No. 13-1367

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

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, ET AL.*

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July 14, 2014

*a complete list of respondents joining this brief is included on the inside cover

List of respondents joining this brief:

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.

QUESTION PRESENTED

Four years ago, petitioners represented by the same counsel filed an *amicus curiae* brief urging this Court to grant review in *SKF USA Inc. v. U.S. Customs & Border Protection*, No. 09-767, to consider the constitutionality of the repealed Continued Dumping and Subsidy Offset Act. The Court denied certiorari and, since then, dozens of lower court cases have been resolved in reliance on *SKF*, leaving only a few cases remaining to which the repealed statute applies. In the decision below, the Federal Circuit rejected petitioners' renewed constitutional challenge and, applying *SKF*, held again that the statute does not violate the First Amendment. The court of appeals denied rehearing en banc and no judge dissented from that decision.

The question presented is:

Did Congress violate the First Amendment guarantee of freedom of speech when, in the now-repealed Continued Dumping and Subsidy Offset Act, it provided that a share of duties collected after an adjudication of injurious dumping would be distributed to prevailing parties that had sought redress by filing or supporting a successful antidumping petition but not to parties that, having benefited from the injurious dumping, chose not to seek redress and instead opposed or took no position on the petition?

CORPORATE DISCLOSURE STATEMENT

American Furniture Manufacturers Committee for Legal Trade is an ad hoc association of companies that produce wooden bedroom furniture in the United States. The Committee has no parent company and does not issue stock.

Kincaid Furniture Co., Inc. is owned by La-Z-Boy Incorporated. La-Z-Boy Incorporated is the only publicly held company that owns 10% or more of Kincaid Furniture Co., Inc.

L. & J.G. Stickley, Inc. has no parent company, and no publicly held company owns 10% or more of L. & J.G. Stickley, Inc.

Sandberg Furniture Manufacturing Company, Inc. has no parent company, and no publicly held company owns 10% or more of Sandberg Furniture Manufacturing Company, Inc.

Stanley Furniture Company, Inc. has no parent company. Ariel Investments is the only publicly held company that owns 10% or more of Stanley Furniture Company, Inc.

T. Copeland and Sons, Inc. has no parent company, and no publicly held company owns 10% or more of T. Copeland and Sons, Inc.

Vaughan-Bassett Furniture Company, Inc. has no parent company, and no publicly held company owns 10% or more of Vaughan-Bassett Furniture Company, Inc.

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INTRODUCTION

Petitioners Ashley Furniture Industries, Inc. ("Ashley") and Ethan Allen Global, Inc. and Ethan Allen Operations, Inc. ("Ethan Allen") are domestic producers, importers, and retailers of wooden bedroom furniture whose Chinese suppliers dumped bedroom furniture into the United States and caused material injury to the domestic industry. When other American furniture producers filed an antidumping petition requesting the imposition of duties on imports from China, Ashley and Ethan Allen did not join the petition's request for relief but instead continued to take advantage of the injurious dumping to maximize their sales. By choosing to oppose or take no position on the petition, Ashley and Ethan Allen aligned themselves with parties who urged the Department of Commerce ("Commerce") not to initiate an antidumping investigation and who urged the U.S. International Trade Commission ("Commission") to conclude that the domestic industry was not materially injured or threatened with material injury by reason of the dumped imports.

After completing their investigations, Commerce and the Commission found that the petition was meritorious and imposed antidumping duties on imports of wooden bedroom furniture from China. The collected duties were eventually distributed to "affected domestic producer[s]," as required by the Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000), *repealed* Pub. L. No. 109-171 (2006) ("CDSOA"). Even though Ashley and Ethan Allen did not join the petition's request for

relief, and even though their actions made it more difficult for the petition to succeed, they contend that they are entitled to receive distributions. As the courts below recognized, however, that argument fails as a matter of statutory construction: Ashley and Ethan Allen are not "affected domestic producer[s]" entitled to distributions under the CDSOA because they have never been "interested part[ies] *in support of* the petition." 19 U.S.C. § 1675c(b)(1)(A) (emphasis added); *see also* 19 C.F.R. § 159.61(b)(1). The complaints they filed in the trial court proceedings below include no allegations that they ever supported the petition, urged the government to impose antidumping duties on imports from China, or took any affirmative step to convince the Commission that the domestic industry was materially injured or threatened with material injury by the dumped imports.

Because Ashley and Ethan Allen do not satisfy the statutory requirements, they have challenged the constitutionality of the CDSOA's "petition support" requirement, arguing that it violates the First Amendment. But the same constitutional arguments were raised and resolved five years ago in *SKF USA, Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, *reh'g en banc denied*, 583 F.3d 1340 (Fed. Cir. 2009) (per curiam), *cert. denied* 560 U.S. 903 (2010), a case in which Ashley, represented by the same counsel, participated as *amicus curiae*. Drawing an analogy to prevailing parties in litigation, *SKF* held that the CDSOA permissibly provides distributions to domestic producers who successfully seek redress—*i.e.*, those who file or support an antidumping petition that is ultimately successful—

but not to those who do not—*i.e.*, those who oppose or take no position on a successful petition. The CDSOA's support requirement does not impose any kind of government-mandated viewpoint- or content-based discrimination because the government agencies that administer the CDSOA serve as neutral arbiters, analogous to courts in civil litigation, with no ex ante interest in the outcome of an antidumping petition.

Although this Court denied review in *SKF*, Ashley and Ethan Allen urge the Court to revisit that decision. But they have not satisfied the requirements for certiorari. No court of appeals, and certainly no decision from this Court, has ever held that a statute that distributes benefits to prevailing parties in litigation-like contexts involves viewpoint- or content-based discrimination. The cases Ashley and Ethan Allen rely on are readily distinguished and do not raise any conflict in authority that would warrant this Court's intervention. Moreover, because Congress repealed the CDSOA in 2006, the question presented has very limited prospective significance. Granting review to revisit *SKF* would not advance this Court's First Amendment jurisprudence, but it would disrupt settled expectations and delay the prompt resolution of the handful of remaining cases to which the CDSOA still applies.

The petition should be denied.

STATEMENT

The question presented in this case is closely intertwined with the government's administration and fact-bound application of the nation's antidumping laws. In seeking review, Ashley and Ethan Allen urge this Court to revisit its denial of certiorari in *SKF* and to consider the constitutionality of a provision that Congress repealed more than eight years ago. To understand the repealed provision's operation, it is necessary to understand its place in an intricate network of pre-existing and subsequently operative antidumping laws.

A. The Antidumping Laws

Congress enacted the antidumping laws to protect United States workers and firms harmed by dumping—the practice of selling merchandise at a price less than its fair value. *See* 19 U.S.C. § 1677(34); *see also id.* § 1671 (authorizing Commerce to impose countervailing duties when merchandise is subsidized by a foreign government). For an antidumping petition to succeed, Commerce must decide to initiate an investigation and then, after completing its investigation, conclude that dumping is in fact occurring. *See id.* §§ 1677(1), 1677b(a). If Commerce reaches that conclusion, the Commission must determine whether a domestic industry is materially injured or threatened with material injury by reason of the dumped imports. *See id.* § 1673d(b)(1). If the Commission reaches an affirmative determination, Commerce will issue an antidumping order directing United States Customs

and Border Protection to assess duties on imported merchandise. *See id*. §§ 1673d(c)(2), 1673e(a)(1).

In performing these statutory functions, Commerce and the Commission serve as neutral arbiters under pre-existing legal standards with no predetermined view on the merits of any antidumping petition. The agencies rely on private parties to initiate proceedings, and they reject more than half the petitions they receive. From 1980 through 2007, only 40 percent of the petitions filed resulted in antidumping or countervailing duty orders. *See* U.S. Int'l Trade Comm'n, *Antidumping and Countervailing Duty Handbook*, USITC Pub. 4056, at IV-7-8 (Dec. 2008), *available at* www.usitc.gov/trade_remedy/documents/handbook.pdf.

To succeed, a petition must receive sufficient support from domestic producers. *See* 19 U.S.C. § 1673a(c). Before initiating an investigation, Commerce must confirm that domestic producers supporting the petition account for at least 25 percent of the production of the domestic like product and over 50 percent of the production of the domestic like product by producers who indicate either support or opposition to the petition. *See id*. § 1673a(c); *see also id*. § 1677(10) (defining "domestic like product" as "a product which is like . . . [or] most similar" to the imported product). If Commerce concludes that the petition has sufficient support and decides to initiate an investigation, the Commission will then send questionnaires to U.S. producers to collect evidence as to whether the industry has suffered harm as a result of the alleged dumping.

The extent of domestic industry support for the petition is relevant in determining whether the industry has suffered material injury. *See, e.g.*, *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994). As a result, the Commission's questionnaire has long contained a standard question—included both before and after the CDSOA was in effect—asking each domestic producer to indicate whether it supports, opposes, or takes no position on the petition. As noted by Ashley and Ethan Allen, the Commission "considers the answers in deciding whether the dumping has caused, or is threatening, material injury." Pet. 4. Accordingly, as the court below recognized, "filling out the questionnaire without indicating support for the petition can contribute to the petition's defeat." Pet. App. 14a (citing *SKF*, 556 F.3d at 1357–59).

B. The Repealed Continued Dumping and Subsidy Offset Act of 2000

The CDSOA, which Congress enacted in 2000 and repealed in 2006, amended the antidumping laws to provide additional relief to domestic producers that assist in the enforcement of the antidumping laws by initiating or supporting a successful petition. Under the CDSOA, Congress directed that when parties seeking redress are successful and a petition results in an antidumping order, collected duties are to be distributed to each "affected domestic producer." 19 U.S.C. § 1675c(d)(3). That term is defined to include any "petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." *Id*. § 1675c(b)(1)(A).

The CDSOA thus provides (in the few cases to which it still applies) that distributions should be paid only to prevailing parties—those producers who sought redress by supporting a successful petition's allegations of dumping and injury and not to those producers who did not seek redress and did not support the allegations of dumping and injury. Moreover, the statute establishes a workable administrative process for determining which producers qualify as prevailing parties. To be eligible for distributions, a producer must have taken the affirmative step of asking for redress by either filing a successful petition or informing the Commission "by letter or through questionnaire response" that it supported a petition that was later determined to be meritorious. *Id*. § 1675c(d)(1).

In February 2006—more than eight years ago—Congress repealed the CDSOA. With that repeal, Congress ended the statutory scheme to which Ashley and Ethan Allen object. To ease the burden on domestic producers harmed by injurious dumping, however, Congress instructed that "[a]ll duties on entries of goods made and filed before October 1, 2007 . . . 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). Accordingly, the CDSOA has limited continuing effect; it applies only to a small and diminishing pool of duties collected on imports that entered the United States before October 1, 2007.

C. The Proceedings Below

Since 2002, certain domestic producers—those who largely benefited from injurious dumping—have

challenged the CDSOA as unconstitutional, arguing that applying the statute discriminates on the basis of viewpoint. The Federal Circuit has repeatedly rejected that argument.

Most significantly, the Federal Circuit held in *SKF* that the CDSOA's petition-support requirement 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." 556 F.3d at 1360. The court of appeals determined that the CDSOA does not impose any kind of government-mandated viewpoint- or content-based discrimination, because government agencies are neutral arbiters, analogous to courts in litigation, with no ex ante interest in the outcome of any antidumping petition. *Id*. at 1351. Parties who do not support a petition's request for redress—either by opposing or taking no position—choose to assume a role "similar to the role of opposing or neutral parties in litigation" and are not entitled to a share in any recovery if the petition ultimately proves successful. *Id*. at 1359.

The constitutional issues resolved in *SKF* have been extensively litigated in the Federal Circuit, always with the same result. SKF sought en banc review, which the Federal Circuit denied. *See SKF*, 583 F.3d 1340. Supported by Ashley as *amicus curiae*, SKF then filed a petition for certiorari, which this Court also denied. *See SKF*, 560 U.S. 903. The issues were then re-litigated in *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 409 F. App'x 327 (Fed. Cir. 2010), where the Federal Circuit affirmed that

SKF was "controlling with regard to all constitutional issues." *Id.* at 329. In a later ruling in the same case, the Federal Circuit again cited *SKF* as controlling on the constitutional issues and held on narrow statutory grounds that a domestic producer was entitled to distributions because, although it took no position in an unsigned response to a final questionnaire, it informed the Commission that it supported the petition in response to an initial questionnaire. *See PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374, 1382–83 (Fed. Cir. 2012).

Consistent with this authority, the panel below rejected Ashley and Ethan Allen's statutory and constitutional arguments. It is undisputed that Ashley and Ethan Allen never supported the petition or otherwise sought redress against dumped imports under the antidumping laws. Neither alleged that it ever submitted a questionnaire or letter (during either the preliminary or final phases of the Commission's investigation) indicating support for the petition seeking to impose antidumping duties on imports from China. To the contrary, as the Commission's investigation revealed, Ashley, Ethan Allen, and other non-supporting producers benefited from a "blended" sourcing strategy that took advantage of the lower prices of the dumped imports to maximize their sales. *See* CAFC JA 234. In fact, because their Chinese suppliers were found to have dumped wooden bedroom furniture into the United States, non-supporting producers (including Ashley and Ethan Allen) were exposed to significant antidumping duties. *See, e.g.*, Kincaid Furniture Br. at 24–25, *Ethan Allen Global, Inc., et al v. United*

States, No. 2012-1200 (Fed. Cir. Sept. 14, 2012), 2012 WL 4762496 (noting that because Ethan Allen's Chinese suppliers were found to have dumped bedroom furniture, Ethan Allen was exposed to potential antidumping duties of 8.4 percent to 198.1 percent).

The actions taken by Ashley, Ethan Allen, and other non-supporting producers proved devastating to the domestic industry and U.S. workers. While Ashley and Ethan Allen benefited from dumping, the industry's operating income as a whole fell by 56.7 percent, production workers dropped by 19.9 percent, and 68 plants across the country were forced to close. CAFC JA 239–40. Moreover, Chinese producers cited Ashley's and Ethan Allen's lack of support for the petition (as well as the lack of support of other non-supporting producers) as evidence that the domestic industry was not injured. *See* CAFC JA 243. In other words, Ashley and Ethan Allen not only benefited from the illegal dumping, their decisions to oppose or take no position on the petition were cited to convince the government that the statutory requirements for initiating an investigation and issuing an antidumping order were not satisfied.

Against this backdrop, the Federal Circuit held that Ashley's and Ethan Allen's attempt to receive distributions funded in part by the duties they paid on their own dumped imports fails as a matter of statutory construction: Ashley and Ethan Allen are not "affected domestic producers" because they have never been an "interested party *in support of the petition*," as the statute requires. 19 U.S.C. § 1675c(b)(1)(A) (emphasis added). Their "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." Pet. App. 13a. The Federal Circuit also concluded that there was no basis for revisiting its earlier *SKF* decision. As the court explained, "*SKF* resolved the facial First Amendment challenge presented" and, contrary to Ashley and Ethan Allen's assertions, this Court's "recent . . . precedent" has not overruled *SKF*. Pet. App. 11a–12a.

Ashley and Ethan Allen both sought rehearing en banc. The Federal Circuit denied that request, and no judge dissented from the denial of rehearing. *See* Pet. App. 90a–97a.

REASONS FOR DENYING THE PETITION

I. The Decision Below Does Not Conflict With This Court's Precedent.

Ashley and Ethan Allen cannot dispute that the constitutional issues presented in this case were raised and resolved in *SKF* and that this Court denied review. They nonetheless urge the Court to revisit that denial, arguing that certiorari is warranted because the CDSOA purportedly discriminates on the basis of viewpoint. But that premise is not established by any decision of any court. Nor is it correct. The precedents on which Ashley and Ethan Allen rely are far removed from the facts of this case.

A. As *SKF* Concluded, The CDSOA Does Not Discriminate Based On Viewpoint.

Contrary to Ashley and Ethan Allen's assertions, the CDSOA does not discriminate on the basis of viewpoint. Instead, as *SKF* recognized, antidumping proceedings involve adjudications in which Commerce and the Commission, after investigation, apply existing legal standards to complex and often disputed facts. Acting in the role of neutral adjudicators, the agencies' tasks are to make fair, fact-intensive determinations as to whether duties are warranted under the particular circumstances presented in each case. Neither agency has any ex ante view or predetermined position on the merits of an antidumping petition. Nor do the antidumping laws have any viewpoint- or content-based suppressive purpose.

The Federal Circuit has thus construed the CDSOA to avoid First Amendment concerns by recognizing that petitioners and petition-supporters are analogous to parties who seek relief in litigation. *SKF*, 556 F.3d at 1359. As *SKF* concluded, Congress enacted the CDSOA to "reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *Id.* at 1352; *see also id.* at 1356–57. As *SKF* also recognized, the CDSOA does not reward or penalize abstract expression of particular views; instead, it provides distributions to parties who take the affirmative step of calling on the government for relief by supporting successful antidumping petitions but not to petition opponents or non-supporters. *See id*. at 1352, 1354, 1358–59; *see also id*. at 1357 (the CDSOA "does not reward unsuccessful efforts").

In distinguishing between petition-supporters and non-supporters, the CDSOA is hardly an unfamiliar or speech-threatening kind of measure. For neutral adjudicators to furnish awards to those who file or join a claim for redress of grievances—but not to those who refrain from calling for remedial action and those who oppose it—is common in our civil justice system. The award of benefits only to those seeking redress has never been thought to discriminate on the basis of viewpoint or to trigger strict scrutiny under the First Amendment. *See*, *e.g.*, Sup. Ct. R. 12.6 ("Parties who file no document will not qualify for any relief from this Court"); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (non-appealing party is subject to *res judicata* despite appellate success of other party). Indeed, this Court has never invalidated under the First Amendment

any statute, rule, or practice that attaches consequences to taking positions in litigation-like proceedings. *See SKF*, 556 F.3d at 1355 ("We are not aware of any Supreme Court case that rejects the legitimacy of such rewards."). Nor has this Court ever referred to or treated attaching consequences to litigation positions as viewpoint discrimination.

B. There Is No Reason To Revisit The Denial Of Certiorari In *SKF*.

Ashley and Ethan Allen cite no authority that applies strict scrutiny to a measure like the CDSOA addressing parties' claims for relief in adjudications overseen by neutral adjudicators applying preexisting legal standards. Nor do they advance any credible argument that anything has changed since this Court denied certiorari in *SKF* that could justify granting review. The arguments they do raise are meritless.

First, contrary to Ashley and Ethan Allen's assertions, no recent or intervening decision of this Court supports revisiting *SKF*. *See* Pet. 22–26; *see also id*. at 38 (arguing the Federal Circuit "made literally no effort to reconcile *SKF* and its own decision with this Court's [recent] precedents"). The decisions they cite involve statutes that bear no resemblance to the CDSOA.

For instance, Ashley and Ethan Allen rely heavily on *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), which struck down a statute requiring that organizations receiving federal funds pledge that they "explicitly agree with the

Government's policy to oppose prostitution and sex trafficking." *Id.* at 2327. This Court held that the statute was invalid because it sought "to leverage funding to regulate speech outside the contours of the program itself," *id.* at 2328, and compelled recipients to "adopt—as their own—the Government's view on an issue of public concern," *id.* at 2330.

This case could scarcely be less like *AID*. The CDSOA does not regulate speech and certainly does not regulate speech outside the contours of the antidumping investigation itself. *See SKF*, 556 F.3d at 1351–52. Moreover, as noted above, the government has no view on the merits of any given antidumping petition that it seeks to pressure others to adopt. Nor does it have any ex ante view on whether petitions seeking enforcement of the antidumping laws should succeed or fail. Like a variety of accepted aspects of our civil justice system that provide awards only to those who seek relief, the CDSOA raises none of the special threats to First Amendment principles recognized in *AID*.

Ashley and Ethan Allen also argue that *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), undermines *SKF* because the Court there noted that a statute fails intermediate scrutiny "if the government 'offers no explanation why remedies other than content-based rules would be inadequate' to fulfill its interests." Pet. 25 (quoting *Sorrell*, 131 S. Ct. at 2669). But as explained above, the CDSOA does not impose any content-based restriction that violates the First Amendment. Nor is the decision to award distributions based on "citizens' political speech." Pet. 26.

Sorrell is also readily distinguished. *Sorrell* applied "heightened scrutiny" to a Vermont law that sought to suppress messages that were "in conflict with the goals of the state" in discouraging prescription drug use. 131 S. Ct. at 2661, 2672. The Court struck down the law because it was aimed at prohibiting certain forms of disfavored speech made by speakers disfavored by the government. *Id*. at 2663, 2665. *Sorrell* is thus consistent with cases that have invalidated statutes aimed at suppressing "dangerous ideas" or designed to "drive certain ideas or viewpoints from the marketplace." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (internal quotation marks omitted). Nothing in *Sorrell* casts doubt on *SKF*'s determination that the CDSOA does not favor any form of expression by any particular speaker but instead "merely rewards successful applicants" that have asked for redress before a neutral forum. *SKF*, 556 F.3d at 1355 n.29.

Second, Ashley and Ethan Allen assert that the litigation analogy is "inapt" and that interested parties who support a successful antidumping petition are not analogous to prevailing parties in litigation but more like witnesses or "federal contractors who assist in the implementation of a federal program." Pet. 26–27. But that does not take into account the details of the antidumping laws. Non-petitioning U.S. producers, like Ashley and Ethan Allen, are interested parties with a direct stake in the outcome of an antidumping petition. A petition is a request for relief, analogous to a complaint in a lawsuit. By endorsing a petition's allegations of dumping, injury, and causation, parties

who support a petition play a role that is much different from mere witnesses or contractors.

Third, Ashley and Ethan Allen contend that they were denied distributions based on "the content of their speech on a question of public concern and political controversy." Pet. 20; *see also* Pet. 23 (suggesting that the CDSOA requires petitioners to "adopt a particular position on a politically controversial question of national trade policy"); *but see SKF*, 556 F.3d at 1352 (rejecting this argument). That argument, however, ignores context and the longstanding role of questionnaire responses in the administration of the antidumping laws. For decades, the government has asked members of an affected industry whether they support, oppose, or take no position on an antidumping petition. The point of this inquiry is not to open a public forum for parties to air their views on U.S. trade policy or on any other matter of public concern. Nor does it prevent parties from exercising their First Amendment rights, pose any threat to public discourse on important policy issues, or target speech directed to the public. Instead, when the government adjudicates an antidumping petition, it undertakes an administrative process for determining whether the statutory requirements for initiating an investigation are satisfied and, if so, for collecting evidence to evaluate the merits of the petition and deciding whether petitioners and petition-supporters are entitled to the relief they seek.

Significantly, Ashley and Ethan Allen do not contend that the First Amendment prohibits the Commission from asking domestic producers—who

are interested parties in the proceedings—to indicate their support, or lack of it, for the imposition of antidumping duties. They argue only that, under the First Amendment, they cannot be denied a share of duties generated by a petition they either opposed (in the case of Ashley) or took no position on (in the case of Ethan Allen). But that would be an odd principle to find in the First Amendment. There is nothing suspicious or improper about a rule that extends monetary relief only to parties who seek relief and not to parties who are indifferent or opposed to the awarding of relief. While the decision to seek relief implicates speech in the literal sense that the decision is conveyed in words, the denial of relief turns not on expression as such but on a party's conduct—its decision not to join the petition and request relief in the first place.

II. There Is No Relevant Conflict In Lower Court Authority.

Ashley and Ethan Allen acknowledge that the decision below creates no direct inter-circuit conflict over the interpretation of the CDSOA. Pet. 29. They nonetheless contend that review is warranted because the decision below "cannot be reconciled with the decisions of other circuits faced with similar questions." *Id.* But these are the same arguments, relying on the same supposed conflicts, that were raised in the petition for certiorari in *SKF*. The Court denied that petition, and there is no reason for a different result now.

Ashley and Ethan Allen first contend that the "need for review is enhanced" because of "enduring divisions within the Federal Circuit." *Id.* But the

reality is that the Federal Circuit denied en banc rehearing in this case, and no judge dissented from that denial. Ashley and Ethan Allen's confusion over Federal Circuit precedent is not shared by the Federal Circuit itself. An opinion needs to be read as a whole, *Grable & Sons Metal Prods, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317 (2005), and when the Federal Circuit's decisions are read as a whole and in context, there can be no serious debate over what those decisions have held. The reality is that the Federal Circuit has developed a stable, nuanced body of law for resolving the few remaining cases to which the CDSOA applies. The lower courts are thus in a position to bring to a close all pending CDSOA-related litigation.

Ashley and Ethan Allen next assert, echoing the petition in *SKF*, that there is a circuit split over the proper First Amendment test for statutes that provide government benefits to parties "who support a particular policy position." Pet. 30. But that argument disregards crucial differences between the CDSOA and the measures addressed in those other cases. None of the cases they cite have anything to do with attaching consequences to positions taken in litigation-like proceedings before a neutral arbiter. *See* Brief for Federal Resps. in Opp. at 15–16, *SKF USA, Inc. v. U.S. Customs & Border Prot.*, No. 09-767 (Apr. 10, 2010), 2010 WL 1513109 (distinguishing same cases).

Their main authority, *Lac Vieux Desert Band of Lake Superior Chippewa Indian v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999), is nothing like this case. It involved a city ordinance

that granted a contract-bidding preference based on the favored bidders having engaged in political advocacy to city and state electorates by sponsoring and promoting voter referenda to alter city and state laws to permit gambling. As *SKF* recognized, the decision is inapposite because instead of rewarding prevailing parties that seek redress before a neutral arbiter, the city ordinance involved bestowing benefits on those who provide "'political support'" for the government's preferred "legislative efforts." *SKF*, 556 F.3d at 1356 n.32.

Hoover v. Morales, 164 F.3d 221 (5th Cir. 1998), is likewise inapposite. That case considered the constitutionality of a state law that barred professors at a state university from testifying as witnesses against a pre-determined state position. That plain suppression of viewpoint was evaluated under the distinct body of public-employee First Amendment doctrine. The case has no relevance to the CDSOA.

Finally, Ashley and Ethan Allen argue that the courts of appeals are divided over the proper treatment of viewpoint- or content-based discrimination under the *Central Hudson* test for commercial speech. But the CDSOA does not involve viewpoint- or content-based discrimination. And no court has held to the contrary. This case thus presents no opportunity to address potential divisions in lower court authority addressing an issue not raised here.

III. The Petition Does Not Raise Any Issue Of Exceptional Importance.

While no doubt a source of consternation for producers, like Ashley and Ethan Allen, who benefited from injurious dumping, the decision below is not exceptionally important in any manner that might call for this Court's review. No *amicus* has filed a brief in support of certiorari. Moreover, Ashley and Ethan Allen identify no analogous legislation or regulatory measure that is even arguably affected by this case. The absence of any lower court confusion or divisions over the constitutionality of plausibly analogous legislation underscores that this case is not a suitable vehicle for resolving any constitutional question of general, pressing importance. The issues raised in this case are enmeshed in the administration of a unique, complex body of antidumping law that Ashley and Ethan Allen oversimplify and mischaracterize.

In any event, the CDSOA was repealed more than eight years ago, a fact that strongly counsels against the exercise of this Court's supervisory jurisdiction. *See Rice v. City of Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 77 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 499 (1971) (Harlan, J., concurring). As the government noted in *SKF*, the question presented has limited prospective significance because the CDSOA applies only to duties on goods that entered the United States before October 1, 2007. *See SKF*, Brief for Federal Resps. in Opp. at 17. Also, because all of the questionnaire responses on which CDSOA eligibility

determinations have been made were submitted years ago (in this case, ten years ago), there is no possibility the decision below could affect the behavior of any domestic producer in any pending or future antidumping case.

At this late juncture, there are only a handful of cases that remain to be decided. In fact, since this Court denied certiorari in *SKF*, parties in 19 cases have either voluntarily dismissed or abandoned their challenges to the CDSOA. *See* Appendix. As a result, apart from cases addressing the antidumping order on wooden bedroom furniture from China, only three cases involving the CDSOA remain to be decided by the Court of International Trade, and only six cases remain on appeal before the Federal Circuit.

As the government noted in *SKF*, the amount of money to be distributed with respect to pre-October 2007 entries is "steadily diminishing." *SKF*, Brief for Federal Resps. in Opp. at 17. That observation remains true today. From 2007 to 2013, cash deposits potentially available for distribution declined by 91.7 percent; the number of antidumping duty orders where amounts in CDSOA clearing accounts exceed $1 million declined by 80.4 percent, and the number of countervailing duty orders where amounts exceed $1 million declined by 72.7 percent. *See* http://www.cbp.gov/document/cdsoa.

Contrary to Ashley and Ethan Allen's assertions, nothing is unfair or unjust about giving the CDSOA its remaining effect by limiting distributions to producers who chose to support successful antidumping petitions. Distributing to Ashley and

Ethan Allen the duties they paid on their own dumped imports would be manifestly unfair to U.S. producers that elected to support the antidumping petition rather than rely on dumped imports from China. It would also frustrate legitimate congressional policies, including the desire to redress the injurious effects of dumping.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CDSOA Litigation After
SKF USA Inc. v.
U.S. Customs & Border Protection

Remaining CDSOA Cases Pending Before the Court of International Trade

1. *Nan Ya Plastics Corp., America v. United States*, No. 08-138 (Ct. Int'l Trade filed Apr. 18, 2008)
2. *The Barden Corp. v. United States*, No. 06-435 (cons.) (Ct. Int'l Trade filed Nov. 28, 2006)
3. *JTEKT North America Corp. v. United States*, No. 14-127 (Ct. Int'l Trade filed May 30, 2014)
4. *Ethan Allen Global, Inc. v. United States*, No. 13-183 (Ct. Int'l Trade filed May 8, 2013)
5. *Ashley Furniture Industries, Inc. v. United States*, No. 13-201 (Ct. Int'l Trade filed May 14, 2013)
6. *Standard Furniture Manufacturing Co. v. United States*, No. 13-202 (Ct. Int'l Trade filed May 14, 2013)

CDSOA Cases That Have Been Involuntarily Dismissed at the Court of International Trade and Are Currently Pending on Appeal

1. *Giorgio Foods, Inc. v. United States*, No. 03-286 (Ct. Int'l Trade dismissed Mar. 6, 2012), *appeal docketed*, No. 2013-1304 (Fed. Cir. Apr. 3, 2014)
2. *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, No. 06-290 (cons.) (Ct. Int'l Trade dismissed Mar 1, 2012), *appeal docketed*, No. 2012-1250 (cons.) (Fed. Cir. Mar. 5, 2012)

3. *Schaeffler Group USA, Inc. v. United States*, No. 06-432 (cons.) (Ct. Int'l Trade dismissed Jan. 17, 2012), *appeal docketed*, No. 2012-1269 (Fed. Cir. Mar. 20, 2012)

4. *New Hampshire Ball Bearings, Inc. v. United States*, No. 08-398 (Ct. Int'l Trade dismissed Jan. 3, 2012), *appeal docketed*, No. 2012-1246 (Fed. Cir. Mar. 5, 2012) (summarily affirmed June 12, 2014)

5. *Tampa Bay Fisheries Inc. v. United States*, No. 08-404 (Ct. Int'l Trade dismissed Mar. 20, 2012), *appeal docketed*, No. 2012-1419 (Fed. Cir. May 29, 2012)

6. *JTEKT North America Corporation v. United States*, No. 12-147 (Ct. Int'l Trade dismissed Mar. 13, 2013), *appeal docketed*, No. 2013-1399 (Fed. Cir. May 14, 2013)

7. *Standard Furniture Manufacturing Co. v. United States*, No. 07-28 (cons.) (Ct. Int'l Trade dismissed Feb. 17, 2012), *appeal docketed*, No. 2012-1230 (Fed. Cir. Feb. 27, 2012) (summarily affirmed June 12, 2014)

8. *Ashley Furniture Industries, Inc. v. United States*, No. 07-323 (cons.) (Ct. Int'l Trade dismissed Jan. 31, 2012), *affirmed*, No. 2012-1196 (Fed. Cir. Aug. 19, 2013), *petition for cert. filed*, No. 13-1367 (May 2, 2014)

9. *Ethan Allen Global Inc. v. United States*, No. 08-302 (Ct. Int'l Trade dismissed Jan. 20, 2012), *affirmed*, No. 2012-1200 (Fed. Cir. Aug. 19, 2013), *petition for cert. filed*, No. 13-1367 (May 2, 2014)

CDSOA Cases That Were Involuntarily Dismissed at the Court of International Trade but Were Not Appealed

1. *NSK Corp. v. United States*, No. 07-223 (cons.) (Ct. Int'l Trade dismissed Mar. 6, 2012)
2. *United Synthetics, Inc. v. United States*, No. 08-139 (Ct. Int'l Trade dismissed Apr. 20, 2012)

CDSOA Cases That Have Been Voluntarily Dismissed

1. *Bergeron's Seafood v. United States*, No. 03-448 (Ct. Int'l Trade dismissed Nov. 2, 2010)
2. *Furniture Brands International, Inc. v. United States*, No. 07-26 (Ct. Int'l Trade dismissed Oct. 20, 2011) (Involuntary dismissal before Ct. Int'l Trade), *dismissed*, No. 2012-1059 (Fed. Cir. Apr. 1, 2014) (terminated through stipulated dismissal)
3. *Thornwood Furniture Manufacturing, Inc. v. United States*, No. 07-91 (Ct. Int'l Trade dismissed Feb. 4, 2011)
4. *Evraz Oregon Steel Mills v. United States*, No. 07-368 (cons.) (Ct. Int'l Trade dismissed Feb. 2, 2011)

5. *Tropicana Products, Inc. v. United States*, No. 07-391 (Ct. Int'l Trade dismissed Jan. 28, 2011)

6. *Candle Corp. of America v. United States*, No. 07-396 (Ct. Int'l Trade dismissed Feb. 3, 2011)

7. *Witmer Industries, Inc. v. United States*, No. 08-3 (Ct. Int'l Trade dismissed Feb. 2, 2011) (dismissed for failure to prosecute)

8. *Kimball Furniture Group, Inc. v. United States*, No. 08-37 (cons.) (Ct. Int'l Trade dismissed Apr. 25, 2011)

9. *Fulton Seafood, Inc. v. United States*, No. 08-180 (Ct. Int'l Trade dismissed Jan. 24, 2011)

10. *H&A Seafood, LLC v. United States*, No. 08-181 (Ct. Int'l Trade dismissed Jan. 24, 2011)

11. *American NTN Bearing Manufacturing Corp. v. United States*, No. 08-326 (cons.) (Ct. Int'l Trade dismissed June 16, 2011)

12. *Titan Seafood Co. v. United States*, No. 08-402 (Ct. Int'l Trade dismissed Feb. 3, 2011)

13. *Gulf Finest Investment Co. v. United States*, No. 08-405 (Ct. Int'l Trade dismissed Feb. 3, 2011)

14. *Orleans Furniture, Inc. v. United States*, No. 09-26 (Ct. Int'l Trade dismissed Mar. 8, 2011) (dismissed for failure to prosecute)

15. *Witmer Industries, Inc. v. United States*, No. 09-28 (Ct. Int'l Trade dismissed Feb. 2, 2011) (dismissed for failure to prosecute)

16. *Orleans Furniture, Inc.. v. United States*, No. 10-83 (Ct. Int'l Trade dismissed Mar. 8, 2011) (dismissed for failure to prosecute)

17. *Lang Furniture, Inc. v. United States*, No. 10-145 (Ct. Int'l Trade dismissed Jan. 28, 2011)

19. *Schaeffler Group USA, Inc. v. United States*, No. 12-248 (Ct. Int'l Trade dismissed Mar. 20, 2013)

Other Dispositions

1. *PS Chez Sidney, LLC v. United States*, No. 02-635 (Ct. Int'l Trade June 17, 2008), *reversed in part, vacated in part, and remanded*, No. 2008-1526 (Fed. Cir. July 13, 2012) (CIT instructed CBP to pay plaintiff from the special account), *final judgment*, No. 02-635 (Ct. Int'l Trade Jan. 2, 2013)