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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents acknowledge that the CDSOA discriminates between otherwise identically situated companies based solely on the content of their answers to the question "Do you support or oppose the petition" to impose trade sanctions? Pet. App. 7a. The vitriol in the brief of the trade group representing petitioners' competitors, *see* AFMCLT Br. 10, confirms that the question of how to respond to modern trade problems is an issue of public concern and political controversy. Yet the Federal Circuit held that the First Amendment permits discriminating on the basis of that speech in the distribution of hundreds of millions of dollars in government subsidies that bestow long-term competitive advantages on companies that express the view rewarded by the statute. Contrary to respondents' arguments, that holding warrants this Court's review.

I. Respondents' Defense Of The Decision Below Provides No Reason To Deny Certiorari.

Respondents argue first the certiorari is unnecessary because the decision below is correct. But their arguments are unconvincing.

A. The CDOSA Unconstitutionally Discriminates On The Basis Of Speech.

CDSOA distributions are available to companies, like Oakwood Interiors, that provided the Government exactly the same practical assistance as petitioners (*i.e.*, complete responses to ITC questionnaires) solely because Oakwood checked the

"support" box on the ITC questionnaire while petitioners did not. Respondents defend that discrimination on two basic grounds, neither of which withstands scrutiny.

First, they argue that such discrimination is permissible because it is sufficiently like awarding attorney's fees to prevailing plaintiffs but not to defendants or neutral parties. U.S. BIO 9-12. They say that the petition support question is really asking whether a company wants to join the petitioners in seeking legal relief, and that denying relief to those who do not request it is constitutionally unproblematic. *Id.*; AFMCLT BIO 12-14.

But that misrepresents what the petition support question asks. There is a separate mechanism for companies to join the administrative proceedings as parties, 19 C.F.R. § 201.11, or to request relief if the Government imposes antidumping duties, 19 U.S.C. § 1675c. Instead of asking whether a company wants to join the administrative proceedings as a party, the petition support question instead asks whether a company supports imposition of trade sanctions *as a matter of policy*. A company can honestly believe dumping is occurring, believe that it is injured, want relief if antidumping duties are imposed (including to avoid being disadvantaged vis-à-vis its domestic competitors), yet nonetheless honestly believe that on the whole imposing antidumping duties will do more harm than good. It may believe, for example, that imposing duties could trigger a wider trade war, and that trade negotiations would provide a better response. Or it may think that imposing sanctions on China would simply move production to other countries with low labor costs, like Vietnam. *See,*

e.g., Andrew Higgins, *From China, an end run around U.S. tarrifs*, WASHINGTON POST, May 23, 2011.[1] If a company in fact holds those views, no one denies that it is compelled by law, upon pain of criminal perjury, to state that it does not support the petition. *See* Pet. 24.

Conversely, companies that simply check the "support" box on the ITC questionnaire express political support for imposition of sanctions, but they do not become parties to the proceedings in any meaningful sense. They do not earn distributions by bringing unlawful conduct to the Government's attention, like a plaintiff or an antidumping petitioner. They do not participate in the proceedings and cannot appeal the decision, as could an intervenor. And unlike an opt-in class member, they do not submit their own rights to adjudication and have no claim to have their interests taken into account by the actual parties in the case or the tribunal.

Instead, as the Government ultimately acknowledges, the purpose of the petition support question, like all the other questions in the questionnaire, is not to solicit intervention, but to gather evidence "to inform the government's administrative decisionmaking process." U.S. BIO 12-13; *see also id*. 3. In providing those answers, companies like petitioners and Oakwood Interiors function as witnesses, not plaintiffs. And no one

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[1] *Available at* http://www.washingtonpost.com/world/asia-pacific/from-china-an-end-run-around-us-tariffs/2011/05/09/AF3GRl9G_story.html.

contends that there is a constitutional tradition condoning discrimination among witnesses based on the content of their testimony. *See Hoover v. Morales*, 164 F.3d 221, 225-27 (5th Cir. 1998) (a state may not condition government employment on employee providing expert testimony only for, and never against, the government).

Second, the Government nonetheless argues that because the ITC relies on the answer to the petition support question as evidence, a company that says it supports the petition provides greater practical support for enforcement of the nation's trade laws than a company that honestly says it does not support imposition of the duties. U.S. BIO 11-12. The Government says that petitioners were denied distributions because, although they provided substantial practical support for the investigation, it was not "the *type* of assistance Congress wishes to reward." *Id*. 12.

Respondents offer no explanation how Congress could have any legitimate (much less weighty) interest in rewarding those who provide evidence in support of one particular side of an administrative or adjudicative proceeding. Indeed, this Court recently held that governments ordinarily have no legitimate interest in punishing even their own employees for the content of their testimony in court. *See Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014). If the government may not *punish* disfavored testimony, it is hard to see why it can *reward* only those who provide favored evidence.

In fact, the Government's only legitimate interest is in accurately assessing whether the statutory criteria for antidumping duties are satisfied. And

any truthful testimony that helps the agency determine whether those requirements are met assists in the implementation of federal trade law.[2] That the Federal Circuit adopted, and the Government defends, the contrary proposition is reason enough to grant certiorari.

B. The Decision Below Cannot Be Reconciled With *AID* Or *Sorrell*.

The CDSOA's constitutional infirmity is confirmed by recent decisions of this Court that were unavailable to the Federal Circuit when it initially upheld the constitutionality of the statute in 2010, but were not even mentioned by the panel in this case.

1. In *Agency for International Development v. Alliance for Open Society International, Inc*., 133 S. Ct. 2321 (2013), this Court recently reaffirmed that the Government has no business using its spending power to reward those who profess a particular position on a question of public interest. *See AID*, 133 S. Ct. at 2331. Although petitioners brought the case to the court of appeals' attention, the panel did not see fit to address it. *See* Pet. 38. Respondents say no explanation was needed because the case is not on point, then collectively spend eight pages and

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[2] Moreover, it is not at all clear that expressing support for a petition provides any *material* evidence of threatened or actual injury to domestic injury, particularly when the distorting effect of the CDSOA distributions is taken into account. While the ITC "considers" such answers, it also asks for copious amounts of empirical data that have a far more direct bearing on the question. *See* U.S. BIO 3.

over a thousand words attempting explain why. *See* U.S. BIO 12-16; AFMCLT BIO 14-16; *compare* Pet. App. 9a-15a (Federal Circuit's six-page discussion of the merits of the entire case). They do not succeed.

The Government begins its apologia by arguing that unlike the statute in *AID*, the "CDSOA did not require domestic producers to 'adopt – as their own – the Government's view" because the Government does not have a view on whether sanctions should be imposed in any particular case prior to the completion of the investigation. U.S. BIO 12. But the problem in *AID* was not requiring applicants to adopt *the Government's* view. The problem was "compelling a grant recipient to adopt *a particular belief* as a condition of funding." *See* 133 S. Ct. at 2331 (emphasis added). The result would have been the same if funds had been conditioned on the recipient's professing Canada's official position on prostitution or Apple's policy on child labor.

The CDSOA indisputably requires companies to adopt a particular view (that sanctions should be imposed) as their own in order to receive federal funds. *See* U.S. BIO 12 (emphasizing that the petition support question asks for "domestic producers' *own* views"). Respondents argue that parties "may say whatever they want about the government's trade policies . . . provided they do so outside the context of the proceeding itself." U.S. BIO 13 (quoting *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1351-52 (Fed. Cir. 2010)). This assertion is wrong as a factual matter – because questionnaire responses are filed under penalty of perjury, a company may *not* answer the petition support question untruthfully, then express

its actual views elsewhere. *See* Pet. 25 & n.16. But even setting that aside, petitioners are in the exact same position as the plaintiffs in *AID*: even if they could avoid legal sanction for taking contrary positions in submissions to the Government and in their speech to the public, they could do so "only at the price of evident hypocrisy." 133 S. Ct. at 2331. *See* Pet. 23-24. And that is a price, this Court held, too high for the First Amendment to tolerate. *Id*.

2. The decision below is also in conflict with the Court's decision in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), which made clear 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. As discussed, Congress's only arguably legitimate basis for rewarding companies that simply provide questionnaire responses is to encourage companies to fully answer the questionnaires. The Government can satisfy that interest by providing distributions to *all* parties that provide the evidence the Government requests.

The United States attempts to disparage *Sorrell*'s non-discrimination principle by calling it a "half-sentence" in the opinion, and points out that the statute in that case was different from the one here. U.S. BIO 15-16. But respondents offer no convincing reason why the First Amendment principle the Court applied in *Sorrell* would not apply generally to statutes that discriminate on the basis of viewpoint or content. Instead, they simply repeat their baseless claims that companies like Oakwood Interiors are the equivalent of private attorneys general and that

evidence that supports the imposition of duties is somehow more helpful to federal law enforcement than evidence that undermines the request. U.S. BIO 15-16; AFMCLT BIO 14.

II. The Federal Circuit's Decision Conflicts With The First Amendment Precedents Of Other Circuits.

Respondents do not dispute that the constitutionality of the CDSOA can arise only in the Federal Circuit. Accordingly, certiorari would be warranted even if the decision below implicated no broader circuit conflict. But it does.

Respondents acknowledge that in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999), the Sixth Circuit held that strict scrutiny applied to a law that provided government benefits only if a company expressed a particular point of view on a question of public interest, specifically, promoting passage of a law to legalize casino gambling in Detroit. They attempt to distinguish the case by pointing out that the speech in *Lac Vieux* took place in the context of electioneering, while the speech here expressed support for a particular result in administrative proceedings. U.S. BIO 17. But there is no basis for respondents' speculation that the Sixth Circuit would have found these differences material. The court applied strict scrutiny not because the case involved an election, but because the statute discriminated on the basis of content. *See* 172 F.3d at 409-410 ("[W]e conclude that the ordinance is content-based and is *therefore* subject to strict scrutiny."); *see also id*. at 409 ("When speech is

regulated because of its content, that regulation will be subject to strict scrutiny review. . . .") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (case not involving electioneering)). Nor have respondents pointed to any precedent from the Sixth Circuit or this Court that distinguishes between electioneering speech and speech on matters of public concern in evaluating content or viewpoint discrimination. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (holding that speech on matters of public concern "occupies the *highest rung* of the hierarchy of First Amendment values, and is entitled to special protection") (emphasis added).

Respondents' insistence that this case is different because it involves litigation-like testimony also runs them headlong into the Fifth Circuit's decision in *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998), which held unconstitutional a statute that denied a government benefit (*i.e.*, state university employment) to individuals based on the content of their testimony (*i.e.*, whether they testified as experts for or against the state). The United States says the cases are distinguishable because in *Hoover* the statute "barred" testimony against the state while the CDSOA "does not forbid parties from expressing particular viewpoints." U.S. BIO 17. But that's simply untrue. Like CDSOA, the statute in *Hoover* simply withheld a state benefit (state employment there, federal funds here) based on the content of speech. *See id.* at 223-24. The Fifth Circuit, unlike the Federal Circuit, recognized, that discrimination in the distribution of government benefits is sufficient to invoke strict scrutiny and violate the First Amendment. *See id.* at 227.

III. Respondents' Remaining Reasons For Denying Certiorari Are Meritless.

Respondents' various other reasons to deny certiorari are also meritless.

1. The United States repeats its assurance from its opposition in *SKF* four years ago that the CDSOA is on the verge of becoming obsolete. But respondents do not deny that over $100 million is at stake in this case alone, and that the statute will continue to govern the distribution of millions of dollars for years to come. *See* Pet. 5-6. The United States itself has successfully petitioned for certiorari in similar circumstances, arguing that although intervening legislation made "disputes such as the present one . . . unlikely to arise in the future," certiorari was nonetheless warranted because the question presented governed "several pending cases" involving "liability of up to $100 million." Pet. for Cert. 27, *Thomason v. Cherokee Nation of Okla.*, No. 03-853, cert. granted, 541 U.S. 934 (2004).

Respondents are right that "only a handful of cases" challenging the CDSOA "remain to be decided." AFMCLT BIO 23. But that simply means that unless this Court intervenes now, the Government will continue to distribute millions of dollars on the basis of speech, distorting competition among domestic manufacturers for years to come.[3]

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[3] Petitioners are aware of only one other case in which a petition is forthcoming. After the petition in this case was filed, the Federal Circuit summarily rejected a CDSOA challenge in *Standard Furniture Manuf. Co., Inc. v. United States*, No. 12-

2. Finally, respondent AFMCLT (but not the United States) argues that certiorari would be "manifestly unfair to U.S. producers that elected to support the antidumping petition" because Ashley and Ethan Allen import a portion of the furniture they sell from China and therefore allegedly benefitted from the dumping. AFMCLT BIO 22-23; *see also id*. 10. That is grossly misleading. Respondents fail to disclose that, as the ITC documented, more than half "of the petitioning firms and all ten of the largest domestic producers of wooden bedroom furniture in 2002" had imported furniture from China.[4] This included some of AFMCLT's own members.[5] (Some of its members continue to import large portions of their furniture to this day).[6] Yet, even AFMCLT's members that also

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1230 (Fed. Cir. June 12, 2014). Counsel for petitioners in this case also represent Standard Furniture and plan to file a petition on Standard's behalf by August 10, 2014. The Court may wish to consider the petitions together.

[4] Int'l Trade Comm'n, Wooden Bedroom Furniture From China, No. 731-TA-1058 (Prelim.), USITC Pub. 3667 (Jan. 2004) at 3, 11-12 (reporting that 14 of 27 petitioners imported from China), *available at* http://www.usitc.gov/publications/701_731/pub3667.pdf.

[5] *See, e.g.*, Hearing Tr., Wooden Bedroom Furniture From the People's Republic of China, No. 731-TA-1058 (Review) (Nov. 22, 2010) p. 21, 11.24-25, p. 22, ll. 1-9 (Statement of J. Dorn).

[6] Respondent Stanley Furniture has in recent years moved all of its non-youth bedroom manufacturing off-shore. *See* Stanley Furniture Company, Inc. 2011 Form 10-K at 4, *available at* http://www.stanleyfurniture.com/media/document/10k2011FINAL.pdf. La-Z-Boy sells finished wood furniture through its "Casegoods Group," which includes

"rel[ied] on dumped imports from China," *id.* 23, have received millions of dollars in federal subsidies because they were willing to say what was necessary to obtain distributions under the CDSOA, *see* Pet. 34-35 & n.17.

In truth, globalization has forced many companies to adopt a blended strategy, producing or importing some particularly labor-intensive furniture from abroad while focusing domestic production on more capital-intensive lines of products. Whether that, or protectionist measures like antidumping duties, are the best response to the modern global competitive environment is a quintessential matter of political debate. This Court should not countenance Congress's distortion of that debate through the discriminatory distribution of federal funds.

3. At the very least, the Court should grant the petition, vacate, and remand with instructions to reconsider in light of the Court's decisions in *AID* and *Sorrell*. *See* Pet. 38. As the cases cited in the petition demonstrate, the Government is wrong to suggest that such an order is inappropriate simply because these decisions "had been issued well before the court of appeals decided the case." U.S. BIO 19 n.6.

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respondent Kincaid Furniture Co. *See* La-Z-Boy Inc. 2011 Form 10-K at 4, *available at* http://investors.la-z-boy.com/phoenix.zhtml?c=92596&p=irol-sec. The Casegoods Group imports approximately 75% of the furniture it sells in the United States, explaining that its "import model" is "effective primarily due to the low labor and overhead costs associated with manufacturing casegoods product overseas." *Id*. at 5.

CONCLUSION

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

Respectfully submitted,

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