No. 09-767

# In the Supreme Court of the United States

SKF USA INC., PETITIONER

*v.*

UNITED STATES CUSTOMS AND BORDER PROTECTION, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**


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## QUESTION PRESENTED

The antidumping-duty law, 19 U.S.C. 1673, authorizes the Department of Commerce to impose duties on foreign merchandise sold in the United States at less than its fair value if such sales cause material injury, or threaten to cause material injury, to domestic industry. The law permits an interested party, including a member of domestic industry, to initiate an antidumping proceeding by filing a petition, provided that the petition has a specified level of support among domestic producers or workers. 19 U.S.C. 1673a(b), (c)(1)(A) and (c)(4).

The now-repealed Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), Pub. L. No. 106-387, Tit. X, 114 Stat. 1549A-72 (19 U.S.C. 1675c (2000)), repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 154, provided that antidumping duties on merchandise that entered the United States before October 1, 2007, would be distributed annually to "affected domestic producers." Potential recipients of such distributions include any "petitioner or interested party in support of the petition with respect to which an antidumping duty order * * * has been entered." In 2005, petitioner was found to be ineligible for distributions under a particular antidumping-duty order because it had not supported the petition for that order. The question presented is as follows:

Whether the CDSOA's support requirement violated the First Amendment.

## TABLE OF CONTENTS

Page

Opinions below . . . . . 1
Jurisdiction . . . . . 1
Statement . . . . . 2
Argument . . . . . 10
Conclusion . . . . . 19

## TABLE OF AUTHORITIES

Cases:

*ACLU* v. *City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) . . . . . 16

*BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516 (2002) . . . . . 11

*Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) . . . . . 8, 14

*City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974) . . . . . 17, 18

*Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996) . . . . . 17, 18

*Hoover* v. *Morales*, 164 F.3d 221 (5th Cir. 1998) . . . . . 16

*John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008) . . . . . 7

*Lac Vieux Desert Band of Lake Superior Chippewa Indians* v. *Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) . . . . . 15

*Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001) . . . . 12

*Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) . . . . . 11

*Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) . . . . . 12

*Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) . . . . . 16

Cases–Continued: Page

*Speiser* v. *Randall*, 357 U.S. 513 (1958) . . . . . 12
*State* v. *Musser*, 721 N.W.2d 734 (Iowa 2006) . . . . . 16
*Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978 (Fed. Cir. 1994) . . . . . 3
*Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357 (2002) . . . . . 13
*Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994) . . . 13
*United States* v. *Eurodif S.A.*, 129 S. Ct. 878 (2009) . . . . . 2
*United States* v. *O'Brien*, 391 U.S. 367 (1968) . . . . . 8, 15

Constitution, statutes and regulation:

U.S. Const.:
Art. III . . . . . 18
Amend. I . . . . . 6, 7, 8, 10, 11, 14
Amend. V . . . . . 6, 9
Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, Tit. X, 114 Stat. 1549A-72 (19 U.S.C. 1675c (2000)) . . . . . 3
§ 1002 . . . . . 4
Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 154:
§ 7601(a) . . . . . 4
§ 7601(b) . . . . . 4
19 U.S.C. 1671 . . . . . 2
19 U.S.C. 1673 . . . . . 2
19 U.S.C. 1673(1) . . . . . 3
19 U.S.C. 1673(2) . . . . . 3
19 U.S.C. 1673a . . . . . 2

Statutes and regulation—Continued: Page

19 U.S.C. 1673a(c)(1)(A)(ii) . . . . . 2
19 U.S.C. 1673a(c)(4) . . . . . 2
19 U.S.C. 1673d(c)(2) . . . . . 3
19 U.S.C. 1673e(a)(1) . . . . . 3
19 U.S.C. 1675c (2000) . . . . . 3
19 U.S.C. 1675c(a) (2000) . . . . . 4
19 U.S.C. 1675c(b)(1) (2000) . . . . . 4
19 U.S.C. 1675c(b)(4) (2000) . . . . . 4
19 U.S.C. 1675c(d)(1) (2000) . . . . . 5
19 U.S.C. 1675c(d)(2) (2000) . . . . . 5
19 U.S.C. 1677(9)(C) . . . . . 2, 4
19 U.S.C. 1677(34) . . . . . 2
28 U.S.C. 2636(i) . . . . . 7, 18
19 C.F.R. 351.202(a) . . . . . 2

Miscellaneous:

*Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France*, 53 Fed. Reg. 15,074 (1988) . . . . . 5

United States Customs and Border Protection, *2009 Clearing Account Balance Report* (Oct. 1, 2009) http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/balances.ctt/balances.pdf. . . . . 17

Appellate Body Report, *United States–Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R (Jan. 16, 2003), available at 2003 WL 134123 . . . . . 4

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 556 F.3d 1337. The initial opinion of the Court of International Trade (Pet. App. 129a-155a) is reported at 451 F. Supp. 2d 1355. That court's later opinion upholding the determinations of the International Trade Commission and the Bureau of Customs and Border Protection on remand (Pet. App. 109a-128a) is reported at 502 F. Supp. 2d 1325.

## JURISDICTION

The judgment of the court of appeals was entered on February 19, 2009. A petition for rehearing was denied on September 29, 2009 (Pet. App. 101a-108a). The peti-

tion for a writ of certiorari was filed on December 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In international trade law, the practice of exporting goods to another country to be sold at less than their fair value—*i.e.*, the price for which they are sold in the producer's home market, or their cost of production—is known as "dumping." See 19 U.S.C. 1677(34). Section 1673 of Title 19 authorizes the Department of Commerce to impose antidumping duties to "address harm to domestic manufacturing from foreign goods sold at an unfair price." *United States* v. *Eurodif S.A.*, 129 S. Ct. 878, 883 (2009).[1]

The Department of Commerce may initiate an antidumping proceeding either on its own initiative or in response to a petition filed by an interested party, including a member of domestic industry. 19 U.S.C. 1673a, 1677(9)(C); see 19 C.F.R. 351.202(a) (noting that the Department of Commerce "normally initiates antidumping * * * duty investigations based on petitions filed by a domestic interested party"). A petition must be "filed by or on behalf of the industry," 19 U.S.C. 1673a(c)(1)(A)(ii), meaning that it must receive a specified level of support from domestic producers or workers, 19 U.S.C. 1673a(c)(4).

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[1] Separate statutory provisions authorize the Department of Commerce to impose countervailing duties on merchandise whose "manufacture, production, or export" is subsidized by a foreign governmental entity, and materially injures, or threatens to materially injure, domestic industry. 19 U.S.C. 1671. Because this case involves only antidumping-duty orders, our discussion of the legal framework is limited to antidumping procedures.

Once an antidumping proceeding has commenced, the International Trade Commission (ITC) must determine whether there is a material injury or threat of material injury to a domestic industry by reason of allegedly dumped imports. 19 U.S.C. 1673(2). To make that determination, the ITC issues questionnaires to domestic producers in which it solicits detailed factual information relating to, *inter alia*, production capacity, production, shipments, inventories, prices, and employment records, for periods spanning several years. See Pet. App. 47a. The ITC also considers the degree of support for the petition from members of the domestic industry. See, *e.g.*, *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978, 984 (Fed. Cir. 1994). The ITC's domestic-producer questionnaires accordingly have long included a question asking whether the producer supports, opposes, or is neutral as to the relief sought by the petitioner. Pet. App. 5a.

If the ITC issues a negative determination with respect to material injury, the investigation is terminated. If the ITC issues an affirmative determination, and if the Department of Commerce has determined that the foreign merchandise at issue in the investigation "is being, or is likely to be, sold in the United States at less than its fair value," 19 U.S.C. 1673(1), it issues an antidumping-duty order directing United States Customs and Border Protection (Customs) to assess duties on the merchandise. 19 U.S.C. 1673d(c)(2), 1673e(a)(1).

2. Antidumping duties, like other customs duties, have typically been deposited into the United States Treasury for general purposes. In 2000, however, Congress enacted the Continued Dumping and Subsidy Offset Act (CDSOA or Byrd Amendment), Pub. L. No. 106-387, Tit. X, 114 Stat. 1549A-72 (19 U.S.C. 1675c

(2000)), repealed by Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 154. Enacted to further the remedial purposes of the fair trade laws, CDSOA § 1002, 114 Stat. 1549A-72, the CDSOA directed Customs to distribute monies collected pursuant to antidumping-duty orders to "affected domestic producers" in order to allow such producers to recoup certain qualifying expenditures. 19 U.S.C. 1675c(a) (2000); see 19 U.S.C. 1675c(b)(4) (2000) (defining "qualifying expenditures" to include various costs of production). The CDSOA defined the term "affected domestic producer" to mean "any manufacturer, producer, farmer, rancher, or worker representative" that "was a petitioner or interested party in support of the petition with respect to which an antidumping duty order * * * has been entered," and that "remains in operation." 19 U.S.C. 1675c(b)(1) (2000); see 19 U.S.C. 1677(9)(C) ("interested party" includes, *inter alia*, any "manufacturer, producer, or wholesaler in the United States of a domestic like product").

In 2006, after the Appellate Body of the World Trade Organization (WTO) held that the CDSOA violated the United States' obligations in several international agreements,[2] Congress repealed the CDSOA. Deficit Reduction Act of 2005 § 7601(a), 120 Stat. 154. Congress provided, however, that "[a]ll duties on entries of goods made and filed before October 1, 2007 * * * shall be distributed" pursuant to the CDSOA. *Id.* § 7601(b), 120 Stat. 154.

3. In 1988, the Torrington Company, a domestic producer of antifriction bearings and a predecessor of

[2] See Appellate Body Report, *United States—Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R (Jan. 16, 2003), available at 2003 WL 134123.

respondent Timken US Corporation (Timken), filed a petition alleging that imports of antifriction bearings from several countries were being dumped in the United States. Pet. App. 9a; see *id.* at 18a n.11. The Department of Commerce commenced antidumping proceedings. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France*, 53 Fed. Reg. 15,074 (Dep't of Commerce 1988).

The ITC issued questionnaires to domestic producers, asking for detailed factual data on their production and financial operations. The questionnaires also asked whether the producers supported the Torrington Company's petition. Pet. App. 12a. After further investigation, the ITC determined that domestic industry was materially injured by reason of certain imports of antifriction bearings. *Id.* at 13a-14a. The Department of Commerce subsequently found that the antifriction bearings were being dumped in the United States, and it accordingly issued antidumping-duty orders against antifriction bearings imported from several countries, including Japan. *Id.* at 14a.

In 2000, after the CDSOA became effective, the ITC produced an initial list of supporters of the petition that had resulted in the antidumping-duty orders relating to ball bearings from Japan. Pet. App. 15a; see 19 U.S.C. 1675c(d)(1) (2000). Each year thereafter, Customs published a notice of intent to distribute funds to that group of eligible domestic producers. Pet. App. 16a; see 19 U.S.C. 1675c(d)(2) (2000).

4. Petitioner is a domestic subsidiary of a major foreign bearings producer that was a respondent in the antidumping proceedings. In response to the ITC's questionnaire, petitioner checked a box indicating that it opposed the relief sought by the Torrington Company.

Pet. App. 12a. Because petitioner had not supported the Torrington Company's petition, petitioner was not included in the ITC's list of entities eligible to receive CDSOA distributions, and for four years petitioner made no effort to claim a share of the annual CDSOA distributions. *Id.* at 16a.

In 2005, petitioner requested for the first time that the ITC add it to the list of entities eligible to receive CDSOA distributions under the antidumping-duty order covering antifriction bearings from Japan. Pet. App. 16a. The ITC denied the request on the ground that petitioner had not supported the petition and therefore was not an "affected domestic producer" within the meaning of the CDSOA. *Id.* at 17a. Petitioner later requested CDSOA distributions from Customs. That request was also denied. *Ibid.*

5. Petitioner filed suit in the United States Court of International Trade (CIT), challenging the determination of the ITC and Customs that petitioner was not an "affected domestic producer" and was therefore ineligible for distributions under the relevant antidumping-duty order. Pet. App. 130a. Petitioner contended that the distribution scheme established by the CDSOA, under which a particular entity's eligibility for distributions turns on whether that entity supported or opposed the relevant antidumping-duty petition, violated the First and Fifth Amendments. See *ibid.* The CIT granted petitioner's motion for judgment upon the agency record. *Id.* at 129a-155a.

The CIT held that the CDSOA's support requirement violated the equal protection component of the Fifth Amendment because that requirement lacked a rational basis. Pet. App. 141a-146a. The court stated that "[t]he plain language of the CDSOA fails to rationally indicate

why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry." *Id.* at 143a. The CIT further concluded that the support requirement of the statute must be severed, so that all domestic producers that had participated in the relevant anti-dumping investigation would be eligible to receive CDSOA funds, regardless of whether they had supported the petition. *Id.* at 151a-153a. The CIT remanded the case to allow Customs and the ITC to determine whether petitioner was eligible to receive a CDSOA distribution for fiscal year 2005 under that standard. *Id.* at 153a-154a. On remand, Customs and the ITC concluded that petitioner would qualify for a distribution under that standard, and the CIT affirmed. *Id.* at 109a-128a.

6. The federal respondents and Timken appealed the CIT's judgment to the Federal Circuit. On appeal, petitioner urged affirmance primarily on First Amendment rather than equal protection grounds. The court of appeals reversed. Pet. App. 1a-52a.

a. The court of appeals first held that petitioner's as-applied challenge was not barred by the applicable two-year statute of limitations, 28 U.S.C. 2636(i), which the court assumed was jurisdictional under *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008). The court reasoned that, even though petitioner had waited approximately five years after the CDSOA was enacted and the ITC promulgated its list of entities eligible to receive CDSOA distributions, and some four years after Customs had published that list, its suit was timely because petitioner "could not file suit to recover fiscal year 2005 Byrd Amendment distributions until it

was known whether Byrd Amendment distributions would be available"—*i.e.*, when Customs published its notice of intent to distribute duties for fiscal year 2005. Pet. App. 24a-25a.

On the merits of petitioner's First Amendment challenge, the court of appeals rejected petitioner's argument that the CDSOA "is impermissibly designed to penalize those who oppose antidumping petitions." Pet. App. 31a. The court disagreed with the government's position that "the statute's only purpose was to compensate those who are injured by dumping," using "petition support as a surrogate for injury." *Id.* at 30a. After reviewing the statute's text and purposes, the court concluded that the CDSOA was also designed "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *id.* at 33a; see *id.* at 36a ("The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views.").

The court of appeals held that the statute's "subsidiary purpose" of rewarding injured parties that assisted in enforcement efforts did not render the statute unconstitutional. Pet. App. 31a-52a. Noting that this Court's cases "do not establish a standard for determining when such rewards * * * would be forbidden by the First Amendment," the court of appeals relied by analogy on the standard of scrutiny set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), for reviewing commercial-speech regulations. Pet. App. 39a-40a; see *id.* at 40a n.28 (noting that the result would be the same under "the test for speech combined with conduct in *United States* v. *O'Brien*, 391

U.S. 367, 377 (1968)"). The court concluded that the distribution scheme established by the CDSOA satisfied that standard of review. *Id.* at 40a. The court explained that "preventing dumping is a substantial government interest" and that the CDSOA "directly advances" that interest "by rewarding parties who assist in [trade-law] enforcement." *Id.* at 41a; see *id.* at 44a ("[T]he Byrd Amendment—like qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees— shifts money to parties who successfully enforce government policy."). The court further concluded that the CDSOA is not unduly broad, and that Congress could reasonably choose to reward the supporters of antidumping-duty petitions without rewarding opponents as well. *Id.* at 44a-51a. Finally, finding that "the Byrd Amendment is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping," the court of appeals held that the CIT had erred in concluding that the CDSOA violated the Fifth Amendment's equal protection guarantee. *Id.* at 51a-52a.

b. Judge Linn dissented. Pet. App. 53a-100a. In his view, the CDSOA's support requirement was subject to strict scrutiny because it "denies a benefit on the basis of expression of a viewpoint on a political matter in a public forum." *Id.* at 89a. Applying strict scrutiny, Judge Linn would have held the CDSOA's support requirement to be invalid on the ground that the government had less restrictive means of achieving any interests in compensating injured domestic producers and rewarding those who supported government enforcement efforts. *Id.* at 94a; see *id.* at 80a-84a.

7. The court of appeals denied rehearing en banc over Judge Linn's dissent, which was joined by three other judges. Pet. App. 101a-108a.

**ARGUMENT**

Petitioner (Pet. 12-38) contends that the distribution scheme established by the CDSOA, under which industry participants who support an antidumping petition are entitled to a share of any duties collected while participants who oppose the petition are not, violates the First Amendment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. The question presented is also of limited prospective significance, since the CDSOA was repealed in 2006 and applies only to a diminishing pool of antidumping duties collected on goods that entered the United States before October 1, 2007. Further review is not warranted.

1. The court of appeals upheld the CDSOA based on its conclusion that the CDSOA was designed not only to compensate those members of domestic industry that are injured by unfair trade practices, but also "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." Pet. App. 33a. Although the statute's purpose to compensate injured parties provides a sufficient basis for upholding the CDSOA, the court correctly concluded that a purpose to reward those who assist in the enforcement of federal law is also a valid objective under the First Amendment. See *id.* at 31a-51a.[3]

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[3] The government argued in the court of appeals that, in enacting the CDSOA's support requirement, Congress sought to distribute govern-

As the court of appeals correctly noted, "it is now common for the government to reward those who assist in enforcing government policies through litigation or administrative proceedings," Pet. App. 41a, through such mechanisms as "qui tam proceedings, monetary awards of a portion of the government's recovery, and awards of attorney's fees," *id.* at 44a. Such reward provisions serve substantial governmental interests both in compensating injured parties and in rewarding assistance in enforcing federal law. Nothing in this Court's cases casts doubt on the government's authority to reward successful parties without extending the same benefits to those who unsuccessfully opposed the granting of relief. Cf. *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 537 (2002) ("[N]othing in our holding today should be read to question * * * the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.").

The cases on which petitioner relies (Pet. 14-15) are not to the contrary. Neither *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995),

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ment funds to those domestic producers who had been most severely harmed by dumping, and that Congress viewed a producer's support for an antidumping petition as evidence of likely harm. See Pet. App. 30a. The court of appeals agreed with the government that "the Byrd Amendment was designed to compensate domestic producers." *Id.* at 29a. It disagreed, however, with the government's contention that this was the statute's "*only* purpose," *id.* at 30a, finding that the CDSOA was also intended in part "to reward injured parties who assisted government enforcement of the antidumping laws," *id.* at 33a. Although compensation of injured domestic producers provides a sufficient rationale for upholding the CDSOA against petitioner's First Amendment challenge, the court of appeals was correct that rewarding persons who assist in the enforcement of federal law is a constitutionally valid objective.

nor *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), nor *Speiser* v. *Randall*, 357 U.S. 513 (1958), concerned the government's power to reward parties who assist successful efforts to enforce federal law—or, alternatively, the government's power to deny benefits to those who, like petitioner, oppose such efforts. In *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), see Pet. 34, this Court struck down a statute that prohibited government-funded legal services attorneys from undertaking efforts "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." 531 U.S. at 538, 549. But as the court below correctly noted, the *Velazquez* Court's conclusion that the government may not limit the scope of arguments that may be made by an attorney speaking on behalf of a private client, see *id*. at 542, 547-549, casts no doubt on the government's authority to "reward those who assist in supporting the validity of federal statutes" in the course of litigation or administrative proceedings. Pet. App. 43a.

2. Petitioner raises several challenges (Pet. 17-24) to the court of appeals' conclusion that the CDSOA is in fact designed to reward parties who assisted government enforcement of the antidumping law. None of those challenges merits this Court's review.

First, petitioner contends (Pet. 17-20) that the court of appeals invented "a benign legislative purpose" that is not evident on the face of the CDSOA. But in concluding that the CDSOA was designed to reward enforcement assistance, the court relied on the language of the CDSOA provisions that established the challenged distribution scheme, as well as on statutory findings that emphasized Congress's intent "to strengthen enforcement of the trade laws." Pet. App. 33a. The court of appeals'

approach is thus consistent with "this Court's teaching that the 'purpose, or justification, of a regulation will often be evident on its face.'" Pet. 17 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994)).

Petitioner next contends (Pet. 21-22) that the court of appeals erred in concluding that the CDSOA was designed to reward enforcement assistance, even though the government had argued that the CDSOA was designed solely to compensate those injured by dumping. Petitioner's contention relies primarily on *Thompson* v. *Western States Medical Center*, 535 U.S. 357 (2002), in which this Court rejected a justification for speech-related statutory restrictions that had been raised by the dissenting Justices but not by counsel for the government. *Id.* at 373. The Court in *Thompson* explained that, while it had "sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational," the heightened standard of scrutiny applicable in that case required the government not only to identify a "substantial interest," but "also to prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest." *Id.* at 373-374 (internal quotation marks and citations omitted). The Court rejected the dissent's proposed justification on the ground that the government had "not met any of these requirements with regard to the interest the dissent describes." *Id.* at 374. The Court did not, as petitioner suggests, hold that a court is limited to considering those legislative purposes advanced in the government's briefs.

Finally, petitioner contends (Pet. 22-24) that the "'reward' purpose is entirely fictitious" because "petition supporters and petition opponents provide exactly the same assistance to the government in antidumping inves-

tigations." Pet. 23 (quoting Pet. App. 72a). Petitioner is correct that petition opponents, like petition supporters, may provide important information to the ITC during its antidumping investigations. See Pet. App. 48a. But as the court of appeals observed, "[o]pposing parties' interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping." *Ibid.* Congress may permissibly decline to reward parties who have unsuccessfully opposed the granting of particular relief, and thus have failed to provide the *type* of assistance that Congress wishes to reward, even when those parties have provided relevant information during the course of the proceedings. See *id.* at 50a-51a. In any event, the statute-specific question petitioner raises does not merit this Court's review, particularly in light of the fact that the statute was repealed years ago. See p. 4, *supra*.

3. Petitioner contends (Pet. 24-26, 31-33) that the decision below implicates a conflict in authority about the proper definition of "commercial speech" under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980). That argument reflects a misunderstanding of the court of appeals' analysis. Contrary to petitioner's apparent premise, the court below did not hold that domestic manufacturers' responses to the ITC's questionnaires actually constituted "commercial speech" for purposes of the *Central Hudson* inquiry. Instead, using commercial-speech regulation as an analogy, the court drew on the *Central Hudson* framework to determine the proper standard of review for determining "when, if ever," rewards for assistance in government enforcement efforts "would be forbidden by the First Amendment." Pet. App. 39a. Notably, the court empha-

sized that the same result would obtain if it applied "the test for speech combined with conduct in *United States* v. *O'Brien*." *Id.* at 40a n.28; see *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). Petitioner identifies no conflict about the proper application of commercial-speech doctrine that warrants this Court's intervention.

4. Finally, petitioner contends (Pet. 27-31) that this Court's review is warranted to resolve a conflict among the courts of appeals as to the standard of scrutiny that applies to regulations rewarding support for government action. Petitioner is incorrect.

In *Lac Vieux Desert Band of Lake Superior Chippewa Indians* v. *Michigan Gaming Control Board*, 172 F.3d 397 (1999), the Sixth Circuit held that strict scrutiny applied to a Detroit ordinance that gave bidding preferences to casino developers that had been involved in "actively promoting and significantly supporting a state initiative authorizing gaming." *Id.* at 409 (internal quotation marks, citation, and brackets omitted). But as the court of appeals in this case correctly explained, "[t]he ordinance at issue in *Lac Vieux* did not reward the achievement of the enforcement of government policy through litigation, but instead involved 'political support' for legislative efforts." Pet. App. 44a n.32. The court of appeals' conclusion that rewards for assistance in government enforcement efforts are subject to less search-

ing constitutional review creates no conflict with the Sixth Circuit's ruling in *Lac Vieux*.

Nor does the decision below conflict with *Hoover* v. *Morales*, 164 F.3d 221 (5th Cir. 1998). In *Hoover*, the court of appeals preliminarily enjoined, as presumptively invalid, a policy that barred professors at a state university from serving as consultants or expert witnesses on behalf of parties opposing the State in litigation. *Id.* at 227. The state policy at issue in that case bears little resemblance to the CDSOA, which does not forbid parties from expressing particular viewpoints. Cf. Pet. App. 32a (explaining that "[p]arties who are awarded antidumping distributions under the Byrd Amendment may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself").[4]

5. In any event, the merits of petitioner's as-applied challenge are of limited prospective significance because the CDSOA has been repealed. Even if, as petitioner argues (Pet. 33-34), the CDSOA may once have had a "chilling effect" in antidumping proceedings, all of the ITC questionnaire responses upon which CDSOA eligibility determinations were made were submitted years ago (in this case, more than 20 years ago). There is con-

[4] Petitioner also contends (Pet. 30-31) that the decision below conflicts with *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), *ACLU* v. *City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), and *State* v. *Musser*, 721 N.W.2d 734 (Iowa 2006). None of those decisions, however, addressed the standard of scrutiny that applies to a governmental reward for successful enforcement efforts. See *Solantic*, 410 F.3d at 1274 (content-based prohibition on certain types of signs); *ACLU*, 466 F.3d at 797 (content-based prohibition on certain forms of solicitation); *Musser*, 721 N.W.2d at 743-744 (statute effectively requiring disclosure of speaker's HIV status).

sequently no possibility that the decision below could affect the behavior of industry participants in any pending or future antidumping proceedings. As applied in this case, moreover, the challenged distribution scheme could not have affected industry participants' decisions whether to support or oppose the Torrington Company's antidumping petition, since the questionnaires submitted in connection with that petition were completed several years before Congress enacted the CDSOA. And while petitioner contends (Pet. 36) that "[t]he mere possibility that Congress could reenact the statute * * * chills free speech," such a speculative possibility provides insufficient grounds for this Court's review.

Petitioner also contends (Pet. 35) that this Court's review is warranted because duties on goods that entered the United States before October 1, 2007, continue to be distributed to persons who supported, but not those who opposed, the relevant antidumping petitions. But the monies remaining to be distributed with respect to pre-October 2007 entries are significantly less than the $1 billion figure petitioner cites, and are steadily diminishing.[5] And those figures include monies that would be distributed to a considerable number of petition supporters, not only monies that would be distributed to petition opponents like petitioner and its amici if petitioner were to prevail on its challenge.

Finally, petitioner's reliance (Pet. 36 n.20) on *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974), and *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), is misplaced. Petitioner is correct that the repeal of the

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[5] The most recent CBP statement of the CDSOA clearing account balances, as of October 1, 2009, can be viewed at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/balances.ctt/balances.pdf.

CDSOA does not render this case moot for Article III purposes, since petitioner would derive a tangible benefit if it were held to be entitled to a share of the fiscal year 2005 antidumping duties at issue in this case. See *Alco Parking*, 417 U.S. at 372 n.2; *Fulton Corp.*, 516 U.S. at 327 n.1. But petitioner identifies no persuasive reason for this Court to review the constitutionality of a now-repealed statute, where the case presents no "familiar and recurring" issues, *Alco Parking*, 417 U.S. at 373, of particular importance outside the narrow statutory context at issue.

6. Although the ITC sent Customs the list of entities eligible for CDSOA distributions in December 2000, and Customs published the list in August 2001, petitioner did not file a complaint until October 2005. In the court of appeals, the ITC and respondent Timken argued that petitioner's suit was barred by the applicable two-year statute of limitations. See 28 U.S.C. 2636(i). The court of appeals, while assuming (without deciding) that Section 2636(i)'s limitations period is jurisdictional, held that the suit was timely because petitioner's cause of action did not accrue until June 1, 2005, when Customs published its notice of intent to distribute duties for fiscal year 2005. Pet. App. 23a-26a.

The Court's decision in *Lewis* v. *City of Chicago*, No. 08-974 (argued Feb. 22, 2010), may bear on the proper resolution of the timeliness issue in this case. If this Court were to grant the petition for a writ of certiorari, it might ultimately be foreclosed from deciding the merits of petitioner's constitutional claim if the Court found that claim to be time-barred. The existence of this potential jurisdictional barrier provides a further reason for this Court to deny review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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