No. 13-1367

In the Supreme Court of the United States

ASHLEY FURNITURE INDUSTRIES, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, 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 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The now-repealed Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), Pub.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 X, 114 Stat. 1594A-72 (19 U.S.C. 1675c (2000)), repealed by Deficit Reduction Act of 2005, Pub.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." 19 U.S.C. 1675c(a) (2000). Potential recipients of such distributions included any "petitioner or interested party in support of the petition with respect to which an antidumping duty order * * * has been entered." 19 U.S.C. 1675c(b)(1) (2000). Petitioners were found to be ineligible for distributions under a particular antidumping-duty order because they had not supported the petition for that order. The question presented is as follows:

Whether the CDSOA, by limiting distributions of antidumping duties to domestic producers who had supported the underlying petition, violated the First Amendment rights of non-supporters.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2013. Petitions for rehearing were denied on January 3, 2014 (Pet. App. 90a-95a). On March 13, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 2, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In international trade law, the practice of importing goods from another country to be sold at less than their fair value—that is, 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.*, 555 U.S. 305, 310-311 (2009).[1]

The Department of Commerce may commence an antidumping proceeding 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). In practice, the Department "almost always relies on" interested-party petitions to initiate antidumping proceedings. *SKF USA, Inc.* v. *United States Customs & Border Prot.*, 556 F.3d 1337, 1340 (Fed. Cir. 2009), cert. denied, 560 U.S. 903 (2010); 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"). In order to initiate an antidumping proceeding, 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 spec-

[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(a). Because this case involves only antidumping-duty orders, our discussion of the legal framework is limited to antidumping procedures.

ified level of support from domestic producers or workers, 19 U.S.C. 1673a(c)(4).

Once an antidumping proceeding has commenced, the United States 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 about, *inter alia*, production capacity, production, shipments, inventories, prices, and employment records, for periods spanning several years. See *SKF*, 556 F.3d at 1341. The ITC also considers the degree of support for the petition from members of domestic industry. See, *e.g.*, *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978, 984 (Fed. Cir. 1994). For this reason, the ITC's domestic-producer questionnaires have long asked whether the producer supports, opposes, or is neutral as to the relief sought in the antidumping petition. *SKF*, 556 F.3d at 1341.

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), the Department of Commerce issues an order directing United States Customs and Border Protection (Customs) to assess duties on the subject 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 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. Enacted to further the remedial purposes of the fair-trade laws, CDSOA § 1002, 114 Stat. 1549A-72 to 1549A-73, 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 expenditure" 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 held that the CDSOA violated the United States' obligations under several international agreements,[2] Congress repealed the CDSOA. Deficit Reduction Act of 2005, § 7601(a), 120 Stat. 154. Con-

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[2] See Appellate Body Report, *United States—Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R(Jan. 16, 2003), http://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf.

gress provided, however, that "[a]ll duties on entries of goods made and filed before October 1, 2007 * * * shall be distributed" pursuant to the CDSOA. § 7601(b), 120 Stat. 154. In 2010, Congress further limited the application of the CDSOA by providing that duties on merchandise would be subject to the CDSOA's distribution scheme only if, as of December 8, 2010, the merchandise had been liquidated, was the subject of litigation, or was under an order of liquidation from the Department of Commerce. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 822, 124 Stat. 3163, as amended by Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 504, 124 Stat. 3308.

3. In 2003, a group of domestic furniture manufacturers and labor unions filed a petition alleging that imports of wooden bedroom furniture from China were being dumped in the United States. Pet. App. 7a. In response to the petition, the Department of Commerce commenced antidumping proceedings. *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228 (Dec. 17, 2003).

The ITC issued questionnaires to all known domestic producers of wooden bedroom furniture, asking for sales data and other information. Pet. App. 7a. The questionnaires also asked whether the producers supported, opposed, or took no position on the petition. *Ibid.* At the conclusion of its investigation, the ITC determined that the domestic furniture industry was being materially injured by imports of bedroom furniture from China. *Ibid.* Based on that determination, the Department of Commerce issued an anti-

dumping-duty order on such imports. *Id.* at 31a. After the order was published, the ITC prepared a list of entities eligible for CDSOA distributions. *Id.* at 8a.

Petitioners are two domestic furniture producers who, in responding to the ITC questionnaires, had indicated that they either opposed, or took no position on, the antidumping petition that the other domestic entities had filed. Pet. App. 7a. The ITC determined that petitioners were not "interested part[ies] in support of the petition," 19 U.S.C. 1675c(b)(1)(A) (2000), and accordingly did not include them on the list of entities eligible to receive CDSOA distributions. Pet. App. 8a. Petitioners subsequently filed suits in the United States Court of International Trade (CIT), contending that they had, in fact, "support[ed]" the petition within the meaning of the CDSOA. *Ibid.* They also contended, in the alternative, that the CDSOA violated the First Amendment. *Ibid.*

4. The CIT stayed the cases pending the resolution of *SKF USA, Inc.* v. *United States Customs & Border Protection*, *supra*, which presented "the same or similar issues." Pet. App. 32a. The Federal Circuit ultimately held in *SKF* that the CDSOA was "valid under the First Amendment," 556 F.3d at 1360, rejecting the contention that the CDSOA's distribution scheme was "impermissibly designed to penalize those who oppose antidumping petitions," *id.* at 1351. The court found that the scheme served to compensate parties injured by dumping and "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *Id.* at 1350-1352. The court concluded that this latter "subsidiary purpose" did not render the statute unconstitutional. *Id.* at 1351-1360.

Noting that this Court's decisions "do not establish a standard for determining when such rewards * * * would be forbidden by the First Amendment," the court of appeals in *SKF* 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. *SKF*, 556 F.3d at 1354-1355; see *id.* at 1355 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 determined that the distribution scheme established by the CDSOA satisfied that standard of review. *Id.* at 1355. 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." *Ibid.*; see *id.* at 1356-1357 ("[T]he [CDSOA]—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 determined that the CDSOA was not unduly broad, and that Congress could reasonably choose to reward the supporters of antidumping petitions without rewarding opponents as well. *Id.* at 1357-1360. This Court denied certiorari. *SKF USA, Inc.* v. *United States Customs & Border Prot.*, 560 U.S. 903 (2010).

5. After the Federal Circuit issued its decision in *SKF*, the CIT determined that petitioners' complaints for relief in this case were foreclosed by that decision. Pet. App. 8a; see *id.* at 25a-89a. The CIT accordingly dismissed those complaints. *Id.* at 8a.

6. The court of appeals affirmed. Pet. App. 1a-24a. The court agreed with the CIT that "*SKF* resolved the facial First Amendment challenge presented in these cases," and it rejected petitioners' contention that "recent Supreme Court precedent overruled our *SKF* holding." *Id.* at 11a-12a. Applying the CDSOA to the facts of this case, the court of appeals determined that petitioners were not eligible for distributions because they had never supported the antidumping petition that other entities had filed. *Id.* at 12a-13a.

Finally, in response to petitioners' argument that application of the CDSOA in this case would unconstitutionally burden "abstract expression," the court of appeals explained that "[t]his is not a case about standalone abstract expression." Pet. App. 14a; see *id.* at 12a ("[T]he government did not deny * * * distributions to [petitioners] solely on the basis of abstract expression."). Observing that "the ITC takes the level of support of the petition into account in its determination of material injury," the court pointed out that petitioners had "submitted official questionnaires that could have prevented the ITC and Customs from 'successfully enforc[ing] government policy.'" *Id.* at 14a (brackets in original) (quoting *SKF*, 556 F.3d at 1357); see *ibid.* ("As *SKF* explained, the [CDSOA] does not reward neutral or opposing parties because filling out the questionnaire without indicating support for the petition can contribute to the petition's defeat.").

Judge Clevenger dissented. Pet. App. 16a-24a. He would have held that, by completing the questionnaires, petitioners had sufficiently "support[ed]" the antidumping petition to qualify for CDSOA distributions. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 19-38) that the distribution scheme established by the CDSOA, under which only industry participants who supported an antidumping petition are entitled to a share of any duties collected, violates the First Amendment. This Court denied certiorari on that issue in *SKF USA, Inc.* v. *United States Customs & Border Protection*, 560 U.S. 903 (2010), and there is no reason for a different result here. The court of appeals correctly held that the CDSOA is constitutional, and that holding does not conflict with any decision of this Court or of any other court of appeals. In addition, the question presented has even less prospective significance than it had when the Court denied review in *SKF*, 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. a. In *SKF USA, Inc.* v. *United States Customs & Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009), cert. denied, 560 U.S. 903 (2010), the court of appeals upheld the CDSOA against a First Amendment challenge substantially similar to the one presented here. That holding was premised on the court's 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." *Id.* at 1352. Although the statute's purpose to compensate injured parties provides a sufficient basis for upholding the CDSOA, the court in *SKF* 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 1351-1360.[3]

As the court of appeals in *SKF* explained, "it is now common for the government to reward those who assist in enforcing government policies through litigation or administrative proceedings," 556 F.3d at 1355-1356, through such mechanisms as "qui tam proceedings, monetary awards of a portion of the governments' recovery, and awards of attorney's fees," *id.* at 1356-1357. 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 decisions casts doubt on the government's authority to reward successful parties without extending the same benefits to those who opposed or failed to support 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

[3] The government argued in *SKF* that, in enacting the CDSOA's support requirement, Congress sought to distribute government 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 556 F.3d at 1351. The court of appeals agreed with the government that the CDSOA "was designed to compensate domestic producers." *Id.* at 1350. It disagreed, however, with the government's contention that this was the statute's "*only* purpose," *ibid.*, finding that the CDSOA was also intended in part "to reward injured parties who assisted government enforcement of the antidumping laws," *id.* at 1352. Although compensation of injured domestic producers provides a sufficient rationale for upholding the CDSOA against petitioners' 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.

provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.").

In contending that the CDSOA's distribution scheme is unconstitutionally discriminatory, petitioners assume (*e.g.*, Pet. 21, 26-28) that producers who do not support an antidumping petition contribute to the petition's success to the same degree as those who do. That assumption is unfounded. Although non-supporters who complete the ITC's questionnaire provide the same type of information as supporters, they do not provide the same assistance in enforcing federal antidumping law. See Pet. App. 12a-14a. To the contrary, "filling out the questionnaire without indicating support for the petition can contribute to the petition's defeat." *Id.* at 14a (citing *SKF*, 556 F.3d at 1357-1359).

The ITC takes account of such opposition in determining whether dumping activity has caused a material injury to domestic industry. *SKF*, 556 F.3d at 1357. A producer's opposition to (or lack of support for) an antidumping petition, which likely reflects that it is economically better off under the status quo, thus in itself decreases the probability that an antidumping petition will succeed. "The industry best knows its own economic interests"; "in the difficult enterprise of projecting future economic harm, the industry's views take on added relevance"; and "publicly expressed industry support for the petition, or lack of it, is probative evidence of those views." *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978, 984 (Fed. Cir. 1994); see *SKF*, 556 F.3d at 1358 ("Opposing 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."). 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 1358-1360.

b. Petitioners' reliance (Pet. 22-24) on *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) (*AID*), is misplaced. In *AID*, this Court addressed the constitutionality of a requirement that certain entities "explicitly agree with the Government's policy to oppose prostitution and sex trafficking" as a condition of receiving federal grant funds under a program intended to combat the spread of HIV/AIDS. *Id.* at 2324-2325, 2327. The Court held that the requirement violated the First Amendment because it "demand[ed] that funding recipients adopt—as their own—the Government's view on an issue of public concern." *Id.* at 2330. The Court observed that the requirement effectively prevented entities that received funding under the program from making any public statements contrary to the government's own views. *Ibid.*

The CDSOA's distribution scheme exhibited no similar constitutional infirmity. The CDSOA did not require domestic producers to "adopt—as their own—the Government's view," *AID*, 133 S. Ct. at 2330, on whether an antidumping-duty order was warranted. The government did not even *have* a view on that issue at the time petitioners' views were solicited in this case. Instead, the government solicited domestic producers' *own* views on whether they supported an antidumping petition, in an effort to inform the gov-

ernment's administrative decisionmaking process. That inquiry into producers' views, which was part of the ITC's questionnaire even before the CDSOA was enacted, is a "part of the ITC's material injury investigation," and was not "designed solely to determine eligibility for [CDSOA] distributions." *SKF*, 556 F.3d at 1357.

CDSOA distributions were instead a post hoc award, following successful administrative proceedings, granted to those who had joined in the effort to enforce federal antidumping law by supporting the antidumping petition. The CDSOA's support requirement was thus analogous to a requirement that a potential plaintiff join in litigation, or allow class-action representation, in order to share in the recovery if the litigation is successful. Although the decision to participate in the litigation may affect how the plaintiff is perceived by others, treating that decision as a prerequisite to participation in any recovery has never been deemed to raise a First Amendment issue of the sort that this Court identified in *AID*.

Unlike the provision at issue in *AID*, moreover, the CDSOA focused entirely on communications made to the government within the context of an official proceeding. "Parties who are awarded antidumping distributions under the [CDSOA] 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." *SKF*, 556 F.3d at 1351-1352. Indeed, the Federal Circuit has held that a producer who initially supports an antidumping petition, but later declines to take a position, may nevertheless receive CDSOA distributions if the petition is successful. See

Pet. App. 10a-11a (discussing *PS Chez Sidney, LLC* v. *ITC*, 684 F.3d 1374 (Fed. Cir. 2012)). In *AID*, by contrast, the Court emphasized that, under the challenged provision, "[a] recipient cannot avow the belief dictated by the Policy Requirement when spending [federal] funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its time and dime." 133 S. Ct. at 2330.

c. Petitioners' reliance (Pet. 24-26) on *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653 (2011), is also misplaced. In *IMS Health*, this Court invalidated a state statute that restricted the acquisition and use by pharmaceutical manufacturers of records containing information about the medications a particular doctor had prescribed. *Id.* at 2659, 2667-2672. The Court determined that the statute had been "designed to impose a specific, content-based burden on protected expression." *Id.* at 2664; see *id.* at 2663 (explaining that the statute in *IMS Health* "disfavor[ed] marketing, that is, speech with a particular content"). The Court assumed, without deciding, that the state statute should be evaluated under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). *IMS Health*, 131 S. Ct. at 2667-2668. It recognized that, under the *Central Hudson* test, even a content-based speech restriction is constitutional so long as it "directly advances a substantial governmental interest and * * * is drawn to achieve that interest." *Ibid.* The Court concluded, however, that the particular statute at issue did not satisfy those requirements. *Id.* at 2667-2672.

Petitioners do not contend that this case is factually analogous to *IMS Health*. They instead focus (Pet.

25) on a half-sentence from *IMS Health*, in which the Court noted that the State had "offer[ed] no explanation why remedies other than content-based rules would be inadequate" to further one of the asserted purposes of the state statute at issue in that case. 131 S. Ct. at 2669. According to petitioners, that half-sentence compels the conclusion that the CDSOA's distribution scheme was unconstitutional, because (in petitioners' view) the purposes of the distribution scheme would have been equally well-served by a statute that did not differentiate between producers who supported an antidumping petition and producers who did not.

Petitioners' argument disregards the significant differences between the CDSOA and the state statute at issue in *IMS Health*. The Court in *IMS Health* had no occasion to consider, and did not cast doubt on, the validity of a governmental scheme to reward producers who successfully supported an effort to enforce federal policy through administrative proceedings. Nor does the Court's analysis of the very different statute at issue in *IMS Health* suggest that the government would be foreclosed from carrying out such a reward objective by the only realistic means possible—examining whether a producer in fact supported the relevant antidumping petition.

IMS Health also does not support petitioners' contention that the CDSOA is insufficiently tailored (Pet. 21, 26-27) to achieve the purpose of rewarding producers who contribute to an antidumping petition's success. Although some producers (such as producers who initially filed the petition) might be viewed as having contributed more than others, Congress permissibly chose to reward all parties whose assistance

benefited the government, without making more fine-grained distinctions among petition supporters. See *SKF*, 556 F.3d at 1358. As this Court recognized in *Board of Trustees* v. *Fox*, 492 U.S. 469 (1989)—on which the Court in *IMS Health* relied, see 131 S. Ct. at 2667-2668—the *Central Hudson* test is satisfied by a fit between means and ends "that is not necessarily perfect, but reasonable." 492 U.S. at 480; see *ibid.* (explaining that the test largely "leave[s] * * * to governmental decisionmakers to judge what manner of regulation may best be employed").[4]

2. Petitioners additionally contend (Pet. 29-34) that this Court's review is warranted because the court of appeals' application of the First Amendment in the unique context of the CDSOA conflicts with decisions of other circuits applying the First Amendment to other statutes. Petitioners are 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

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[4] Petitioners' reliance on *IMS Health*'s application of the *Central Hudson* test also disregards that the court of appeals in *SKF* did not rely exclusively on *Central Hudson* in concluding that the CDSOA is constitutional. Rather, the court emphasized that it would reach the same result if it applied "the test for speech combined with conduct in *United States* v. *O'Brien*." *SKF*, 556 F.3d at 1355 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.").

involved in "actively promoting and significantly supporting a state initiative authorizing gaming." *Id.* at 409 (internal quotation marks, citation, and brackets omitted). That decision is inapposite here, since "[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." *SKF*, 556 F.3d at 1356 n.32 (quoting *Lac Vieux*, 172 F.3d at 408). Petitioners' speculation (Pet. 30-31) that the Sixth Circuit would extend its approach in *Lac Vieux* to a statute that rewards assistance in government enforcement efforts during the course of administrative proceedings provides no basis for further review of the court of appeals' decision in this case.

The decision below also does not conflict with *Hoover* v. *Morales*, 164 F.3d 221 (5th Cir. 1998). In *Hoover*, the Fifth Circuit preliminary 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. Such a categorical bar against disagreeing with the State in that context bears little resemblance to the CDSOA, which polls industry participants in an effort to determine how to effectuate government policy, and does not forbid parties from expressing particular viewpoints. Cf. *SKF*, 556 F.3d at 1351-1352 ("Parties who are awarded antidumping distributions under the [CDSOA] 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.").

Finally, the decision below does not conflict with the Ninth Circuit's decision in *Valle Del Sol Inc.* v. *Whiting*, 709 F.3d 808 (2013), or the Seventh Circuit's decision in *ACLU* v. *Alvarez*, 679 F.3d 583 (2012). In *Valle del Sol*, the Ninth Circuit affirmed the grant of a preliminary injunction against enforcement of a measure that prohibited roadside solicitation of day labor. 709 F.3d at 814-815. The Ninth Circuit concluded that the speech ban was broader than necessary to effectuate the State's asserted interest in traffic safety. *Id.* at 825-828. In *Alvarez*, the Seventh Circuit affirmed the grant of a preliminary injunction against enforcement of a statute prohibiting unconsented audio recording, as applied to persons recording the public activities of on-duty police officers. 679 F.3d at 586. The court reasoned, in part, that the statute did not sufficiently advance the State's interest in protecting conversational privacy. *Id.* at 604-608. Neither decision compels the conclusion that rewarding industry members who aid in the successful enforcement of government antidumping policies is unconstitutional.[5]

3. In any event, the merits of petitioners' as-applied challenge are of limited prospective significance because the CDSOA was repealed in 2006. There is consequently no possibility that the decision below could affect the positions of industry participants with respect to any pending or future antidump-

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[5] Petitioners are also wrong in suggesting (*e.g.*, Pet. 29) that this Court's review is warranted to resolve "divisions within the Federal Circuit." The majority below perceived no inconsistency in its own precedent, and any such inconsistency would be for the court of appeals itself to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ing proceedings. Petitioners point out (Pet. 34-36) that proceeds from duties on goods that entered the United States before October 1, 2007, continue to be distributed under the CDSOA's scheme. But that steadily decreasing set of distributions is substantially smaller than it was four years ago when this Court denied certiorari in *SKF*.

Finally, contrary to petitioners' contention (Pet. 34), the court of appeals' application of the First Amendment in the unique context of the CDSOA distribution scheme will not necessarily affect the constitutional analysis of other statutes. Petitioners have not identified any other statute that is substantially similar to the CDSOA for purposes of First Amendment analysis. Nor have they identified any Federal Circuit decision, in the nearly five years since *SKF* was decided, that treats *SKF* as outcome-determinative of the constitutionality of another statutory scheme. Further review is not warranted.[6]

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[6] There is no sound basis for petitioners' suggestion (Pet. 38) that the Court should grant the petition, vacate the judgment below, and remand for further proceedings in light of either *AID* or *IMS Health*. For reasons already discussed, neither decision is relevant here, and both had been issued well before the court of appeals decided this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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