No. ______

In the Supreme Court of the United States

PAPIERFABRIK AUGUST KOEHLER SE,
Petitioner,
v.
UNITED STATES; APPVION, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL H. MCGINLEY
Counsel of Record
F. AMANDA DEBUSK
D. BRETT KOHLHOFER
DECHERT LLP
1900 K Street, N.W.
Washington, D.C. 20006
202-261-3300
michael.mcginley@dechert.com

Counsel for Petitioner

September 21, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Under the Tariff Act, the U.S. Department of Commerce ("Commerce") is required to select an antidumping duty margin that is remedial and not punitive. Commerce may go outside the administrative record and set a duty rate based on adverse "facts otherwise available" to fill a gap in the record that is caused by a party's failure to provide information. 19 U.S.C. § 1677e(a)-(b). When employing that drastic measure, however, Commerce is required to "corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). Here, Commerce employed "adverse facts available" against Petitioner but then expressly refused to consider relevant evidence demonstrating that the exorbitant duty rate it selected could not be corroborated. The decision below held that Commerce's 75.36% duty rate was "extremely aberrant" and uncorroborated in light of the available evidence, but it nonetheless affirmed Commerce's determination because, in its view, the statute's "purpose" of deterring misconduct trumped the statutory provision requiring corroboration. That refusal to enforce the Tariff Act's specific terms had the effect of upholding over $80 million in unsupported duties imposed on Petitioner.

The question presented is: Whether a court may rely on the Tariff Act's perceived purpose to override its specific statutory requirements for selecting antidumping duty rates.

PARTIES TO THE PROCEEDING

Petitioner Papierfabrik August Koehler SE was plaintiff in the Court of International Trade and appellant before the Federal Circuit. Respondent United States was a defendant in the Court of International Trade and appellee before the Federal Circuit. Respondent Appvion, Inc. was a defendant-intervenor in the Court of International Trade and appellee before the Federal Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Papierfabrik August Koehler SE states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 4

JURISDICTION 5

STATUTORY AND REGULATORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

A. Overview Of The Antidumping Laws And "Adverse Facts Available" 7

B. Administrative Proceedings 10

C. Judicial Proceedings 17

REASONS FOR GRANTING THE PETITION . . . 19

I. By Nullifying The Specific Statutory Terms And Structure Of Section 1677e, The Decision Below Squarely Conflicts With Countless Precedents From This Court 21

A. This Court Has Repeatedly Held That Judges May Not Ignore Clear Statutory Directives In Favor Of Perceived Statutory Purposes . . . 21

B. The Decision Below Openly Flouts The Statutory Interpretation Principles Set Forth In This Court's Precedents 22

C. The Decision Below Conflicts With Basic Principles Of Antidumping Law 26

II. The Federal Circuit's Inexplicable Indifference To These Errors Warrants Summary Reversal. 30

CONCLUSION 33

APPENDIX

Appendix A Judgment in the United States Court of Appeals for the Federal Circuit (February 7, 2018) . . . . App. 1

Appendix B Opinion and Judgment in the United States Court of International Trade (July 6, 2016) . . . . App. 3

Appendix C Final Remand Redetermination Pursuant to Court Remand (public version) of the United States Department of Commerce (June 16, 2014) . . . . App. 48

Appendix D Order Denying Panel Rehearing and Rehearing En Banc in the United States Court of Appeals for the Federal Circuit (April 25, 2018) . . . . App. 129

Appendix E Federal Register Notice of Final Results of the 2009–2010 Antidumping Duty Administrative Review (April 9, 2012) . . . . App. 131

Appendix F Federal Register Notice of Amended Final Results of the 2009–2010 Antidumping Duty Administrative Review (May 16, 2012) . . . . App. 141

Appendix G Statutes, Legislative Materials, and Regulations Involved

19 U.S.C. § 1516a(b)(1)(B)(i) . . App. 148

19 U.S.C. § 1677e (2012) . . . . . App. 148

19 U.S.C. § 1677m (2012) . . . . App. 150

19 U.S.C. § 3512(d) . . . . App. 156

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 . . . . App. 157

19 C.F.R. § 351.301 (2012) . . . . App. 177

19 C.F.R. § 351.307(b)(1) . . . . . App. 184

19 C.F.R. § 351.308(d) . . . . App. 185

TABLE OF AUTHORITIES

CASES

Appvion, Inc. v. United States,
100 F. Supp. 3d (Ct. Int'l Trade 2015) 28

Byrd v. United States,
138 S. Ct. 1518 (2018) 31

Chaparral Steel Co. v. United States,
901 F.2d 1097 (Fed. Cir. 1990) 29

Church of the Holy Trinity v. United States,
143 U.S. 457 (1892) 22, 23

Currier v. Virginia,
138 S. Ct. 2144 (2018) 31

Dodd v. United States,
545 U.S. 353 (2005) 21

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 25

F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States,
216 F.3d 1027 (Fed. Cir. 2000) 23, 26, 29

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 25

Fushun Jinly Petrochemical Carbon Co. v. United States,
No. 14-00287, 2016 WL 1170876
(Ct. Int'l Trade Mar. 23, 2016) 32

Gerber Food (Yunnan) Co. v. United States,
387 F. Supp. 2d 1270 (Ct. Int'l Trade 2005) . . . 27

Guangdong Wireking Housewares & Hardware Co. v. United States, 745 F.3d 1194 (Fed. Cir. 2014) 29

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) 21

Kloeckner v. Solis, 568 U.S. 41 (2012) 22

KYD, Inc. v. United States, 607 F.3d 760 (Fed. Cir. 2010) 29

Lasko Metal Prods., Inc. v. United States, 43 F.3d 1442 (Fed. Cir. 1994) 26

Lowe v. SEC, 472 U.S. 181 (1985) 25, 26

Magwood v. Patterson, 561 U.S. 320 (2010) 22

Mukand, Ltd. v. United States, 767 F.3d 1300 (Fed. Cir. 2014) 32

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018) 25

Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012) 31

Nucor Corp. v. United States, 414 F.3d 1331 (Fed. Cir. 2005) 29

Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017) 31

Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365 (2018) 31

Papierfabrik August Koehler AG v. United States,
37 F. Supp. 3d 1378 (Ct. Int'l Trade 2014) 10

Rhone Poulenc, Inc. v. United States,
899 F.2d 1185 (Fed. Cir. 1990) 26

Ricci v. DeStefano,
557 U.S. 557 (2009) 31

Rodriguez v. United States,
480 U.S. 522 (1987) 21

St. Louis Sw. Ry. Co. v. Dickerson,
470 U.S. 409 (1985) 31

Timken Co. v. United States,
354 F.3d 1334 (Fed. Cir. 2004) 26

Zhejiang DunAn Hetian Metal Co. v. United States,
652 F.3d 1333 (Fed. Cir. 2011) 27

STATUTES AND LEGISLATIVE MATERIALS

19 U.S.C. § 1516a 6

19 U.S.C. § 1673 7

19 U.S.C. § 1673a 7

19 U.S.C. § 1673d 7

19 U.S.C. § 1675 7

19 U.S.C. § 1677 7

19 U.S.C. § 1677a 7

19 U.S.C. § 1677b 7

19 U.S.C. § 1677e (2012) . . . . *passim*

19 U.S.C. § 1677m (2012) 6, 8, 28

19 U.S.C. § 3512 9

28 U.S.C. § 1254 5

Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, § 502, 129 Stat. 362 (2015) 33

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994) 9, 27

REGULATIONS

19 C.F.R. § 351.204 10

19 C.F.R. § 351.301 (2012) 6, 8

19 C.F.R. § 351.307 28

19 C.F.R. § 351.308 . . . . 6, 9

OTHER AUTHORITIES

Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, PATENTLYO, (June 2, 2016), http://bit.ly/2MMvGoR 30, 31

PETITION FOR A WRIT OF CERTIORARI

The Tariff Act of 1930 sets forth a specific statutory scheme that governs the Commerce Department's determination of antidumping duties. As a general matter, Commerce is required to set duties based on the facts submitted in response to questionnaires during an investigation and administrative review. However, when necessary information is not available from that record, the Tariff Act allows Commerce to use "facts otherwise available" to reach its determination of a duty rate. 19 U.S.C. § 1677e(a). And if Commerce finds that a party subject to antidumping duties has failed to adequately cooperate in the investigation, it may employ an adverse inference against the party when choosing among the "facts otherwise available." 19 U.S.C. § 1677e(b). But Congress has placed important guardrails on this "adverse facts available" measure. Because the ultimate goal in setting antidumping duties is to select an accurate rate, Congress has required that, when Commerce relies on "adverse facts available," it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c) (2012).

That is not what Commerce did here. Petitioner is a German company that produces, among other things, lightweight thermal paper—which is primarily used for printing receipts. The company is one of the largest producers of lightweight thermal paper in the world, and it has long been a significant importer of the paper into the United States. Until the events that gave rise to this case—*i.e.*, since becoming a U.S. importer in 1987—the company had never encountered any

antidumping-related issues. In 2012, Petitioner discovered that a small group of its employees had engaged in a practice known as "transshipping," in which they shipped products to a third country before returning them for sale in Germany, in order to obscure the domestic nature of the sales, and thus avoid reporting them as "home market" transactions in the databases used to comply with U.S. antidumping rules. Petitioner's senior management were not aware of the practice, and the company quickly took remedial measures. Petitioner also voluntarily informed Commerce that the error affected five out of over 1,000 home market transactions that it had reported during the relevant administrative review period.

Based on this development, Commerce determined that the "adverse facts available" measure was appropriate. It accepted the factual arguments from Petitioner's chief competitor, Appvion, Inc., and selected a rate of 75.36%, which had the effect of imposing an additional $80 million of duties on Petitioner. In doing so, the Department refused to consider any additional submissions offered by Petitioner, including submissions that provided additional information that refuted the exorbitant margin that Commerce had selected and explained that the five additional home market sales had no material impact on the duty rate calculation. Had Commerce considered this information, it would have found a *de minimis* margin that would have resulted in no duties.

Rather than enforcing the limits that the Tariff Act places on the use of "adverse facts available," the decisions below eliminated those guardrails and rubberstamped the agency's unlawful duty rate.

Reviewing Commerce's draconian use of "adverse facts available," the Court of International Trade (CIT) concluded that the duty rate that Commerce chose was "extremely aberrant" and that the Department had failed to corroborate the rate with independent facts at its disposal, as required under 19 U.S.C. § 1677e(c). Yet, the CIT still upheld the "extremely aberrant" rate. In the court's view, the specific requirement in § 1677e(c) must yield to the statute's overall "purpose" of deterring misconduct. With striking honesty, the CIT thus expressly refused to enforce § 1677e(c) despite finding that it had been violated. And with even more striking indifference, the Federal Circuit affirmed the CIT's admittedly atextual gloss on the statute in a one-line order.

This case thus presents the rare example of a federal court openly nullifying a precise statutory command based on its view of the statute's overall purpose. The CIT's decision is completely out of step with this Court's precedents and any rightminded theory of statutory interpretation. Long gone are the days when courts ignore plain statutory terms in favor of perceived statutory purposes. Yet, that is precisely what the CIT did here. Moreover, the case is just one more example of the Federal Circuit's disturbing practice of affirming questionable and novel legal rulings in one-sentence orders, without spilling a single drop of ink on its own analysis. That practice has not deterred this Court from granting certiorari in cases raising similarly important legal issues. In fact, it is a reason to do so and to summarily reverse in this case. Especially because Commerce has increasingly employed aggressive uses of the "adverse facts available" mechanism, this case presents an ideal

vehicle for this Court to remind the lower courts that statutes mean what they say and say what they mean. The judiciary has no authority to flout plain statutory requirements—particularly when doing so lets stand an egregious case of agency overreach that imposes a punitive and unsupported $80 million-dollars-worth of duties without even the pretense of due process.

OPINIONS BELOW

The opinion of the Court of International Trade denying Koehler's motion for judgment on the agency record is reported at 180 F. Supp. 3d 1211, and is reproduced in Appendix B. The Federal Circuit's unpublished, one-sentence order affirming the Court of International Trade's decision is reported at 710 F. App'x 889, and is reproduced in Appendix A. The order of the Federal Circuit denying panel rehearing and rehearing *en banc* is unreported and is reproduced in Appendix D. The original agency determination in *Lightweight Thermal Paper from Germany: Notice of Final Results of the 2009-2010 Antidumping Duty Admin. Review*, 77 Fed. Reg. 21,082 (Int'l Trade Admin. April 9, 2012) ("final results"); *Lightweight Thermal Paper from Germany: Notice of Amended Final Results of the 2009-1010 Antidumping Duty Admin. Review*, 77 Fed. Reg. 28,851 (Int'l Trade Admin. May 16, 2012) ("amended final results") is reproduced in Appendices E and F. The agency redetermination, *Redetermination Pursuant to Court Remand Order in Papierfabrik August Koehler AG v. United States, Consol. Ct. No. 12-00091* (June 16, 2014), ECF No. 75, is reproduced in Appendix C.

JURISDICTION

The Federal Circuit entered its judgment on February 7, 2018. App. B. The Federal Circuit denied Petitioner's timely petition for panel rehearing and rehearing *en banc* on April 25, 2018. App. C. On July 13, 2018, this Court granted Petitoner's application to extend the time to file this petition until September 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The full text of the relevant statutory and regulatory provisions is contained in Appendix G. The key statute at issue is 19 U.S.C. § 1677e (2012). Section 1677e(a) allows Commerce to use "facts otherwise available" in reaching its determinations when "necessary information is not available on the record" or information submitted suffers from certain enumerated deficiencies. App. 148-49. Section 1677e(b) allows Commerce to apply an "inference that is adverse to the interest of [a] party in selecting from among the facts otherwise available" if that party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." App. 149.

Section 1677e(c) provides that if Commerce relies on "secondary information"—information that Commerce did not obtain during the relevant investigation or review—in making a determination based on the facts otherwise available, Commerce is required to "corroborate that information from independent sources that are reasonably at [its] disposal." App. 150. According to Commerce's regulations, "[c]orroborate

means that [Commerce] will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). App. 187. Commerce's ability to apply "facts otherwise available" is constrained by 19 U.S.C. § 1677m(d). App. 152-53. The process by which Commerce obtains information from interested parties and the deadlines for submission of factual information are described in 19 C.F.R. § 351.301 (2012). App. 177.

The Court of International Trade and the Federal Circuit must "hold unlawful any determination, finding or conclusion found" in an antidumping proceeding "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). App. 148.

STATEMENT OF THE CASE

This case involves Commerce's final results in the second administrative review ("AR2") of an antidumping order on lightweight thermal paper from Germany. The dispute arises from Commerce's use of "adverse facts available" to determine Koehler's weighted-average dumping margin. Despite Commerce's failure to comply with a specific statutory requirement that it corroborate the adverse facts with other relevant information, the CIT upheld Commerce's "extremely aberrant" duty margin based on an admittedly strained reading of the statute. For its part, the Federal Circuit did not even bother to issue an opinion, instead affirming the CIT in a one-sentence order.

A. Overview Of The Antidumping Laws And "Adverse Facts Available"

The Tariff Act of 1930, as amended, authorizes domestic producers to petition for the imposition of antidumping duties, a form of tariff surcharge, when foreign merchandise is sold in the United States at less than fair value (*i.e.*, "dumped"). *See* 19 U.S.C. §§ 1673, 1673a. Commerce calculates a dumping margin for foreign merchandise based on the amount by which the "normal value" of the merchandise exceeds the "export price" or "constructed export price" of the subject merchandise. *See id*. § 1677(35)(A). The normal value is the price at which the subject merchandise is first sold for consumption in the exporting country. *See id*. § 1677b(a)(1)(B)(i). The export price or constructed export price reflects the price at which the subject merchandise is first sold to an unaffiliated customer in the United States. *See id.* § 1677a(a)-(b). Commerce aggregates the results of individual comparisons into a single weighted-average dumping margin for the respondent company. *See id*. § 1677(35)(A)-(B).

Antidumping duties are imposed following an investigation conducted by two agencies: Commerce and the International Trade Commission. If the International Trade Commission finds that a U.S. industry is injured or threatened with injury by reasons of the dumped imports and Commerce finds more than a *de minimis* amount of dumping, then Commerce issues an antidumping duty order. *See id.* § 1673d. Pursuant to the antidumping duty order, Commerce conducts annual administrative reviews of the order. *See id.* § 1675(a). Each annual administrative review covers a distinct "period of

review." In an administrative review, Commerce examines the foreign company's sales for the prior year and determines a weighted-average dumping margin for that period. The final results of administrative reviews are used for two purposes. First, Commerce uses the final results as the assessment rate for merchandise that entered during the period of review. Second, Commerce uses the weighted-average dumping margin as the cash deposit rate that importers must pay on future entries of the subject merchandise. Cash deposits act as security for the payment of final duties, which will not be calculated and assessed until the completion of a future administrative review.

In the course of its proceedings, Commerce solicits factual information by issuing questionnaires to producers and exporters. *See* 19 C.F.R. § 351.301(c) (2012). These questionnaires request information on the respondent's corporate structure, the quantity and value of sales of the merchandise in all markets, an account of sales transactions in the home market, an account of sales transactions in the United States, and cost of production data.[1] The data provided in the responses to these questionnaires form the basis on which Commerce determines whether merchandise has been dumped and, if so, the weighted-average dumping margin.

In making its determinations, Commerce has authority, subject to limitations contained in 19 U.S.C. § 1677m, to use "facts otherwise available" if necessary

---

[1] The standard questionnaire is available on the Department of Commerce's Trade Enforcement and Compliance website at http://bit.ly/2OFIgYZ.

information is not available on the record or if an interested party withholds information, fails to provide information by Commerce's deadlines or in the form and manner requested, significantly impedes a proceeding, or provides information that cannot be verified. *See* 19 U.S.C. § 1677e(a). If a party has failed to act to the best of its ability in responding to Commerce's requests for information, then Commerce may also apply an adverse inference in selecting from the facts otherwise available, which is known as "adverse facts available" or "AFA" for short. *See id.* § 1677e(b). If Commerce relies on secondary information as facts otherwise available, Commerce is required by statute to corroborate this information. *See id.* § 1677e(c) (2012). Corroboration means determining that the information "has probative value." Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("Statement of Administrative Action" or "SAA"), H.R. Rep. No. 103-316, vol. 1, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199.[2] *See also* 19 C.F.R. § 351.308(d).

---

[2] The Statement of Administrative Action is the "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

B. Administrative Proceedings

Throughout the history of the antidumping proceeding, Commerce calculated low weighted-average margins for Koehler. For the period of investigation,[3] Commence calculated a weighted-average margin of 6.50%, which led to the imposition of an antidumping duty order. *Lightweight Thermal Paper from Germany*, 73 Fed. Reg. 57,326, 57,328 (Dep't of Commerce Oct. 2, 2008) (final determination). In the first administrative review period ("AR1") after the imposition of the antidumping duty order, Commerce calculated a *de minimis* margin of 0.03% following a Court of International Trade remand to Commerce with instructions to incorporate home market rebates. *Papierfabrik August Koehler AG v. United States*, 37 F. Supp. 3d 1378, 1381 (Ct. Int'l Trade 2014). In the fourth review ("AR4"), Commerce calculated a zero margin. *Lightweight Thermal Paper from Germany*, 79 Fed. Reg. 34,719, 34,720 (Dep't of Commerce June 18, 2014) (2011-2012 final admin. review).

During the second period of review ("AR2") and the third period of review ("AR3"), Commerce determined the applicable margin based on "adverse facts available" rather than the actual evidence at hand. The AR2 review, which covered the period of November 1, 2009 to October 31, 2010, was initiated on December 28, 2010. On May 16, 2012, Commerce calculated a weighted-average margin for Koehler of 4.33 percent,

---

[3] The period of investigation that Commerce uses for purposes of calculating a weighted average margin is a period that predates the filing of the antidumping duty petition. *See* 19 C.F.R. § 351.204(b)(1).

which did not include an adjustment for the monthly home market rebates that were required after the AR1 litigation. *Lightweight Thermal Paper from Germany*, 77 Fed. Reg. at 28,852.

Both Koehler and Appvion filed appeals of AR2. Before the opening briefs were filed in the CIT in the AR2 proceeding, evidence was presented in AR3 that Koehler's original response in AR3 omitted certain home market sales. Specifically, on the last day for submitting new factual information in AR3, Appvion alleged that Koehler sold "48 gram thermal paper that it knows is destined for consumption in Germany through various intermediaries in third-countries" and that those sales were not included in Koehler's home market sales data. App. 58. Appvion submitted a heavily bracketed affidavit, which stated that the affiant was told by a confidential source (an employee of one of Koehler's customers) that Koehler was sending 48-gram thermal paper to third countries that was then shipped back to facilities in Germany. The affidavit stated "it is Source 1's understanding that Koehler engages in these transshipments in order to avoid reporting the transactions as sales to Germany in response to the U.S. antidumping case." App. 58.

Having no prior knowledge of such omissions, Koehler's senior management immediately began a wide-ranging internal investigation into the factual allegations that could be discerned from the heavily redacted versions of Appvion's letter that were available to Koehler and Koehler's counsel. After investigating Appvion's allegations, Koehler confirmed to Commerce that certain home market sales "were shipped to a third country, were ultimately delivered to

customers in the German market, and should have been reported by Koehler as home market transactions." *Papierfabrik August Koehler SE v. United States*, 7 F. Supp. 3d 1304, 1308 (Ct. Int'l Trade 2014). Koehler explained that the sales had been transshipped and misclassified by a small group of employees acting in violation of company policy without the knowledge or approval of senior management. The first of these transshipped sales occurred on September 28, 2010—*i.e.*, covering the last thirty-four days of the AR2 period—and continued through the AR3 period. Koehler explained that the transshipment arrangement was originally suggested by one of Koehler's customers and that the Koehler employees who executed the third-country sales did so "to accommodate the customers' increased demand for 48-gram [lightweight thermal paper] in Germany, without undertaking the rigorous price monitoring and price ceilings required under Koehler's policy of complying with U.S. antidumping law." Br. for Appellant at 15-16, *Papierfabrik August Koehler SE v. United States*, 710 F. App'x 889 (Fed. Cir. 2018) (No. 16-2425), ECF No. 33 (quoting J.A. at 8112, ECF Nos. 55-1, 56 ("J.A. Below")). In response, Koehler ceased all home market sales transactions through any third country, took steps to improve internal controls and checks for data submission, provided additional training to its employees, and took disciplinary actions, including termination, against the Koehler personnel involved.

Koehler attempted to submit the previously omitted home market sales on the due date for supplemental responses, five months prior to the deadline for Commerce to issue its AR3 preliminary results. Commerce, however, rejected the revised database as

untimely. After rejecting Koehler's attempt to provide the missing data, and refusing to verify the information that Koehler had timely submitted, Commerce disregarded the circumstances surrounding Koehler's omission and chose to treat all of Koehler's remaining AR3 data as "unreliable and unusable." J.A. Below at 8178-79. Commerce applied a "total" adverse facts available inference against Koehler and assigned a rate of 75.36 percent for AR3. This resulted in a total duty liability of more than $100 million in AR3. The CIT upheld Commerce's AR3 Final Results, the Federal Circuit affirmed, and this Court denied certiorari.

Although Appvion's allegations arose in and addressed only AR3, Koehler voluntarily notified Commerce that the earliest sale omitted from its home market data took place on September 28, 2010, meaning that some transshipped sales occurred at the very end of the AR2 period. Koehler explained that a total of five sales were omitted from the AR2 home market database and, in a showing of good faith and honesty, indicated it would support a voluntary remand for the purposes of reopening the record in AR2 and "supplementing the record as necessary." J.A. Below at 8130. Although both Koehler and Appvion had appealed the original AR2 results, Koehler consented to, and the CIT ordered, a voluntary remand to Commerce "for further consideration of the final results" of AR2. App. 49.

On February 11, 2014, prior to Commerce taking any action in the remand proceedings, Koehler offered supplemental information to be considered by Commerce on the circumstances surrounding the omission of the five home market sales and the

materiality of the missing sales. Commerce rejected Koehler's submission on February 18, 2014, as "a submission of information that is unsolicited by the Department at this stage of the remand proceeding." J.A. Below at 8060.

On March 31, 2014, Commerce placed documents from AR3 on the record for AR2. Included in these documents was Koehler's explanation in the AR3 proceedings regarding the results of Koehler's internal investigation and Koehler's explanation in AR3 that five home market sales were omitted from Koehler's sales response in AR2.

On the same day, Commerce issued its Draft Remand Results, which relied on the new information that Commerce placed on the AR2 record. In the Draft Remand Results, Commerce deemed all of Koehler's AR2 data "unreliable" in light of the information from AR3 and, again, applied a total adverse facts available inference against Koehler—even though only five of its over 1,000 entries for AR2 were affected. Based on that adverse inference, the duty rate imposed for AR2 skyrocketed from the (already inflated) 4.33% to an exorbitant rate of 75.36%. In its invitation for comments on its Draft Remand Results, Commerce stated that "[i]nterested parties that wish to submit new factual information specifically related to the rate being applied and the corroboration of this rate may do so in their initial comments on the draft results." App. 54. But Commerce created an exception to that solicitation of information, stating that "the Department will not accept any information that could be considered responsive to the Department's initial questionnaire or supplemental questionnaires from the

underlying 2009-2010 administrative review proceeding, including additional sales data for the period of review." App. 55.

On April 29, 2014, Koehler submitted its Comments on the Draft Remand Results. To respond to the documents from the AR3 proceeding that Commerce had placed on the AR2 record, as well as Commerce's specific invitation, Koehler submitted materials explaining that: (1) the omitted home market sales represented an extremely small portion of Koehler's AR2 home market sales; (2) inclusion of the missing sales in the dumping margin calculation would have no effect on Koehler's ultimate weighted-average margin once Koehler's home market rebates were properly factored into the calculation; and (3) the transaction-specific margin that Commerce relied on in supposedly corroborating the AFA rate was the result of a calculation error. On May 2, 2014, Commerce rejected Koehler's comments, finding that they contained "information [that] . . . should have been provided in response to the Department's initial questionnaire and supplemental questionnaires." App. 90. On May 6, 2014, Koehler refiled with the information redacted, as Commerce required.

On May 14, 2014, the European Union ("EU") expressed "serious concerns" about the Commerce Department's application of total adverse facts available in the AR2 Draft Remand Results, noting that the omitted sales "represent less than one-half of one percent of the home market sales." J.A. Below at 8902-03. On June 11, 2014, EU representatives reiterated their concerns to representatives from Commerce during a phone call. In the meantime,

representatives from Commerce met with counsel for Koehler regarding the remand, and Koehler provided additional information in response to issues raised by Commerce during that meeting. But Commerce once again rejected Koehler's information.

On June 16, 2014, Commerce issued its Final Remand Results and maintained its decision to assign a rate of 75.36%. That 75.36% rate resulted in an additional $80 million in duties owed for AR2, despite only five out of more than 1,000 home market sales in AR2 having been omitted from Koehler's original AR2 responses. The new $80 million in duties is in addition to the more than $100 million in duties assessed in AR3 because of the application of the same 75.36% rate based on a total adverse facts available inference.

Thus, based on Commerce's use of "adverse facts available" during AR2 and AR3, it imposed over $180 million worth of antidumping duties, where the supplemental evidence from Koehler and all indications from the periods surrounding those review periods suggested that either no duties or exponentially lower duties would have been appropriate. The chart below illustrates the striking spike in duties caused by the Commerce Department's application of adverse facts available.

Review	Weighted-Average Margin	Duties
AR1	0.03%	$0
AR2	4.33% (75.36% after remand)	$88.5 million (plus interest)
AR3	75.36%	$110 million (plus interest)
AR4	0.00%	$0
AR5	0.00%	$0

C. Judicial Proceedings

Koehler and Appvion both submitted complaints in the CIT, which upheld Commerce's determination. The CIT held that Commerce erred in relying on a single, 144.63% transaction-specific margin to support its 76.36% duty rate. Indeed, the CIT found it unnecessary even to address evidence submitted by Koehler demonstrating that the 144.63% margin was the result of an accounting error, because the CIT concluded that the margin for that transaction so grossly departed from the rest of Koehler's transaction-specific margins that it was aberrational on its face.

The CIT explained that "[t]he 144.63% margin is not evidence corroborating as 'probative' the Department's use of the 75.36% rate as secondary information." App. 36. On the contrary, "[t]he Department's calculated margin of 144.63% percent [*sic*] is *aberrant* when compared to a margin obtained from any other specific transaction, none of which yielded a margin close to 144.63%, and is *extremely aberrant* when viewed

against a weighted average of all individual margins." App. 36 (emphases added).

The CIT nonetheless upheld the Commerce Department's aberrant rate. After determining that Commerce failed to satisfy Section 1677e(c)'s corroboration requirement, the CIT concluded that the corroboration requirement conflicted with the "purpose" of the "adverse inference" provision in Section 1677e(b). App. 41-42. Expressly acknowledging that it was declining to enforce Section 1677e(c)'s corroboration requirement, the CIT claimed that this case presents a "rare factual circumstance in which the objectives of the two provisions come into direct conflict," and it concluded that "the more specific purpose of § 1677e(b) must prevail." App. 41. The CIT therefore denied Koehler's motion for judgment on the agency record and affirmed the use of total adverse facts available and the 75.36% duty rate.

Without issuing a written opinion addressing the CIT's willful nullification of Section 1677e(c)'s corroboration requirement, the Federal Circuit affirmed the CIT's decision in a one-sentence order and denied Petitioner's request for en banc review.

REASONS FOR GRANTING THE PETITION

The decision below openly and unabashedly flouts a federal statutory provision that was designed to rein in the sort of agency overreach that resulted in the $80 million-dollars-worth of unsupported antidumping duties that Commerce imposed on Petitioner. The decision below held that Commerce's use of "adverse facts available" failed to satisfy Section 1677e(c)'s corroboration requirement and that the duty margin Commerce selected was "extremely aberrant." Yet, rather than vacating Commerce's actions, as the statute requires, the court explicitly declined to enforce the statute's specific corroboration requirement in favor of a separate provision's perceived "purpose" of preventing misconduct. The CIT's express refusal to enforce a duly enacted statutory scheme is incompatible with well-established requirements of statutory construction.

This Court has long held that perceived statutory purposes cannot override specific statutory commands. The decision below harkens back to a bygone era when judges would override specific statutory terms in favor of the perceived "spirit" of the law. But for decades, this Court has repeatedly warned that no statute pursues its purpose at all costs, and that the precise terms of a statute must be respected as the law that survived the Constitution's finely wrought legislative process. In fact, this case is a perfect example of that wisdom: The decision below claimed to divine Section 1677e's overriding purpose as aimed at deterring wrongdoing by parties subject to antidumping investigations and administrative reviews. Perhaps that is the policy motivating subsection (b) of the

statute. But, on its face, subsection (c) reveals a countervailing purpose to keep the "adverse facts available" tool from becoming a limitless cudgel. It requires Commerce to corroborate the adverse facts available with all *other* relevant facts readily available to the agency. Taken as a whole, the statute's specific terms and its conscious structure evince a much more nuanced purpose: To deter misconduct through adverse inferences, but not to become punitive. By ignoring the limits imposed by subsection (c), the court frustrated rather than furthered the overall statutory design.

Because the decision below so blatantly ignored the clear directions from this Court on how to interpret federal statutes, and the Federal Circuit so brazenly abdicated its responsibility to exercise meaningful review, this is a prime candidate for summary reversal. Although Petitioner would welcome full briefing and argument, it respectfully suggests that this Court could make short order of this case by swiftly and definitively reversing, in an opinion that reminds the lower courts that they have no license to ignore direct statutory commands. Indeed, the Federal Circuit's failure to issue an opinion *increases* rather than *decreases* the need for the Court to address this case. The Federal Circuit has adopted a troubling pattern of summarily affirming decisions raising important and novel legal questions. Accordingly, this Court has not hesitated to grant review from one-sentence orders issued by the Federal Circuit. It should do the same here and reverse.

I. By Nullifying The Specific Statutory Terms And Structure Of Section 1677e, The Decision Below Squarely Conflicts With Countless Precedents From This Court.

A. This Court Has Repeatedly Held That Judges May Not Ignore Clear Statutory Directives In Favor Of Perceived Statutory Purposes.

This Court's precedents conclusively establish that judges must interpret and apply statutes according to their precise terms, not their perceived purposes. Over thirty years ago, this Court cautioned that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). More recently, the Court has explained that "[l]egislation is, after all, the art of compromise," and "the limitations expressed in statutory terms [are] often the price of passage." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). Because "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice[,] . . . it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526. Accordingly, the Court has repeatedly emphasized that federal judges "must presume that the legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (alteration marks omitted) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The Court, of course, did not always take this approach. Most infamously, the Court's decision in

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), declined to enforce the plain meaning of a statute in favor of its perceived purpose, declaring: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459. But the Court has long since abandoned that judge-empowering view in favor of an approach in which "even the most formidable argument concerning [a] statute's purposes could not overcome" clear statutory text. *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). In short, under this modern approach to statutory interpretation, courts "cannot replace the actual text [of a statute] with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010).

B. The Decision Below Openly Flouts The Statutory Interpretation Principles Set Forth In This Court's Precedents.

If nothing else, the CIT's decision is remarkable in its candor. The court concluded that, under the terms of Section 1677e(c), Commerce failed to "corroborate" the adverse facts available with "information from independent sources that are reasonably at [its] disposal." App. 33-34. Indeed, it went so far as to describe the Department's reliance on a single transaction's margin, which underpinned its 75.36% duty rate, as "extremely aberrant when viewed against the weighted average of all individual margins." App. 36. Had it been faithfully seeking to apply Congress' command in Section 1677e(c), it would have stopped there and invalidated Commerce's "aberrant" duty rate

as not corroborated by the full range of facts available to the agency.

Instead, with echoes of *Holy Trinity*, the CIT perceived a "conflict" between the result of subsection (c)'s straightforward application in this case and the "statutory purpose" it perceived behind subsection (b)'s adverse inference provision. App. 41. In the CIT's telling, "[t]he purpose of § 1677e(b) is evident from the very words Congress chose: Commerce or the [International Trade] Commission may use an inference that is *adverse* to the *interests* of a noncooperating party when choosing from among the information otherwise available." App. 40. Relying on Federal Circuit precedent, the CIT stated that the statute "provides Commerce the authority to use an inference adverse to the interests of such a party in order to deter future noncompliance." App. 40 (citing *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*")).

The CIT then went on to identify what it viewed as subsection (c)'s purpose. "The purpose of the corroboration provision of § 1677e(c)," the court explained, is "to ensure that Commerce, to the extent 'practicable' when using secondary information, uses secondary information that is 'reliable.'" App. 40. In doing so, the court further reasoned, "the corroboration provision serves to ensure that Commerce, when seeking to deter future noncooperation, does not 'overreach.'" App. 40 (quoting *De Cecco*, 216 F.3d at 1032).

Although these perceived purposes are not inherently contradictory—Commerce can impose an

inference against noncompliant companies, while still seeking to corroborate its fact-finding with reliable evidence—the CIT posited the possibility that some instances of misconduct are "so serious" that the two subsections' purposes "come into direct conflict" such that one purpose must win out over the other. In particular, the CIT was troubled with the possibility that "a respondent committing serious misconduct might have received a small or *de minimis* margin even had it cooperated fully and in good faith." App. 41. The CIT worried that, "were a court to insist that Commerce confine its discretion to the use of a rate constituting secondary information that is *fully* corroborated"—that is, what Section 1677e(c) requires—"such a rate could never be sufficiently 'adverse' within the meaning of § 1677e(b) as to provide any meaningful deterrent." App. 41. While recognizing that Section 1677e(c) "create[s] a general qualification that applies both to the use of facts otherwise available (as provided for in § 1677e(a)) and the use of an adverse inference (as provided for in § 1677e(b))," the CIT concluded that the "general qualification must not be read so broadly as to defeat entirely the more specific purpose of § 1677e(b)." App. 41. When "the objectives of the two provisions come into direct conflict"—as the CIT viewed them to be here—the court held that "the more specific purpose of § 1677e(b) must prevail." App. 41.

This supposed battle between statutory purposes directly conflicts with how this Court has instructed federal judges to interpret complex statutes. Rather than divine abstract free-floating "purposes" from specific statutory provisions and then pit those objectives at war with each other in an imagined

conflict, the Court has indicated that courts must take each provision on its terms and seek when possible to find *harmony* not *discord* among them. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."). "As this Court has noted time and time again, the Court is obliged to give effect, if possible, to every word Congress used," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (internal quotation marks omitted), "and fit, if possible, all parts into an harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted)).

That sort of careful parsing is clearly possible in the case of Section 1677e. The statute begins in subsection (a) by allowing Commerce to consider "facts otherwise available" when the record before it is incomplete. Then, in subsection (b), it permits Commerce to draw adverse inferences against misbehaving parties—whose credibility has been undermined—when the agency is choosing among "otherwise available" extra-record facts. But, in subsection (c), it imposes a key backstop to prevent runaway adverse inferences. Thus, by requiring an agency to "corroborate" secondary information with other reliable information at its disposal, the statute ensures that duty rates imposed under Section 1677e are not completely divorced from reality. Put another way, "the basic [provisions for 'facts otherwise available' and adverse inferences] must be read together with the exclusion in order to locate the place where Congress drew the line." *Lowe v. SEC*,

472 U.S. 181, 235 n.53 (1985). By choosing to pit the statute at war with itself and then completely eliminate the effect of subsection (c), the CIT violated the cardinal principles that this Court has set forth in the precedents cited above and many others like them. And the Federal Circuit rubber stamped that error by affirming in a one-sentence order.

C. The Decision Below Conflicts With Basic Principles Of Antidumping Law.

The more textually sound and structurally harmonious reading set forth above also happens to comport with the basic principles behind the Tariff Act. Because dumping margins are intended to be remedial, Commerce has a duty to calculate margins as accurately as possible. As the Federal Circuit has previously explained, "there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994). Indeed, the "basic purpose of the statute" is "determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Even when applying Section 1677e's strong medicine, an adverse facts available rate should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032; *see also Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004) ("[I]n selecting a reasonably adverse facts-available rate, Commerce must balance the statutory objectives of finding an accurate dumping margin and

inducing compliance, rather than creating an overly punitive result.").

The United States' Statement of Administrative Action on the Uruguay Round reinforces these principles. That legislative document states that Commerce "must make [its] determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration." SAA, H.R. Rep. No. 103-316, vol. 1, at 869, 1994 U.S.C.C.A.N. at 4199. Commerce generally may not use facts otherwise available to replace information that is on the record and usable. *See id.* at 869-70. In other cases, the CIT has recognized this rule: "Because Commerce is empowered to use adverse inferences only in 'selecting from among the facts otherwise available,' it may *not* do so in disregard of information of record that is not missing or otherwise deficient." *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1288 (Ct. Int'l Trade 2005). And the Federal Circuit has reinforced this rule. *See, e.g.*, *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) ("For the reasons stated in *Gerber*, and under the plain language of § 1677e(a), it is clear that Commerce can only use facts otherwise available to fill a gap in the record.").

Commerce, however, rejected Koehler's data and abandoned the goal of accuracy in calculating a dumping margin. Sales originally omitted from Koehler's data constituted only a discrete category of information—home market sales routed through a third country. There is no evidence that Koehler's other timely submissions were incomplete or otherwise

unusable. Commerce could have used this data to calculate a weighted-average dumping margin. Adverse facts available could have then been used to fill-in missing sales volume data—*e.g.*, by applying the highest home market sales prices on the record to the missing home market sales volume. Even if Commerce had doubts about the accuracy of Koehler's submission, Commerce had the time and opportunity to verify the information. *See* 19 U.S.C. § 1677m(i); 19 C.F.R. § 351.307(b)(1).[4]

Indeed, Koehler voluntarily offered to remand the AR2 proceedings to Commerce so that it could assess the impact of the sales data that Koehler uncovered during its extensive internal investigation. Koehler emphasized during the review that it stood willing to accommodate Commerce's on-site verification of Koehler's submissions. Instead, Commerce rejected the entirety of the information that would be most probative of Koehler's actual level of dumping—Koehler's own data—and relied solely on a margin alleged in Appvion's petition.

The decision below upheld Commerce's violation of Section 1677e(c) based on a gross misunderstanding of what an adverse "inference" is intended to accomplish. In the CIT's view, the adverse inference permitted in subsection (b) of the statute must result in a sufficiently adverse duty rate to be of any meaningful

---

[4] Commerce verified Koehler's submitted information in AR4, even though certain home market sales were shipped through third countries during the period covered by that review. Koehler included these sales in its initial home market sales database in that review. *See Appvion, Inc. v. United States*, 100 F. Supp. 3d 1374, 1382 (Ct. Int'l Trade 2015).

value. *See* App. 41. But an adverse inference does not automatically require an adverse result against its recipient; it is not a default judgment. Nor does the adverse facts available mechanism exist to "impose punitive . . . margins," but instead "to provide respondents with an incentive to cooperate." *KYD, Inc. v. United States*, 607 F.3d 760, 767-68 (Fed. Cir. 2010) (quoting *De Cecco*, 216 F.3d at 1032); *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005) ("[T]he purpose of antidumping and countervailing duty laws is remedial, not punitive or retaliatory."); *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1199-1200 (Fed. Cir. 2014); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990).

Put simply, while the adverse facts available mechanism exists to deter deception and encourage honesty, it does not compel injustice. Yet, that is precisely the result of the lower courts' view that subsection (b)'s adverse inference must "prevail" over subsection (c)'s corroboration requirement anytime, in its view, the respondent would not suffer a sufficiently painful duty rate. Indeed, as the Commerce Department rejected every single one of Petitioner's offers to supplement the record with reliable, probative evidence, it discarded any pretense of due process in favor of the trade equivalent of rough justice. That is not what the Tariff Act requires. In fact, it is precisely what it prohibits.

II. The Federal Circuit's Inexplicable Indifference To These Errors Warrants Summary Reversal.

Despite the CIT's novel and highly questionable approach to interpreting Section 1677e, the Federal Circuit did not even bother to issue an opinion in this case. Following full briefing and argument, which raised these glaring flaws in the Commerce Department's draconian use of adverse facts available and the CIT's atextual reasoning, the Federal Circuit unceremoniously affirmed in a one-sentence order. *See* App. A. The summary disposition is particularly confounding given the Federal Circuit's pointed, critical take on the proceedings below during oral argument. Oral Argument Recording at 23:56-24:22, *Papierfabrik August Koehler SE*, 710 F. App'x 889 (Fed. Cir. 2018) (No. 2016-2425) (observing that the increase in duties imposed on Koehler "gets to the point of becoming really punitive, as opposed to just allowing for a little bit of a deterrence margin" and commenting that this procedure "doesn't seem to be what the point of [adverse facts available] is all about"), available at http://bit.ly/2ODb4RK; *id.* at 27:15-27:22 ("[W]e have said in prior cases that [adverse facts available] can't be the end of the inquiry [and] there still is a corroboration obligation.").

Unfortunately, this judicial indifference is a growing trend in the Federal Circuit. Scholars have noted that the Federal Circuit has increasingly relied on one-word summary decisions, such as the Rule 36 decision here, to sidestep difficult issues on appeal and simply affirm. *See* Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, PATENTLYO, (June 2,

2016), http://bit.ly/2MMvGoR (percentage of Rule 36 opinions in appeals from district courts increased from 21 percent to 43 percent in less than a decade). Accordingly, this Court has not treated the Federal Circuit's avoidance of difficult issues as a barrier to certiorari. *See, e.g.*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017) (granting certiorari to determine whether *inter partes* review by the Patent Trial and Appeal Board violates Article III or the Seventh Amendment, despite one-word summary affirmance by the Federal Circuit).[5] If anything, the federal circuit's treatment of this case is one more reason to grant certiorari and, for that matter, to summarily reverse. Indeed, as with similarly egregious cases in the past, a summary reversal here could correct a lower court's demonstrated indifference to long-settled principles of law. *See, e.g.*, *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 20 (2012) (summarily reversing Oklahoma court's decision that "disregard[ed] this Court's precedents" on issues of federal law); *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (summarily

---

[5] Moreover, historically, the absence of a reasoned decision from the Courts of Appeals has not foreclosed the Court's review—particularly where a case presents important issues. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009). Last Term alone, a number of the Court's decisions followed summary disposition from appellate courts. *See Byrd v. United States*, 138 S. Ct. 1518, 1525–26 (2018) (granting certiorari after "[t]he Court of Appeals affirmed in a brief summary opinion"); *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018) (granting certiorari after "[t]he Virginia Supreme Court summarily affirmed"); *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018) (reviewing constitutional issues not addressed by Federal Circuit's one-word disposition).

reversing where Missouri court refused to follow Court's "clear" precedent on statutory issue settled for "[n]early 70 years").

This Court's review is also warranted in light of the Commerce Department's increasingly aggressive use of adverse facts available. Commerce routinely uses total adverse facts available without identifying specific deficiencies with timely submitted information on the record. And the Federal Circuit and the Court of International Trade in many other cases have upheld Commerce's decision to apply total adverse facts available where the respondent timely submitted large amounts of uncontestably accurate information relevant to the margin calculation. For example, in *Mukand, Ltd. v. United States*, 767 F.3d 1300 (Fed. Cir. 2014), Commerce applied total adverse facts available because the respondent failed to provide size-specific cost information, which was potentially relevant only to the calculation of normal value (*i.e.*, the price at which subject merchandise is first sold for consumption in the exporting country). *Id.* at 1304-05. The Federal Circuit upheld Commerce's determination without any discussion of why Commerce could not at least rely on the respondent's reported U.S. sales and limit its application of adverse facts available to the calculation of normal value. *Id.* at 1307-08; *see also*, *e.g.*, *Fushun Jinly Petrochemical Carbon Co. v. United States*, No. 14-00287, 2016 WL 1170876, at *12 (Ct. Int'l Trade Mar. 23, 2016) (upholding use of total adverse facts available because the respondent did not disclose all of the details of its relationship with a customer and its invoicing practices until its second supplemental questionnaire response). Intervention by this Court is necessary so that Commerce adheres to its statutory

mandate and so that the Federal Circuit and the Court of International Trade conduct judicial review of Commerce's actions consistent with the plain terms of Section 1677e.[6]

CONCLUSION

For the reasons stated above, Koehler respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Federal Circuit.

---

[6] In 2015, Congress amended Section 1677e(c) to exempt from the corroboration requirement "any dumping margin or countervailing duty applied in a separate segment of the same proceeding." *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, § 502, 129 Stat. 362, 383-84 (2015). Those amendments post-date Commerce's final results challenged by Koehler and do not apply here. The amendments do not affect the importance of the issues before this Court, nor the appropriateness of this case as a vehicle for addressing those issues. Rather, the relevant text of the corroboration requirement in Section 1677e(c) remains unchanged, and the problems presented in this petition remain for other importers.

Respectfully submitted,

Michael H. McGinley
Counsel of Record
F. Amanda DeBusk
D. Brett Kohlhofer
DECHERT LLP
1900 K Street, N.W.
Washington, D.C. 20006
202-261-3300
michael.mcginley@dechert.com

Counsel for Petitioner

September 21, 2018