically that the CDSOA engages in

impermissible viewpoint discrimination, conditioning a government benefit on the content of political speech, *i.e.*, expression of support for an antidumping petition, *id.* ¶ 42. They claim, further, that the CDSOA is overbroad and not narrowly tailored to achieve a compelling government objective, *id.* ¶ 43, imposes a content-based restriction, and creates a designated public forum for political speech, then imposing its content-based restriction on that speech, all in violation of the First Amendment, *id.* ¶¶ 44-45.

Count IV of the First Amended Complaint bases a facial challenge to the CDSOA on the equal protection guarantee of the Fifth Amendment. *Id*. ¶¶ 53-58. In brief summary, plaintiffs claim that the CDSOA creates a classification infringing on Ethan Allen's free speech rights that is not narrowly tailored to a compelling government objective, *id.* ¶ 54, and creates an arbitrary and restrictive classification consisting of domestic producers that supported a petition, thereby discriminating between similarly-situated domestic producers without a rational basis and without serving a legitimate government purpose, *id.* ¶¶ 55-56.

SKF held broadly that the CDSOA is not unconstitutional under the First Amendment and does not abridge the Fifth Amendment's equal protection guarantee. 556 F.3d at 1360 ("[T]he 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."); *id.* at 1360 n.38 ("For the same reason, the Byrd Amendment does not fail the equal

protection review applicable to statutes that disadvantage protected speech."); *id.* at 1360 ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard."). Relief on plaintiffs' claims that the petition support requirement is facially invalid under the First Amendment and under the Fifth Amendment equal protection guarantee is foreclosed by this precedent.

B. Plaintiffs' As-Applied Constitutional Challenges Also Must Be Dismissed

In Count I of the First Amended Complaint, plaintiffs bring various as-applied challenges to the CDSOA under the First Amendment. First Amended Compl. ¶¶ 33-39. They ground their as-applied challenges in the First Amendment guarantees of freedom of speech and the ability to petition for redress of grievances, *id.* ¶ 34, and claim specifically that the CDSOA discriminates against those, such as Ethan Allen, who did not express support for the antidumping petition, *id*. ¶ 35. They claim, further, that such an application of the CDSOA is overbroad and not narrowly tailored to achieve a compelling government objective, *id*. ¶ 36. Plaintiffs claim, further, that the CDSOA as applied to Ethan Allen impermissibly compels speech by requiring manufacturers such as plaintiffs to articulate support for a specific policy, *id*. ¶ 37, a content-based restriction, and creates a designated public form for political speech, which is subject to a content-based restriction, *id*. ¶ 38.

Count III of the First Amended Complaint brings an as-applied challenge to the CDSOA that plaintiffs base on the equal protection guarantee of the Fifth Amendment. *Id*. ¶¶ 47-52. Specifically, plaintiffs claim that the application of the CDSOA to Ethan Allen and others who did not support a petition creates a classification infringing on Ethan Allen's free speech rights that is not narrowly tailored to a compelling government objective. *Id.* ¶ 48. They claim that the CDSOA creates an arbitrary and restrictive classification consisting of those domestic producers that supported a petition, thereby discriminating between similarly-situated domestic producers without a rational basis and without serving a legitimate government purpose. *Id.* ¶¶ 49-50.

In opposing dismissal, plaintiffs attempt to distinguish their case from *SKF* by arguing that "SKF actively opposed the proceeding in its case; Ethan Allen did not." Resp. in Opp'n to Defs.' Mot. to Dismiss 12, 15 (Jun. 6, 2011), ECF No. 65 ("Pls.' June Opp'n"). Plaintiffs, however, fail to plead facts that would bring their as-applied claims outside of the holding in *SKF*, in which the Court of Appeals held that the CDSOA did not violate constitutional First Amendment or equal protection principles when applied to plaintiff SKF USA, Inc. ("SKF"), which, in its questionnaire response to the ITC, indicated opposition to the petition at issue in that case. In imposing the petition support requirement as a condition for the receipt of CDSOA distributions, the CDSOA did not distinguish between a party who opposed an antidumping or countervailing duty

petition and a party who simply declined to take a position in support of such a petition. *See* 19 U.S.C. § 1675c(b)(1)(A), (d)(1). The Court of Appeals, rejecting SKF's First Amendment and equal protection challenges to the CDSOA, reached a broad holding in *SKF* that did not turn on any such distinction. *SKF*, 556 F.3d at 1360. The reasoning supporting that holding is equally broad. The Court of Appeals analogized that "[a]t 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," and that it was "rational for Congress to conclude that those who did not support the petition should not be rewarded." *Id.* at 1359. It is, therefore, unavailing for plaintiffs to claim that they are differently situated than SKF because they "[Took] No Position" rather than "[O]pposed" the petition, as SKF did. Resp. in Opp'n to Def.-intervenors' Mot. to Dismiss 10-11, 15-16 (April 22, 2011), ECF No. 58 ("Pls.' April Opp'n"); Pls.' June Opp'n 9, 12, 15.

In support of their as-applied First Amendment challenge to the CDSOA, plaintiffs cite three recent U.S. Supreme Court decisions, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *United States v. Stevens*, 130 S. Ct. 1577 (2010). They consider these cases to "cast significant doubt on whether the approach adopted by the Federal Circuit in deciding the First Amendment issues presented in *SKF* can be applied to the Ethan-Allen specific facts at issue in this litigation," arguing that "the specific, different

facts alleged by Ethan Allen mandate a reconsideration of the *SKF* court's analysis and a stricter level of scrutiny than was applied in that case." Pls.' June Opp'n 18-25; Pls.' April Opp'n 13-14. Ethan Allen views these three cases as undermining "the Federal Circuit's analysis under the *Central Hudson* test," which applied "an intermediate level of scrutiny" that plaintiffs view to be no longer appropriate for the CDSOA as applied to Ethan Allen. Pls.' June Opp'n 19 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). We reject this argument, concluding that each of the three Supreme Court decisions upon which plaintiffs rely neither invalidates the holding of *SKF* nor otherwise requires us to apply a strict scrutiny analysis in the case before us.

In *Snyder v. Phelps*, the Supreme Court ruled that members of the Westboro Baptist Church who picketed at public sites near the funeral of a member of the U.S. Marine Corps killed in the line of duty in Iraq could not be held liable, in the particular circumstances of that case, on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. 131 S.Ct. at 1213-14, 1220. Concluding that the speech in question, signs displaying various controversial messages condemning the United States and its military, was entitled to "'special protection' under the First Amendment," *id*. at 1219, the Supreme Court held that the jury verdict holding the Westboro picketers liable on the tort claims must be set aside. The Court emphasized as essential to its holding that the Westboro picketers carried signs displaying

messages that, for the most part, constituted speech addressing matters of public concern, *id.* at 1216-17, and conducted their picketing peacefully, and without interfering with the funeral, at each of three locations the Supreme Court considered to be a public forum, *id.* at 1218-19.

Citing *Snyder v. Phelps*, plaintiffs argue that "[c]onsistent with the Supreme Court's recent clear directive, voicing a position on a government antidumping investigation (or, in Ethan Allen's case, deciding not to take a position) constitutes speech on a 'matter of public concern,' subject to heightened First Amendment protection." Pls.'s June Opp'n 20. *Snyder* did not address the question of whether the type of speech involved in this case constituted speech on a matter of public concern. But even were we to accept plaintiffs' premise that the speech involved here was on a matter of public concern, we still would conclude that *Snyder v. Phelps* resolved a fundamentally different First Amendment question than those presented by this case and by *SKF*. Here, plaintiffs are not asserting First Amendment rights as a defense against civil liability for an award of monetary damages. The "burden" the CDSOA placed on Ethan Allen's speech the ineligibility to receive potential CDSOA distributions does not rise to a level commensurate with the burden the Supreme Court precluded by setting aside the jury verdict imposing tort liability on the Westboro picketers. In speaking to a First Amendment issue far afield of those presented here, *Snyder v. Phelps* does not establish a principle of First Amendment law requiring us to

invalidate the CDSOA petition support requirement as applied to Ethan Allen.

Citizens United v. Federal Election Comm'n struck down on First Amendment grounds a federal election law imposing an "outright ban, backed by criminal sanctions" on independent expenditures by a "corporation," including "nonprofit advocacy corporations" or "unions," during the 30-day period preceding a primary election or the 60-day period preceding a general election, for an "electioneering communication" or for advocacy of the election or defeat of a candidate. 130 S. Ct. at 886-87, 897. Stating that "political speech must prevail against laws that would suppress it, whether by design or inadvertence," the Supreme Court concluded that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 898 (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). Plaintiffs argue that "the ITC's conditioning of a 'reward' (i.e., CDSOA distributions) on a particular expression of an opinion effectively suppresses a category of speech entitled to heightened protection under *Snyder* and *Citizens United*." Pls.' June Opp'n 21. "This is because non-political corporate speech is entitled to strict scrutiny when the speech is not merely related to a commercial transaction but is an independent assertion of a particular viewpoint on a matter of public importance." *Id.* at 21-22. According to plaintiffs, "Defendants' actions suppressed Ethan

Allen's corporate right to express itself on matters concerning public affairs and its right to petition the government." *Id.*

The Supreme Court's admonishments in *Citizens United* that "political speech must prevail against laws that would suppress it, whether by design or inadvertence" and that "[l]aws that burden political speech are 'subject to strict scrutiny,'" 130 S. Ct. at 898, should not be applied indiscriminately to any statute raising First Amendment concerns, and we decline to do so here. The statute struck down in *Citizens United* banned political speech and subjected that speech to criminal sanction, and the Court's decision to apply strict scrutiny can only be viewed properly in that context. The Court of Appeals recognized in *SKF* that the CDSOA "does not prohibit particular speech," that "statutes prohibiting or penalizing speech are rarely sustained," and that "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." 556 F.3d. at 1350. As the Court of Appeals reasoned, "[i]n considering limited provisions that do not ban speech entirely, the purpose of the statute is important." *Id.* The Court concluded that "[n]either 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." *Id.* at 1351. Accordingly, we reject plaintiffs' arguments to the effect that the holdings in *Snyder* and *Citizens United* implicitly invalidated the

First Amendment analysis the Court of Appeals employed in *SKF*.

In *United States v. Stevens*, the Supreme Court struck down as "substantially overbroad, and therefore invalid under the First Amendment," a federal statute that criminalized the commercial creation, sale, or possession of depictions of "animal cruelty," which the statute defined as "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." 130 S. Ct. at 1582 n.1, 1592. The Court rejected the government's argument that the statute, which contained an "exceptions clause" exempting depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value," *id.* at 1583, is "narrowly limited to specific types of 'extreme' material," *id.* at 1587. According to plaintiffs, *Stevens* "further supports Ethan Allen's position that the ITC's application of the CDSOA to Ethan Allen's particular facts (i.e., a domestic producer that submitted completed questionnaires to the ITC and checked the 'take no position' box) is overbroad and thus unconstitutional." Pls.' June Opp'n 22. Plaintiffs submit that the petition support requirement as interpreted by defendants "restricts Ethan Allen's right to freedom of speech without furthering the government's interest" and "extends beyond the stated purpose of excluding those who did not support the petition and discriminates against active supporters like Ethan Allen who adopted a

neutral *viewpoint* in its ITC questionnaires." *Id.* at 23.

Unlike the statute invalidated by *Stevens*, the CDSOA does not criminalize or otherwise prohibit a broad category of protected speech. The First Amendment analysis in *Stevens*, therefore, is not applicable to the First Amendment issues raised by this case. The Court of Appeals upheld the petition support requirement according to the test of *Central Hudson*, 447 U.S. at 566, under which regulation of commercial speech must directly advance a substantial governmental interest and not be "more extensive than necessary" to serve that interest. *SKF*, 556 F.3d at 1355. The Court of Appeals concluded that the CDSOA was not overly broad when judged according to the "not more extensive than necessary" criterion. *Id.* at 1357-60. We conclude that nothing in the holding in *Stevens* invalidates the holding of *SKF*.

In summary, we consider *SKF* binding on us, and controlling in this case, notwithstanding the Supreme Court's holdings in *Snyder*, *Citizens United*, and *Stevens*. For this reason and the other reasons discussed above, we conclude that plaintiffs' as-applied First Amendment and equal protection claims must be dismissed under USCIT Rule 12(b)(5).

C. No Relief Can Be Granted on Plaintiffs' APA Claim

Count V of the First Amended Complaint claims under the APA that defendants' actions were "unlawful, arbitrary, capricious, an abuse of agency discretion, not supported by substantial evidence,

and contrary to Ethan Allen's constitutional right to due process." First Amended Compl. ¶ 60. Plaintiffs allege that defendants "have inappropriately treated similarly situated domestic producers differently, without any rational basis for doing so" and "have limited the definition of ADP to include only those domestic producers who supported the Petition by their conduct *and* expressed support for the petition, while excluding from this definition those domestic producer[s] who likewise supported the Petition by their conduct but did not express support for the petition." *Id.* ¶ 61. Relying on certain language in *SKF*, plaintiffs claim that defendants' interpretation of the ADP definition "conflicts with the purpose of the CDSOA, which is to reward domestic producers who support the Petition through their conduct." *Id*.

Plaintiffs have based their APA claim on an impermissible construction of the CDSOA. The CDSOA limits ADP status to "a petitioner or interested party in support of the petition," 19 U.S.C. § 1675c(b)(1), and further provides, so that Customs may make distributions, that the ITC is to inform Customs of "persons that indicate support of the petition by letter or through questionnaire response," *id.* § 1675c(d)(1). Plaintiffs do not allege that they indicated their support of the wooden bedroom furniture petition, either by letter or through questionnaire response, and admit that, Ethan Allen, when asked by the ITC petition whether it supported that petition, took no position. First Amended Compl. ¶ 23 ("Although Ethan Allen is a domestic producer of [wooden bedroom furniture], Ethan Allen took no position on the petition but participated fully in the

investigation process by returning the completed questionnaire and making revisions thereto, as requested by the ITC."). On the facts as pled in the complaint, we conclude that the ITC did not act unlawfully in denying Ethan Allen status as an ADP. Nor did Customs unlawfully refuse to pay Ethan Allen CDSOA distributions. Contrary to plaintiffs' claim, defendants did not "inappropriately" treat "similarly situated domestic producers differently, without any rational basis for doing so," *Id*. ¶ 61. The CDSOA charged the ITC with determining the identity of the parties who supported the petition based on the test set forth in 19 U.S.C. § 1675c(b)(1) and (d)(1). With a "rational basis" grounded in the plain meaning of the statute, ITC applied the statutory test in determining that Ethan Allen was not among the parties who qualified as ADPs. Defendants' determinations, therefore, comported with the APA. Plaintiffs allege no facts supporting a conclusion that either agency failed to accord Ethan Allen fundamental fairness in making those determinations, and plaintiffs' claim under the APA that the agencies violated Ethan Allen's constitutional due process rights is, accordingly, meritless.

In support of their APA claim, plaintiffs argue that "the Federal Circuit in *SKF* enunciated a saving construction with respect to the CDSOA support provision under which benefits are awarded for 'actions (litigation support),' not viewpoint expression." Pls.' June Opp'n 24 (citing *SKF*, 556 F.3d at 1353) (stating that the purpose of the petition support requirement is to "reward injured parties

who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings"). Plaintiffs maintain that denial by the ITC of ADP status for Ethan Allen based on Ethan Allen's having expressed no position on the petition in the ITC's questionnaire is "inconsistent with the statutory construction identified by the Federal Circuit in *SKF*." *Id.* at 24-25.

Plaintiffs misconstrue the holding in *SKF*, which the Court of Appeals did not base on a limiting construction of the CDSOA. *See SKF*, 556 F.3d at 1353. In analyzing the CDSOA under the First Amendment, the Court of Appeals construed the CDSOA such that "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." *Id.* at 1352. When later alluding to a "limiting construction" that "rewards actions (litigation support) rather than the expression of particular views," the Court of Appeals was speaking only hypothetically and in *dicta*. *Id.* at 1353 ("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."). But the Court of Appeals held, broadly, that the CDSOA "is valid under the First Amendment" and "is also clearly not violative of equal protection under the rational basis standard." *Id*. at 1360. The Court of Appeals did not adopt a limiting construction under which the CDSOA, in order to conform to the First

Amendment, must be construed to permit distributions to a party who participated in the ITC'sinvestigation but did not "indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). As we pointed out previously, the Court of Appeals stated that it was "rational for Congress to conclude that those who did not support the petition should not be rewarded," and it did so in the context of discussing "the role of parties opposing (or not supporting) the petition." *Id*. at 1359.

Plaintiffs also cite legislative history of the Byrd Amendment to support the proposition that Congress intended to effectuate a broad remedy for injurious foreign dumping and thus did not intend to benefit only those who supported petitions. Pls.' Jun Opp'n 3-6. The legislative history plaintiffs cite, which speaks of injured domestic producers and industries in the aggregate, does not support a construction disregarding the language of the statute itself, 19 U.S.C. § 1675c(b)(1), (d)(1), which determines ADP eligibility on an individual, not an industry, basis and limits eligibility to petitioners and those in support of a petition.

For the reasons discussed in the foregoing, we conclude that plaintiffs' claim arising under the APA must be dismissed.

III. CONCLUSION

Plaintiffs' facial and as-applied constitutional claims are precluded by binding precedent, and

plaintiffs' APA claim rests on an impermissible construction of the CDSOA. All claims in this action must be dismissed as they are not supported by "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). Plaintiffs already have availed themselves of the opportunity to amend their complaint. We conclude that it is appropriate to enter judgment dismissing this action.

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Judge

Dated: January 20, 2012
New York, New York

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ASHLEY FURNITURE INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES
Defendant-Appellee,

AND

UNITED STATES INTERNATIONAL TRADE COMMISSION,
Defendant-Appellee,

AND

AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., T. COPELAND AND SONS, INC., AND VAUGHAN-BASSETT FURNITURE COMPANY, INC.,
Defendants-Appellees.

2012-1196

Appeal from the United States Court of International Trade in No. 10-CV-0081, Judge Gregory W. Carman, Leo M. Gordon, and Timothy C. Stanceu.

ON PETITION FOR REHEARING EN BANC

Before RADER, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER,* DYK, PROST, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges.*

PER CURIAM

O R D E R

A petition for rehearing en banc was filed by the appellant, and responses thereto were invited by the court and filed by the appellees. The matter was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and responses were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing be, and the same hereby is, DENIED, and

The petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on January 10, 2014.

Circuit Judge Hughes did not participate.

FOR THE COURT

January 3, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

* Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

APPENDIX E

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ETHAN ALLEN GLOBAL, INC. AND ETHAN ALLEN OPERATIONS, INC.,
Plaintiff-Appellants,

v.

UNITED STATES AND UNITED STATES CUSTOMS AND BORDER PROTECTION,
Defendant-Appellees,

AND

INTERNATIONAL TRADE COMMISSION,
Defendant-Appellee,

AND

KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., T. COPELAND AND SONS, INC., AND VAUGHAN-BASSETT FURNITURE COMPANY, INC.,
Defendants-Appellees.

2012-1200

Appeal from the United States Court of International Trade in No. 08-CV-0302, Judge Gregory W. Carman, Leo M. Gordon, and Timothy C. Stanceu.

ON PETITION FOR REHEARING EN BANC

Before RADER, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER,* DYK, PROST, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges.*

PER CURIAM

O R D E R

A petition for rehearing en banc was filed by the appellants, and responses thereto were invited by the court and filed by the appellees. The matter was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and responses were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing be, and the same hereby is, DENIED, and

The petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on January 10, 2014.

Circuit Judge Hughes did not participate.

FOR THE COURT

January 3, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

* Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

APPENDIX F

Continued Dumping And Subsidy Offset Act

19 U.S.C.A. § 1675c

(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.

(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.

(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) of this section, 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) of this section, 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) of this section; 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.