No. 10-

IN THE

Supreme Court of the United States

NUCOR CORPORATION,

Petitioner,

v.

UNITED STATES AND TATA STEEL IJMUIDEN BV F/K/A CORUS STAAL BV,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tariff Act of 1930—which defines "dumping" as "the sale or likely sale of goods at less than fair value" and "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise"—unambiguously excludes above-fair-value sales (*i.e.*, those sales that do not constitute "dumping") from the statutory formula for "weighted average dumping margin."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Nucor Corporation ("Nucor"). Nucor has no parent company, and no publicly held company owns 10% or more of Nucor's stock. Capital World Investors, a privately held entity, owns approximately 12% of Nucor's stock.

Respondents are the United States and Tata Steel Imjuiden BV f/k/a Corus Staal BV.

In addition to Petitioner, Plaintiffs-Appellants below included United States Steel Corporation which is also being served as a Respondent. Before the Court of International Trade, Plaintiffs also included Gallatin Steel Company, SSAB North American Division, Steel Dynamics, Inc., and ArcelorMittal USA, Inc. These parties are no longer involved in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nucor Corporation respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is available at 621 F.3d 1351 and is reprinted in the Appendix ("App.") at 1a-27a. The decision of the United States Court of International Trade is available at 637 F. Supp. 2d 1199 and is reprinted at App. 28a-62a. The final determination of the Department of Commerce is available at 72 Fed. Reg. 25,261 and is reprinted at App. 63a-78a.

JURISDICTION

The United States Court of Appeals for the Federal Circuit rendered its decision on October 4, 2010. App. 2a. A timely petition for rehearing en banc was denied on February 23, 2011. App. 79a-81a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tariff Act of 1930 provides, in relevant part:

If—

> (1) the administering authority determines that a class or kind of foreign merchandise is being,

or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

* * *

(34) Dumped; dumping

The terms "dumped" and "dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

> The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

> The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

19 U.S.C. §§ 1673, 1677(34), (35).

STATEMENT

This Petition presents a question of major national importance regarding the proper interpretation of the federal Tariff Act of 1930: whether the Act—which defines "dumping" as "the sale or likely sale of goods at less than fair value" and "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise"—unambiguously excludes above-fair-value sales (*i.e.*, those sales that do not constitute "dumping") from the statutory formula for "weighted average dumping margin." "Weighted average dumping margin" is defined as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the

aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35). It is a fraction in which the numerator is the "aggregate dumping margins" for a particular exporter. Thus, the meaning of "weighted average dumping margin" is tied to the meaning of the statutory terms "dumping" and "dumping margin." The United States Department of Commerce ("Commerce"), after taking the position that the statute "unambiguously requires [it] to consider only transactions where [there is dumping] in calculating dumping margins," Brief for United States, *Timken Co. v. United States*, No. 03-1098, 2003 WL 24305310, at *18-19 (Fed Cir. May 19, 2003), now construes the statute to permit consideration of above-fair-value sales, *i.e.*, non-dumped sales, such that they may offset dumped sales in the calculation of "weighted average dumping margin."

The importance of this question of statutory construction is indisputable. Whether above-fair-value sales are considered in calculating "weighted average dumping margin" has a substantial effect on the resulting antidumping duty to be imposed under the Tariff Act. In some cases, above-fair-value sales may offset dumping entirely, leaving American businesses without the statutory protection that Congress intended to give them in enacting the Tariff Act. *See* Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (adopting the law "to encourage the industries of the United States [and] to protect American labor"); *see also Agro Dutch Indust. Ltd. v. United States*, 508 F.3d 1024, 1027 (Fed. Cir. 2007) ("The purpose of the antidumping statute is to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers.").

Indeed, this is such a case. Here, Commerce's inclusion of above-fair-value sales in its calculus and subsequent recalculation of the "weighted average dumping margin" in this investigation reduced that margin from 2.59% to *zero*, resulting in the revocation of the *entire* antidumping duty order covering hot-rolled steel from the Netherlands. *See U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353, 1355 (Fed. Cir. 2010). And the Federal Circuit endorsed Commerce's construction of the Act, allowing "sales made at less than fair value [to be] offset by those made above fair value." *Id.* at 1355. This offsetting thus allowed Respondent Tata Steel Ijmuiden BV (f/k/a Corus Staal BV) ("Tata Steel" or "Corus") to avoid entirely the imposition of an antidumping duty—notwithstanding the undisputed fact that it sold merchandise in the United States at less than fair value that had materially injured the U.S. steel industry, leaving these instances of dumping unremedied and future dumping undeterred.

Notably, because the Tariff Act applies across all industries, Commerce's impermissible construction of the Act will have a profound and deleterious effect on American businesses. Improperly enforced antidumping laws will cause domestic industries to suffer "lost sales, declining prices, declining market share, and declining profits." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1364 (Fed. Cir. 2007).

By contrast, proper enforcement of the antidumping laws would create a level playing field and allow American industries to defend themselves against unfair competition. *See, e.g.*, *Polyvinyl Alcohol from China, Japan and Korea*, USITC Pub. No. 4067, at 34 (Mar. 2009) (finding that imposition of orders led to sharp decreases

in the volume of affected imports and increases in import prices, permitting the domestic industry to return to profitability). In other words, antidumping duty law "is no less than the essential guardian of fair trade between the myriad of the world's countries and economic systems." Michael Kabik, *The Dilemma of "Dumping" from Non-Market Economy Countries*, 6 Emory Int'l L. Rev. 339, 353 (1992). Given the importance of antidumping laws to American industry and labor and thus to the health of the economy, it is clear that this Petition presents a question of great national importance.

A grant of certiorari is warranted to correct Commerce's invalid construction of the Tariff Act. The Act defines "dumping" as "the sale or likely sale of goods *at less than fair value*," 19 U.S.C. § 1677(34) (emphasis added), and defines "dumping margin" as "the amount by which the normal value *exceeds* the export price or constructed export price," *id.* § 1677(35)(A) (emphasis added). Yet Commerce has construed the Act to somehow include in the calculation of a "weighted average dumping margin" domestic sales that were made at *more than fair value* and thus *did not* constitute dumping. This makes no sense. This interpretation is irreconcilable with the Tariff Act's text and is incompatible with the Act's core purpose of "protect[ing] domestic manufacturing against foreign manufacturers who sell at less than fair market value." *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994).

This unlawful (and harmful) construction of the Tariff Act can be remedied only by this Court. Because a party aggrieved by a final determination of the International Trade Commission or the Department of Commerce may

appeal such a decision only to the Court of International Trade and then to the Federal Circuit, *see* 19 U.S.C. § 1516a; 28 U.S.C. §§ 1295, 1581, there is no possibility of a circuit split on this issue. Moreover, the Federal Circuit denied a petition for rehearing en banc in this case, thus clearly demonstrating that it has no intention of revisiting this important issue. *See* App. 79a-81a. A grant of certiorari is therefore warranted to allow the Court to settle this important question of federal law. *See* S. Ct. Rule 10(c).

1. The Tariff Act Of 1930

Congress enacted the Tariff Act in order "to encourage the industries of the United States" and to "protect American labor" from unfair trade practices. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930). Simply put, "[t]he purpose of the Act is to prevent dumping." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); *see also Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1372 (Fed. Cir. 2007) ("The antidumping laws protect United States industries against the domestic sale of foreign manufactured goods at prices below the fair market value of those goods in the foreign country."); *Agro Dutch Indus. Ltd.*, 508 F.3d at 1027 ("The purpose of the antidumping statute is to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers."). The Tariff Act's antidumping protections are based upon similar provisions in the Anti-Dumping Act of 1921, ch. 14, 42 Stat. 9, which were adopted to "protec[t] our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are

destroyed . . . .” H.R. Rep. No. 67-1, at 23 (1921). Like its predecessor statute, the Tariff Act protects American businesses and American labor—and thus the American economy—from dumping, which the Act defines as “the sale or likely sale of goods at less than fair value.” 19 U.S.C. § 1677(34).

The Act’s key form of protection is in the form of antidumping duties imposed on “foreign merchandise . . . sold in the United States at less than its fair value.” 19 U.S.C. § 1673(1). The purpose of these antidumping duties is to “remedy disparities in the value of imported and domestic merchandise created by impermissible international trade practices.” *Bethlehem Steel Corp. v. United States*, 162 F. Supp. 2d 639, 643 (Ct. Int’l Trade 2001).

Under the Act, Commerce must impose duties upon imported merchandise that “is being, or is likely to be, sold in the United States at less than its fair value” and that “materially injure[s]” or “threaten[s]” to injure a domestic industry. 19 U.S.C. § 1673; *id.* § 1677 (34) (“The terms ‘dumped’ and ‘dumping’ refer to the sale or likely sale of goods at less than fair value.”). Once Commerce identifies a domestic sale of foreign merchandise that constitutes “dumping,” it must identify the “dumping margin” for the imported merchandise at issue. The “dumping margin” is “the amount by which the normal value [NV] exceeds the export price [EP] or constructed export price [CEP].” *Id.* § 1677(35)(A).[1] A “weighted average dumping margin”

1. “Normal value” generally means the “price at which the good or a foreign like product is sold in the foreign home market in the ordinary course of trade.” *NTN Bearing Corp. of Am. v. United States*, 295 F.3d 1263, 1266 (Fed. Cir.

is then calculated by "dividing the aggregate dumping margins . . . by the aggregate export prices . . . of such exporter or producer." *Id.* § 1677(35)(B). "Weighted average dumping margin" thus is defined with reference to "dumping margins," the aggregate of which constitutes the numerator in the statutory formula for "weighted average dumping margin." The duty imposed on dumped merchandise is equal in amount to the "weighted average dumping margin." *See id.*

2. Commerce Previously Construed The Act To Exclude Above-Fair-Value Sales From The Calculation Of "Weighted Average Dumping Margin"

For decades, Commerce excluded above-fair-value sales from its calculation of "weighted average dumping margin" under Section 1677(35). Its change of course and recalculation of "weighted average dumping margin" in this case marks the first time that Commerce has offset dumping with above-fair-value sales in calculating an antidumping duty margin.

The exclusion of these sales—sales that do not

2002) (citing 19 U.S.C. § 1677b(a)(1)(B)(i). "Export price" generally means the "price at which the good is sold to an unaffiliated purchaser in the U.S. market." *Id.* (citing 19 U.S.C. § 1677a(a)). "Constructed export price" means "the price at which the subject merchandise is first sold . . . in the United States . . . to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of [19 U.S.C. § 1677a]." 19 U.S.C. § 1677a(b); *see RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) ("Under section 1677a(c), the price used to establish constructed export price is subject to specified increases and reductions. Further adjustments to constructed export price are set forth in section 1677a(d).").

constitute "dumping"—from the calculation of "weighted average dumping margin" is sometimes referred to as "zeroing." *See Timken Co. v. United States*, 354 F.3d 1334, 1338-39 (Fed. Cir. 2004). The Court of International Trade first considered the exclusion of above-fair-value sales in *Serampore Industries Pvt. Ltd. v. United States Department of Commerce*, 675 F. Supp. 1354 (Ct. Int'l Trade 1987). That court upheld Commerce's construction of the Act, emphasizing that "[a] plain reading of the statute discloses no provision for Commerce to offset sales made at [less than fair value] with sales made at [or above] fair value." *Id.* at 1360.

Commerce employed this construction of the Act in the initial investigation underlying this case. In 2000, Commerce and the International Trade Commission initiated antidumping duty investigations into hot-rolled carbon steel flat products from a variety of countries, including the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 65 Fed. Reg. 77,568 (Dec. 12, 2000) (initiation of antidumping duty investigation). Tata Steel was the only Dutch respondent. Consistent with its longstanding practice, Commerce excluded Tata Steel's above-fair-value sales when calculating the weighted average dumping margin, which resulted in a duty margin of 2.59%. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 55,637 (Nov. 2, 2001) (amended final determination of sales at less than fair value).

Notably, Commerce had taken the position that its construction of "weighted average dumping margin" was compelled by the unambiguous terms of the Act. In *Timken*

Co. v. United States, a Japanese exporter of tapered roller bearings had challenged Commerce's practice of excluding above-fair-value sales from its calculation of "weighted average dumping margin." 354 F.3d at 1338-39. Before the Federal Circuit, the United States argued that "[t]he antidumping statute *unambiguously requires* Commerce to consider only transactions where the price falls below [normal value] in calculating dumping margins." Brief for United States, *Timken Co. v. United States*, No. 03-1098, -1238, 2003 WL 24305310, at *18 (Fed. Cir. filed May 19, 2003) (emphasis added). Expanding on this point, the United States argued that, "[c]onsidering the[] definitions [of "dumping margin" and "weighted-average dumping margin"] together, the statute plainly directs Commerce to aggregate the entries where NV *exceeds* U.S. price in determining the 'weighted average dumping margin.' The statute neither provides nor suggests that this amount may be reduced or offset by other EP or CEP transactions that exceed NV." *Id.* at *19 (emphasis in original). The *Timken* court considered this a "close question," ultimately ruling that Commerce's construction of the Act was a permissible one. *Timken*, 354 F.3d at 1341.

3. The World Trade Organization And Commerce's Change In Position

In 1994, the United States became a signatory to the Uruguay Round Agreements and thus a member of the World Trade Organization ("WTO"). The Uruguay Round Agreements, including the WTO Antidumping Agreement,[2] have been incorporated into federal law

2. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement"), *available at* http://www.wto.org/

through the Uruguay Round Agreements Act, 19 U.S.C. § 3511(d).

Decisions by the WTO interpreting and applying the Uruguay Round Agreements may be implemented into federal law pursuant to administrative procedures set out in Sections 123 and 129 of the Uruguay Round Agreements Act. Under Section 123, Commerce may institute a proceeding to amend, rescind, or modify an agency regulation or practice that is found to be inconsistent with any of the Uruguay Round Agreements. *See* 19 U.S.C. § 3533(g)(1).[3] Section 129 allows for the amendment, rescission, or modification of an application of an agency regulation or practice in a specific anti-dumping, countervailing duty, or safeguards proceeding that is found to be inconsistent with U.S. obligations under the Uruguay Round Agreements. *See* 19 U.S.C. § 3538(a)(1), (b)(1).[4] In either scenario, however, federal law controls:

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english/docs_e/legal_e/19-adp.pdf.

3. Before Commerce may amend, rescind, or modify an agency practice pursuant to a Section 123 proceeding, the United States Trade Representative ("USTR") must consult with the appropriate congressional and private sector advisory committees and provide the relevant congressional committees with a report that describes the proposed modification, the reasons for the modification, and a summary of the advice obtained from the private sector advisory committees. In addition, Commerce must provide an opportunity for public comment before determining whether and how to implement the agency regulation or practice at issue. *See* 19 U.S.C. § 3533(g)(1).

4. Prior to a Section 129 determination, the USTR must consult with the relevant congressional committees and direct that the pertinent agency issue a new determination not inconsistent with the findings of the WTO's Dispute

"no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a).

In 2003, the European Communities instituted an action before the WTO's Dispute Settlement Body ("DSB") to challenge Commerce's exclusion of above-fair-value sales in fifteen antidumping investigations, including the investigation that resulted in the imposition of a 2.59% antidumping duty upon Tata Steel's sales of hot-rolled carbon steel flat products. *See* Request for Consultations, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/1, G/L/630, G/ADP/D49/1 (June 19, 2003). A DSB panel concluded that the exclusion of above-fair-value sales did not comply with the WTO Antidumping Agreement, *see* Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005), and the DSB adopted this portion of the panel decision, *see* Action by the Dispute Settlement Body, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/17 (May 15, 2006).

In response to the WTO's ruling that the exclusion of above-fair-value sales did not comply with the WTO Antidumping Agreement, Commerce initiated Section 123 and 129 proceedings. In the Section 123 proceeding, Commerce elected to abandon its practice of zeroing in future less-than-fair-value investigations. *See*

Settlement Body or Appellate Body. *See* 19 U.S.C. § 3538(a)(1), (a)(3)-(5), (b)(1)-(3).

Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dec. 27, 2006). In other words, Commerce abandoned its position that exclusion of above-fair-value sales from the calculation of "weighted average dumping margin" was mandated by the unambiguous terms of the Tariff Act. In addition, in the Section 129 proceeding, Commerce recalculated the antidumping margin relating to its order on hot-rolled carbon steel flat products from the Netherlands. Its recalculation resulted in a reduction of the margin from 2.59% to zero. *See Implementation of the Findings of the WTO Panel in U.S.-Zeroing (EC)*, 72 Fed. Reg. 25,261, 25,262 (May 4, 2007). Accordingly, Commerce revoked the antidumping duty order on hot-rolled carbon steel flat products from the Netherlands. *Id.*

4. Proceedings In The Courts Below

Nucor and U.S. Steel, as well as other members of the domestic industry, filed suit in the Court of International Trade ("CIT") to challenge Commerce's rulings in both the Section 123 proceeding and the Section 129 proceeding. The CIT upheld Commerce's rulings, relying on *Timken* for the proposition "that Congress's definition of 'dumping margin' is unclear as to whether positive and negative value dumping margins fit within the description of that term." *U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199, 1210 (Ct. Int'l Trade 2009) (citing *Timken*, 354 F.3d at 1341-43).

Nucor appealed to the Federal Circuit. Like the CIT, the Federal Circuit held that the Tariff Act was not "'so clear as to compel a finding that Congress expressly

intended to require zeroing.'" *U.S. Steel Corp.*, 621 F.3d at 1361 (quoting *Timken*, 354 F.3d at 1341). The court thus concluded that it was bound by circuit precedent and, in any event, the court agreed with *Timken*. *Id.* In the court's view, *Timken* had correctly held that "Congress has given Commerce discretion in forming its methodology in antidumping investigations, and where the statutory language does not address the methodology at issue, we decline to conclude that Congress has manifested its unambiguous intent." *Id.* Nucor filed a petition for rehearing en banc, which the Federal Circuit denied. *See* App. 79a-81a.

REASONS FOR GRANTING THE PETITION

I. This Case Satisfies The Rule 10 Standard For Granting Certiorari

This case presents an important question of federal law: whether the Tariff Act of 1930—which defines "dumping" as "the sale or likely sale of goods at less than fair value" and "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise"—unambiguously excludes above-fair-value sales (*i.e.*, those sales that do not constitute "dumping") from the statutory formula for "weighted average dumping margin." This question, the answer to which will have a profound effect on the administration of the antidumping provisions of the Tariff Act, is of indisputable importance. American businesses in diverse industries rely on the antidumping laws to ensure that foreign corporations—especially those in non-market economies—compete fairly in U.S. markets. The antidumping laws also help to preserve domestic

manufacturing capacity and employment from unfair trade practices. In short, they are a critical piece of the United States' comprehensive trade policy.

International trade represents an enormous share of the United States economy. Last year, United States imports totaled more than $2.3 trillion, while exports totaled more than $1.8 trillion. *See Annual 2010 Trade Highlights*, U.S. Census Bureau 2010, *available at* http://www.census.gov/foreign-trade/statistics/highlights/annual.html. When international trade functions properly, it can lead to greater wealth, more jobs, and a higher standard of living. Global markets do not, however, function in a vacuum. Undergirding this country's trade policy are laws and regulations ensuring that markets and industries can function properly and fairly. Chief among these are the federal antidumping laws.

The antidumping laws "prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers." *Agro Dutch Indust. Ltd.*, 508 F.3d at 1027. Without such laws, American industry would suffer "lost sales, declining prices, declining market share, and declining profits." *Wheatland Tube Co.*, 495 F.3d at 1364. In order to remedy and prevent such harm to our economy, antidumping laws "impos[e] duties on foreign exports, which [are] intended to raise the United States market price for the subject merchandise and thereby increase sales and profits of domestic producers." *Id.* This in turn "equalize[s] competitive conditions between foreign exporters and domestic industries affected by dumping." *Huaiyin Foreign Trade Corp. v. United* States, 322 F.3d

1369, 1379 (Fed. Cir. 2003) (citations omitted).

Antidumping law is thus an essential attribute of this nation's comprehensive approach to global trade:

> It serves as a regulator of unfair trade practices and imposes penalties where the rules of the international trade game are violated. It promotes equitable footing between domestic and foreign producers in the domestic market and balances the inherent disparities in international trade. It further serves to deter future dumping, both collectively against specific industries and individually against specific producers and importers . . . . In an age of global and interdependent economies, antidumping duty law is an indispensable element. Antidumping duty law is no less than the essential guardian of fair trade between the myriad of the world's countries and economic systems.

Kabik, *supra*, at 353.

Congress has long used antidumping laws to combat unfair trade practices. Congress passed the first antidumping law in 1916 and five years later adopted the Anti-Dumping Act of 1921, which established dumping duties as a non-penal tax to comprehensively "equalize competitive conditions between the exporter and the American industries affected" by dumping. *C.J. Tower & Sons v. United States*, 71 F.2d 438, 445 (1934). This was followed by the Tariff Act of 1930, which was designed "to encourage the industries of the United States" and to "protect American labor" from the unfair trade practices

of foreign competitors. Tariff Act of 1930, ch. 497, 46 Stat. 590.

Congress has never retreated from this stance, repeatedly reaffirming its commitment to protect fair trade by policing dumping. *See, e.g.*, Trade Agreements Act of 1979, S. Rep. No. 96-249 at 61 (1979) (noting that the bill "establish[es] the conditions for imposition of antidumping duties consistent with" international agreements); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-826, at 807 (1994) ("[T]he Agreement preserves the ability of U.S. industries to obtain meaningful relief from dumped imports into the U.S. market and ensures U.S. exporters fair treatment in foreign antidumping investigations."). In short, antidumping laws have been and continue to be an indispensible feature of U.S. international trade policy.

Indeed, one need only look at recent antidumping investigations to see the continued necessity of these laws. For example, the U.S. International Trade Commission recently determined that the domestic industry producing certain non-canned warmwater shrimp was materially injured by imports from Brazil, China, Ecuador, India, Thailand, and Vietnam. *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, USITC Pub. No. 3748, at 36 (Jan. 2005). According to the Commission, "[t]he large and increasing volume of subject imports that entered the United States during the period examined caused domestic prices to decline. These declines led to declines in operating revenues for both fishermen and processors, poor financial performance, and declining employment." *Id.* at 35. Additionally, "[e]mployment

declined throughout the period examined and wages paid to production workers declined from 2001 to 2003 and were lower in interim 2004 than in interim 2003." *Id.* at 31.

Unfortunately, this example is not unique. *See, e.g., Polyvinyl Alcohol from China, Japan and Korea*, USITC Pub. No. 4067, at 34 (Mar. 2009) (determining that if certain antidumping duty orders were revoked, "low-priced cumulated subject imports would likely increase in absolute terms and in their market share at the expense of the domestic industry, significantly undersell the domestic like product, and depress and suppress prices of the domestic like product," which would "likely materially impact the domestic industry, including the domestic industry's output, sales, market share, employment, profits, and return on investment"); *Certain Potassium Phosphate Salts from China*, USITC Pub. No. 4171, at 29 (July 2010) (finding that "the domestic industry producing DKP is materially injured by reason of subject imports of DKP from China found by Commerce to be sold in the United States at less than fair value and subsidized by the Government of China" and that "there is a sufficient causal nexus between the subject imports and the domestic industry's poor performance during the period examined to attribute significant adverse effects on the domestic industry to subject imports"); *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine*, USITC Pub. No. 3546, at 32-33 (Oct. 2002) (determining that "subject imports were a significant cause of material injury to the entire industry" because "as the cumulated subject imports took sales from the domestic industry, the domestic industry experienced growing operating losses, an

increased cost-price squeeze, and cost inefficiencies as production and shipments declined," and "[b]ecause of the subject imports' significant underselling and adverse price effects, the domestic industry could not raise prices to recover increased costs"). Indeed, there are approximately 256 antidumping duty orders presently in effect, covering industrial, agricultural, and consumer products that range from chemicals and steel, to orange juice and garlic, to school supplies and candles. *See Antidumping and Countervailing Duty Orders in Effect* (Mar. 21, 2011), *available at* http://www.trade.gov/ia. And these orders cover billions of dollars of imported goods annually. *See, e.g.*, Statement of Allen Gina, U.S. Customs and Border Protection, Senate Finance Committee, International Trade, Customs, and Global Competitiveness Subcommittee at 1 (May 5, 2011) (highlighting the "$5.4 billion of goods" subject to antidumping and countervailing duty orders in fiscal year 2010).

As Congress has determined, antidumping laws are a necessary and effective safeguard for American businesses in various industries suffering from trade-disruptive pricing practices originating in foreign markets. By ameliorating the harms to domestic industries and their workers from unfairly priced imports, U.S. antidumping laws have in turn enabled these industries to reinvest in their production processes, improve efficiency, and become profitable again. *See, e.g.*, *Polyvinyl Alcohol from China, Japan and Korea*, USITC Pub. No. 4067, at 34 (Mar. 2009) (finding that the antidumping duty orders "restrained the volume of cumulated subject imports shipped to the U.S. market," "contributed to the industry's improved financial performance during the period of review," and allowed "the domestic industry . . . to increase or maintain

its market share and increase its production capacity, production, and U.S. shipments"); *Ferrovanadium from China and South Africa*, USITC Pub. No. 4046, at 34 (Nov. 2008) (finding that "after imposition of the antidumping duty orders . . . the domestic industry . . . increased its market share over the period of review, and its overall performance indicators improved considerably"); *Petroleum Wax Candles from China*, USITC Pub. No. 3790, at 23 (July 2005) ("[T]he antidumping duty order had a significant restraining effect on subject imports. After imposition of the order, the volume of subject imports sharply declined and the average unit value for the imports doubled. U.S. producers were able to raise their prices and regain market share . . . ."). In a very real sense, antidumping laws ensure the survival of American jobs and industries.

Antidumping laws have been particularly important in redressing harm caused to American industry by unfair competition from non-market economies. In such countries—most notably China—prices and costs are distorted by government intervention and centralized control over the economy. *See* 19 U.S.C. § 1677(18) (defining a non-market economy country as one that "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise"). This nationalized business model allows goods to be produced both at prices and in volumes that would be unsustainable in a market economy such as the United States. *See id.* Various segments of American industry have been devastated repeatedly by the unfair competition emerging from such markets. In fact, more than one-third of all current antidumping duty orders involve imports from China or Vietnam. *See Antidumping and Countervailing Duty Orders in Effect* (Mar. 21, 2011).

China, in particular, has inflicted severe harm through unfair trade practices. *See* Robert E. Scott, *The China Trade Toll*, Economic Policy Institute (July 2008) ("The growth of U.S. trade with China since China entered the World Trade Organization in 2001 has had a devastating effect on U.S. workers and the domestic economy. Between 2001 and 2007 2.3 million jobs were lost or displaced, including 366,000 in 2007 alone."). Indeed, Chinese dumping in particular inflicts serious harm to American labor. For example, Chinese dumping in the market for oil country tubular goods ("OCTG") alone resulted in "OCTG pipe producers los[ing] 2,421 [steelworker jobs] between the end of 2008 and September 2009." *USW Applauds Final ITC Vote Placing Tariffs on Oil Tubular China Imports* (May 3, 2010), *available at* http://www.usw.org/media_center/releases_advisories?id=0285. Antidumping duties have been *directly* responsible for preventing job losses from Chinese unfair trade practices. *See, e.g., id.*; *see also Petroleum Wax Candles from China*, USITC Pub. No. 3790, at 23 (Aug. 2005) (determining that revoking an antidumping duty order on petroleum wax candles from China "would result in employment declines for domestic firms, particularly the smaller and medium-sized companies that do not utilize heavily automated processes"). Without proper enforcement of antidumping provisions of the Tariff Act, American industry simply cannot overcome the unfair trade practices of these non-market economies.

But antidumping protections are decimated by the decision below. By upholding Commerce's determination that the Tariff Act permits offsetting, importers found to have engaged in dumping will be permitted to engage in dumping that far outpaces any duty that might be imposed upon the dumped merchandise. Indeed, as

here, they may avoid duties altogether. This avoidance of statutory obligations gives foreign manufacturers an unfair and legislatively unintended advantage over domestic competitors. Offsetting virtually guarantees that American businesses and workers will suffer substantial losses across all industries because of unfair trade. *See* Jenna Greene, *U.S. Trade Policy Nears Zero Hour*, Nat. L. J. (Apr. 6, 2010) ("What makes zeroing so significant is that, unlike disputes over a particular commodity—say, cotton from Brazil—the methodology is relevant in every dumping case.").

Worse, offsetting allows dumpers to go undetected by allowing foreign manufacturers to "mask" their dumped sales. As several Members of the U.S. Senate warned in a letter to Commerce and the USTR, permitting above-fair-value sales to offset dumping "would result in a dramatic weakening of the antidumping laws. *Dumped sales would be masked by non-dumped sales. Unfair trade would go undetected and without remedy.*" *See* Letter from Sens. Rockefeller, Baucus, Craig, Durbin, Crapo, Byrd, Voinovich, Conrad, Graham, Bayh, and Dole to the Sec. of Commerce and the U.S. Trade Representative (Dec. 11, 2006) (emphasis added) (quoted in Raj Bhala & David A. Gantz, *WTO Case Review 2006*, 24 Ariz. J. Int'l & Comp. Law 299, 382-83 (2007)). Further, as the United States has explained to this Court: "[i]f non-dumped sales are included in the calculation of dumping margins, then foreign producers and importers will be better able to target particular markets within the United States in which to lower prices below normal value when necessary to capture sales." Brief of the Solicitor General, *Koyo Seiko Co., Ltd. v. United States,* No. 04-87, at 17 n.7

(U.S. filed Sept. 30, 2004).[5] Excluding above-fair-value sales protects against the problems created by masked dumping—it "ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Serampore*, 675 F. Supp. at 1360; *see also Timken*, 354 F.3d at 1343.

By allowing for offsetting, Commerce effectively signals to foreign manufacturers that dumping may go undetected and that, even if detected, the antidumping laws will not be fully enforced and may even go entirely unenforced. This effectively "green-lights" dumping by foreign manufacturers, especially those in non-market economies. Review by this Court is therefore needed to ensure that Congress's intent in enacting the antidumping laws—to protect American industry and labor by preserving a fair competitive balance between domestic producers and foreign manufacturers—is not thwarted by the decision below.

II. Review Of This Case Is Warranted To Correct Commerce's Impermissible Construction Of The Tariff Act

After having previously advanced the position that the definition of "weighted average dumping margin" "unambiguously requires [it] to consider only transactions where the price falls below [fair value] in calculating

5. To be sure, the Tariff Act includes specific protections against some forms of masked dumping. *See* 19 U.S.C. § 1677f-1(d)(1)(B). Nevertheless, permitting offsetting enables foreign manufacturers to "mask" dumped sales through practices not specifically addressed by the Tariff Act.

dumping margins," Brief for United States, *Timken Co. v. United States*, No. 03-1098, at 16 (Fed Cir. filed May 19, 2003), Commerce adopted the position that the statute permits above-fair-value sales to offset dumped sales in determining the "weighted average dumping margin." *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*; Final Modification, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006). And the Federal Circuit endorsed this construction of the Act, concluding that it was bound by circuit precedent in *Timken* and, in any event, agreeing with *Timken* that the Tariff Act was not "'so clear as to compel a finding that Congress expressly intended to require zeroing.'" *U.S. Steel Corp.*, 621 F.3d at 1361 (quoting *Timken*, 354 F.3d at 1341). Following *Timken*, the Federal Circuit noted that "Congress has given Commerce discretion in forming its methodology in antidumping investigations, and where the statutory language does not address the methodology at issue, we decline to conclude that Congress has manifested its unambiguous intent." *Id*. at 1362.

However, Commerce's construction of the Act is an impossible one. No deference to Commerce is warranted because the Tariff Act is clear on this point. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The text and purpose of the Tariff Act conclusively demonstrate that the statute

unambiguously precludes offsetting. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) ("[A court] must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable.").

The text of the Tariff Act is clear. Reading the term "weighted average dumping margin" *in pari materia* with the statutory definitions of "dumping" and "dumping margin" makes plain that the Act unambiguously requires the exclusion of above-fair-value sales from the calculation of "weighted average dumping margin." *See Virginia Int'l. Terminals, Inc. v. Edwards*, 398 F.3d 313, 317 (4th Cir. 2005) ("[U]nder a longstanding canon of interpretation, adjacent statutory subsections that refer to the same subject matter . . . must be read *in pari materia* as if they were a single statute.").

To begin, the entire antidumping statutory scheme is premised upon Congress's unambiguous decision to limit "dumping"—the conduct that the statute was designed to address—to a defined class of impermissible trade practices; that is, "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34). In other words, there is no permissible interpretation of the Tariff Act under which the "dumping margin" can be derived from domestic sales that do not themselves meet the definition of "dumping." There can only be a "dumping margin"—weighted average or otherwise—when there is "dumping." And the statute makes clear that domestic sales of imported goods at more than fair value do not constitute dumping. As a consequence, the "weighted average dumping margin" cannot be derived from sales that fall outside of Congress's chosen definition of the statute's key

term. That the statute does not use the term "zeroing," *see U.S. Steel Corp.*, 621 F.3d at 1361 ("Our case law has repeatedly examined the antidumping statute and found it to be 'silent or ambiguous' as to zeroing methodology."), does not introduce ambiguity; zeroing is merely jargon used by Commerce. The Tariff Act defines dumping. And that term must be interpreted faithfully and consistently throughout the statute, including in the definition of "dumping margin." *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 942-43 (2000).

Likewise, the statutory definition of the term "dumping margin"—which is defined as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," 19 U.S.C. § 1673—unambiguously precludes offsetting. By using the word "exceeds" in defining "dumping margin," Congress made clear its intent that there would be a "dumping margin" (and a "weighted average dumping margin") only where normal value is "greater than" export price, *i.e.*, *only where there is dumping*. This is because the plain meaning of "exceed" is "to be or go beyond" or "to be greater than." *See, e.g.*, *The American Heritage College Dictionary* 477 (3d ed. 1993) ("1. To be greater than; surpass. 2. To go beyond the limits of[.]"); *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 636 (2d ed. 1980) ("to be or go beyond (the given or supposed limit, measure, or quantity)"); *Webster's Third New International Dictionary* 791 (1st ed. 1981) ("to enlarge beyond," "to be greater than or superior to," "to be too much for," "to go beyond a limit set," "to go too far," "to be more or greater than others");[6] *see generally*,

6. *Webster's Third New International Dictionary* cites to the Constitution: "the number of representatives shall not exceed one

Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 724 (2011) (relying on *Webster's Third New International Dictionary* to determine the "ordinary meaning" of the term "applicable" in the Bankruptcy Code); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010) (consulting multiple dictionaries to determine the "plain meaning" of the term "award" in the Equal Access to Justice Act); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (construing a statutory term "in accordance with its ordinary or natural meaning" by citing Black's Law Dictionary); *Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992) (relying on *Webster's New International Dictionary* to determine the "plain meaning" of the term "exclusive" in a statute governing this Court's jurisdiction).[7]

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for every thirty thousand." *Webster's Third New International Dictionary* 791 (1st ed. 1981) (quoting U.S. Const. art. I, § 2, cl. 3).

7. Notably, the Federal Circuit has acknowledged this plain meaning of the term "exceeds." *See Timken*, 354 F.3d at 1341 ("[D]ictionaries define 'exceeds' as 'to be or go beyond (the given or supposed limit, measure, or quantity),' *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 636 (2d ed. 1980), or '1. To be greater than; surpass. 2. To go beyond the limits of,' *The American Heritage College Dictionary* 477 (3d ed. 1993)."). Yet the *Timken* court disregarded the plain and ordinary meaning of the term, concluding without any asserted basis that, "[a]t least in a mathematical context, 'exceeds' does not unambiguously preclude the calculation of a negative dumping margin." *Id*. A court should not so casually dismiss the plain and ordinary meaning of a statutory term, *see, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import."), especially where, as here, that meaning is confirmed by similar usage of the term in the statute.

Although no dictionary or even ordinary usage of "exceed" means to be "less than" or "fewer than," this is precisely the meaning that Commerce would give the statutory term and that the Federal Circuit has affirmed. Commerce construes the Tariff Act to allow offsetting by including above-fair-value sales in the calculation of "weighted average dumping margin." Following Commerce's logic, above-fair-value sales have "negative" dumping margins because (for those sales) the normal value is *less than* export price.

That the term "exceeds" should be given its plain, natural and reasonable meaning ("to be greater than") is confirmed by Congress's decision to give the term this precise meaning in other places in the Tariff Act. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (quotation omitted). For example, Section 1673c(b), which covers agency agreements to suspend antidumping investigations, uses the term "exceeds" consistent with its plain meaning. Commerce may enter into a so-called suspension agreement only so long as "the exporters of the subject merchandise agree" to cease certain exports and "to revise their prices to eliminate completely any amount by which the normal value of the merchandise which is the subject of the agreement *exceeds* the export price." 19 U.S.C. § 1673c(b)(2) (emphasis added). If "exceeds" could mean both to be "greater than" and to be "less than," this provision would require as a condition

of a suspension agreement that exporters *cut their above-fair-value prices to normal value*. Such a construction of the term "exceeds" would reduce this condition on suspension agreements to utter nonsense. To construe the term "exceeds" as Commerce does likewise would render 19 U.S.C. § 1673c(c)(1)(B) nonsensical.

The Federal Circuit's fundamental error was confusing the question of *whether* dumping is occurring with the question of *how much* dumping is occurring. Whether dumping is occurring is determined by answering a straightforward question: is a particular imported good being sold in the United States for less than it is being sold in the importer's home market? If it is, Commerce is then charged with identifying how much dumping is occurring—*i.e.*, evaluating a broader set of importation data to determine by how much the "normal value exceeds the export price or constructed export price." 19 U.S.C. § 1677(35)(A). Per the text of the statute, Commerce may not use a formula for calculating the "dumping margin" that negates its determination that imported merchandise has been "dumped" in the United States. Once Commerce has determined that "dumping" is occurring, by definition the answer to how much dumping is occurring cannot be "none" under this statutory scheme.

But that is the absurd result of the agency's interpretation. Commerce determined that dumping was occurring in this case. But by "offsetting" non-dumped sales against dumped sales, Commerce recalculated the dumping margin from 2.59% to zero and revoked the antidumping duty order. Commerce thus effectively redefined "dumping" to mean something different than the "sale or likely sale of goods at less than fair value,"

19 U.S.C. § 1677(34), as there is no question that Corus sold merchandise in the United States at less than fair value. In so doing, Commerce has redefined "dumping" in a manner that leaves domestic companies such as Nucor without any remedy for undeniable instances of this unfair trade practice. Although this Court should be "mindful of the expertise of agencies charged with implementing statutory directives," it "cannot . . . allow an agency . . . to rewrite the will of Congress." *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 990 (4th Cir. 1996).

At bottom, then, the Federal Circuit upheld an interpretation of the Tariff Act that is not only inconsistent with its text but at war with the statute's basic purpose. *See Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997); *Spilker v. Shayne Laboratories, Inc.*, 520 F.2d 523, 525 (9th Cir. 1975) ("It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.") (citing *Kokoszka v. Belford*, 417 U.S. 642, 650-51 (1974); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)). As noted above, the purpose of the antidumping provisions of the Tariff Act is "to prevent foreign goods from being sold at unfairly low prices in the United States." *Agro Dutch Indust. Ltd.*, 508 F.3d at 1027. Yet, by endorsing Commerce's impermissible construction of the Tariff Act, the Federal Circuit's ruling leaves American industries without the full statutory protection Congress provided them against dumped imports. Indeed, the Federal Circuit endorses a construction of the statute that forces American companies and their workers to accept a certain amount of dumping notwithstanding Congress's twin purposes: to shield domestic industry from injurious dumping and to deter future instances of this unlawful

trade practice. By preventing domestic industry from obtaining the full competitive benefit that the antidumping duty laws were enacted to provide, the Federal Circuit's opinion undermines Congress's purposeful safeguards against dumping. An interpretation of the Tariff Act "so at odds with its structure and manifest purpose cannot be sustained." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001).

The Federal Circuit, having endorsed Commerce's impossible construction of the Tariff Act, has made clear that it has no interest in reconsidering its position. *See* App. 79a-81a (order denying rehearing en banc). And due to the exclusive jurisdiction of the Court of International Trade and the Federal Circuit, *see* 19 U.S.C. § 1516a; 28 U.S.C. §§ 1295, 1581, there is no possibility of a circuit split on this issue. Accordingly, review by this Court is necessary to correct Commerce's invalid construction of the Tariff Act and to vindicate Congress's decision to protect American industry from dumping in international trade.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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