**IN THE UNITED STATES COURT
OF INTERNATIONAL TRADE**

THE NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al., Defendants.	No. 19-00053 Hon. Jane A. Restani

PLAINTIFF NATIONAL ASSOCIATION OF MANUFACTURERS' MOTION FOR JUDGMENT ON THE AGENCY RECORD

Plaintiff the National Association of Manufacturers respectfully moves for judgment on the agency record under this Court's Rule 56.1. For the reasons explained in the accompanying brief, the Court should hold unlawful and set aside, and permanently enjoin Defendants from enforcing, the following portions of *Modernized Drawback*, 83 Fed. Reg. 64,942 (2018) (A.R. 2180): (i) the restriction on drawback of internal revenue taxes in 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), 191.32(b)(4), and (ii) the expanded definitions of "drawback" and "drawback claim" in 19 C.F.R. § 190.2 (together, the Rule).

Alternatively, if the Court concludes that the Rule is otherwise valid, it should hold that the Rule cannot apply to drawback claims filed before its effective date.

June 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, a true and accurate copy of the document above was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of this filing to all counsel of record.

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PLAINTIFF NATIONAL ASSOCIATION OF MANUFACTURERS' BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE AGENCY RECORD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Regulations

Legislative Materials

Administrative Decisions

Other Authorities

INTRODUCTION

Drawback is the refund of duties, taxes, or fees paid on imported merchandise to promote related exports. It "was initially authorized by the Second Act of Congress in 1789, and has been a critical export program even since." H.R. Rep. 114-114(I) (2015). "The rationale for duty drawback has always been to increase U.S. competitiveness in the global marketplace, encourage U.S. manufacturing by enabling manufacturers to take advantage of economical raw materials, and promote U.S. exports and jobs." *Id.*

Recognizing these benefits, Congress has repeatedly expanded the drawback regime. One such expansion is "substitution drawback," introduced over 35 years ago. Substitution drawback allows a refund of duties or taxes paid on imported merchandise when sufficiently similar "substitute merchandise" is exported or destroyed. For example, a claimant who imported a case of Spanish wine, having paid duties and excise taxes on that wine, could obtain a refund of those payments upon exporting a case of similar California wine. This encourages U.S. exports, boosting domestic employment, use of raw materials, and manufacturing.

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) broadened and clarified the substitution standard to further encourage exports and U.S. manufacturing. Pub. L. No. 114–125, 130 Stat. 122 (2016); *see also* H.R. Rep. 114-114(I); S. Rep. 114-45 (2015). Before TFTEA, with limited exceptions for certain wines and petroleum products, merchandise could be substituted—and drawback claimed—only if the imported and exported goods were "commercially interchangeable," a restrictive (and subjective) standard that effectively precluded many U.S.

manufacturers from benefiting from substitution drawback. Under TFTEA, imports and exports can now be substituted whenever they share the same 8-digit Harmonized Tariff Schedule (HTS) classification. 19 U.S.C. § 1313(j)(2). This simple, objective standard reflects a significant expansion of drawback that will boost U.S. manufacturing. The only way a net-importer will benefit from this standard is to grow its domestic manufacturing, hire workers, and export substitute goods.

Defendants, however, have issued a rule imposing a new, extra-statutory restriction on substitution drawback (the Rule). A.R. 2180. The Rule states that drawback of excise taxes paid on *imported* merchandise is limited to the amount of taxes paid (and not refunded) on the substitute *exported* merchandise. This matters because many domestically produced goods, including beer, wine, spirits, and petroleum products, are exempt from excise taxes if they are exported. So, in the example above, the Rule would, for the first time, bar the drawback of *any* excise taxes paid on the imported Spanish wine because the California wine was untaxed.

The Rule contradicts the drawback statute's text, history, and purpose. Paragraph 1313(j)(2) of Title 19 governs substitution drawback. It imposes three conditions: (1) there must be "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation"; (2) there must be "any other merchandise … classifiable under the same 8-digit HTS subheading number"; and (3) the other merchandise must be exported or destroyed within five years, must not be used, and must be within the claimant's control. 19 U.S.C. § 1313(j)(2). If these conditions are met, drawback "shall" be paid. *Id.* A claim for substitution drawback of excise taxes indisputably meets all of these conditions, *whether or not* the substitute merchandise was taxed. And paragraph (j)(2) requires payment "*notwithstanding any other provision of law*." *Id.* (emphasis added).

Even so, Defendants' Rule depends on the argument that an "other provision of law" prohibits drawback for goods that meet these conditions. That provision is subsection 1313(v), which says that "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback." Defendants contend that (i) every excise-tax exemption for an exported good is a "claim for drawback," and thus (ii) any good exported without paying excise taxes is already the subject of a "claim for drawback" and cannot "be the basis of any other claim for drawback," including for excise taxes paid on similar imported goods. Otherwise, Defendants say, claimants would receive "double drawback."

Defendants' "double drawback" argument works only if their premise is correct—that is, if every tax-exempt exportation is somehow a "claim for drawback." But that premise distorts the statutory text beyond any reasonable reading. "Drawback"—as used in both § 1313 and the tax code—is the *cancellation* or *refund* of a fixed or paid tax, duty, or fee. And a "claim for drawback" is a request that the government cancel or refund a fixed or paid liability. An exporter entitled to a tax exemption has not made a "claim for drawback," and thus that exemption does not deprive the exporter of its independent statutory right to drawback.

In fact, if Defendants were right that every untaxed exportation is a "claim for drawback," subsection (v) would bar substitution drawback not only of *excise* *taxes*, as the Rule says, but also of *any duties, taxes, or fees at all*—a result Defendants agree is improper. That is because, under subsection (v), once merchandise is the subject of one claim for drawback, it "shall not be the basis of any other claim for drawback." So, for example, if a case of California wine is exported without paying excise taxes, Defendants say that the exportation itself is a "claim for drawback" and that same case of wine cannot be "the basis of *any other* claim for drawback." Thus, on Defendants' theory, the exporter could not use that case of wine as "the basis for [a] claim for drawback" of import duties paid on a case of similar imported wine—even though Defendants *agree* that the exporter should at least receive substitution drawback for duties and fees imposed on imported goods. A.R. 2200.

Defendants try to avoid this absurd result by saying that an untaxed export is a "claim for drawback" *only for excise taxes,* and not for other taxes, duties, or fees. Thus, they say, subsection (v)'s bar on multiple drawback claims based on the same goods does not apply "*across* all types of taxes, duties, and fees" but only "*within* each class." *See id.* But subsection 1313(v) cannot be read to draw that distinction: It says that once a claim for drawback is made, that merchandise cannot provide the basis for "*any other*" claim, not some special category of claims. Defendants' interpretation thus has consequences that even they agree are not acceptable. That is good reason to reject it.

This is not the first time, or even the second, that Defendants have tried to bar excise-tax drawback (or to persuade Congress to do so). All of those efforts have failed. Indeed, Congress has consistently increased the reach of substitution drawback and rejected efforts to restrict it. In 2004, Congress abrogated a series of Federal Circuit decisions that would have prohibited drawback of generalized federal charges like excise taxes, simultaneously adding the "notwithstanding any other provision of law" clause to paragraph 1313(j)(2). In 2007, Congress rejected legislative proposals to enact precisely the Rule's restriction. In 2009, Defendants issued a proposed rule imposing this same restriction, which failed in the face of stiff opposition, including from legislators in both Houses of Congress. And in 2016, Congress again broadened the substitution drawback regime through TFTEA. Yet Defendants insist that excise-tax drawback has in fact been illegal since Congress adopted subsection (v), with no fanfare, in 1993. That makes no sense.

The Rule is also arbitrary and capricious. Defendants say the Rule is justified because excise-tax drawback (a) fails to promote exports and (b) will cause massive tax revenue losses. Neither claim is supported by record evidence or basic economics. Defendants' first claim is based solely on an analysis of wine exports that includes *no data* from when excise-tax drawback was not allowed, making a proper comparison impossible. Indeed, Defendants *admit* "that double drawback may promote exports for some firms" and that they "lack[ ] sufficient data to control for [other] variables." A.R. 2204–05. And Defendants' revenue-loss claims similarly depend on unrealistic assumptions and unsupported assertions. Thus, even if not foreclosed by statute, the Rule would be invalid.

BACKGROUND

A. Internal revenue excise taxes.

An excise tax is a tax "imposed on the manufacture, sale, or use of goods." Black's Law Dictionary, *Tax* (11th ed. 2019). Spirits, beer, wine, tobacco products, and petroleum products are all subject to federal excise taxes. But in accordance with the constitutional rule that "No Tax or Duty shall be laid on Articles exported from any State," U.S. CONST. art. I, § 9, cl. 5, excise taxes do not apply to these goods when exported.

For example, there is a tax "on all distilled spirits produced in or imported into the United States." 26 U.S.C. § 5001(a)(1). But this tax is not paid if domestic spirits are *exported*. If the tax "has not [yet] been paid or determined," spirits may simply "be withdrawn from the bonded premises of any distilled spirits plant … without payment of tax for exportation." *Id.* § 5214(a)(4). If the tax has already been "paid or determined," then upon "exportation … there shall be allowed … a drawback equal in amount to the tax found to have been paid or determined on such distilled spirits." *Id.* § 5062(b). Only the latter—a cancellation or refund of a fixed tax liability—is described in the tax code as a "drawback." *Id.* And the latter is far less common: Most spirits exports occur "without payment of tax" under § 5214(a)(4).

B. Substitution drawback.

1. Congress adopts and expands the substitution drawback regime.

Drawback reflects Congress's consistent view that, in the words of Alexander Hamilton, imposing a "duty of entry" "would injure" the Nation's "Commercial interest" "if the duty was not drawn back" upon export. Alexander Hamilton, *The Defence No. XII* (2–3 Sept. 1795). Drawback "permit[s] U.S.-made products to compete more effectively in world markets" and "encourages domestic production." S. Rep. 114-45; H.R. Rep. 114-114(I).

Congress first adopted substitution drawback in 1984. Then, as now, 19 U.S.C. § 1313(j)(2) governed substitution drawback. The original statute allowed the drawback of duties, taxes, or fees paid on imported merchandise "upon the exportation or destruction" of substitute merchandise "fungible with such imported merchandise." Pub. L. No. 98–573, 98 Stat. 2948 (1984). Customs regulations defined "fungible merchandise" to mean "merchandise which for commercial purposes is identical and interchangeable in all situations." 19 C.F.R. § 191.2(*l*) (1990).

In 1993, Congress essentially adopted this standard, providing for substitution drawback if the exported merchandise was "commercially interchangeable with [the] imported merchandise." Pub. L. No. 103–182, 107 Stat. 2057 (1993). Congress also adopted a special HTS-based substitution standard for petroleum products. *See id.*

The 1993 amendments also added subsection 1313(v). *See id.* That provision, captioned "Multiple drawback claims," provides: "Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback ...." 19 U.S.C. § 1313(v). Congress explained that this provision simply "provides that only one drawback claim per exportation or destruction of goods would be allowed." *See* H.R. Rep. 103-361(I), at 130, 1993 U.S.C.C.A.N. 2552, 2680.

Between 1993 and TFTEA's enactment in 2016, paragraph (j)(2)'s general substitution standard remained the same. But Congress made three other relevant changes to the statute, and rejected another.

In 2004, Congress abrogated a series of judicial and administrative rulings that had restricted drawback of federal taxes, including excise taxes. At the time, paragraph (j)(2) permitted drawback of "any duty, tax, or fee imposed ... because of [the merchandise's] importation." 19 U.S.C. § 1313(j)(2) (2000). The Federal Circuit had read the phrase "because of" to exclude "generalized Federal charges" that apply to imports and non-imports alike. *Texport Oil Co. v. United States*, 185 F.3d 1291, 1296 (Fed. Cir. 1999). *Texport* thus held that the Harbor Maintenance Tax, "assessed in a nondiscriminatory fashion against all shipments utilizing ports," was not eligible for drawback. *Id.* at 1296–97; *see also George E. Warren Corp. v. U.S.*, 341 F.3d 1348, 1352 (Fed. Cir. 2003) (same, for environmental taxes). Congress abrogated these decisions by replacing "because of ... importation" in paragraph (j)(2) with "upon entry or importation." Pub. L. No. 108–429, § 1557(b), 118 Stat. 2434, 2579 (2004); *see* S. Rep. 108-28, at 173 (2003). This change expanded paragraph (j)(2)'s reach to "allow[ ] drawback for any duty, tax, and fee imposed upon entry," which include excise taxes. *Shell Oil Co. v. United States*, 688 F.3d 1376, 1380 (Fed. Cir. 2012) (noting *Texport*'s abrogation).

Also in 2004, Congress amended the statute to require that drawback claims complying with paragraph (j)(2)'s requirements must be paid "notwithstanding any other provision of law." Pub. L. No. 108–429, § 1557(b), 118 Stat. at 2579. This addition overruled a series of Customs rulings holding that excise taxes were not subject to drawback under § 1313 because the "exclusive provisions" of the Internal Revenue Code governed the refund of those taxes. HQ 227916 (Jan. 6, 1999); *see also* HQ 229320 (July 29, 2002); HQ 229322 (Dec. 19, 2001); HQ 229276 (Dec. 10, 2001).

In 2007, Congress considered and rejected a pair of statutory amendments that would have established the same restriction on excise-tax drawback that Defendants now seek to impose through the Rule. These amendments would have reduced substitution drawback payments "by an amount equal to any Federal tax credit or refund of any Federal tax" on the substitute merchandise. 153 Cong. Rec. S7909, S7941, § 832(b); *accord* 153 Cong. Rec. S13774, S13927, § 12318(b).

Finally, in 2008, Congress expanded the substitution standard for wine. The new standard (still in effect today) allows substitution if imported and exported wine are "of the same color" and within 50 percent of the same price. Pub. L. No. 110–234, § 15421, 122 Stat. 923, 1547 (2008). At the time, U.S. Customs & Border Protection (CBP) had already allowed excise-tax drawback on wine for several years. H.R. Conf. Rep. 110-627, at 1094–95, 2008 U.S.C.C.A.N. 536, 514–15; *see al-*

so A.R. 2. Knowing that, Congress chose to expand the substitution standard for wine without restricting excise-tax drawback.

2. Defendants try unsuccessfully to restrict excise-tax drawback.

Defendants saw things differently from Congress. In 2009, they proposed to bar substitution drawback of excise taxes "paid on imported merchandise … where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of tax" under the tax code. A.R. 1. Defendants asserted that allowing drawback in these situations would improperly permit "'piggybacking' a previously existing Federal excise tax exemption benefit … onto the drawback benefits" of § 1313. A.R. 3.

This proposal generated significant opposition, including in both houses of Congress. As ten Senators explained in a comment letter, the "current statutory scheme," and particularly the 2004 amendments, reflects Congress's "unequivocal intent" to "allow[ ] for drawback of *any* duty, tax or fee imposed under federal law," including excise taxes. A.R. 86. The Senators also emphasized that drawback "is vital to U.S. businesses seeking to maintain and grow their exports," and that the wine industry had seen a "dramatic increase in exports … due in large part to the availability of the drawback program." *Id.*

Eighteen House Members similarly objected that the proposal "ignore[d] the clear intent of Congress under 19 USC 1313(j)(2)" and "would reduce wine exports and the overall international competitiveness of the American wine industry." A.R. 83. They noted that CBP had "been heard many times on this issue," and thus the proposed rules were "an attempt by the administering agencies to change existing law via rulemaking, pre-empting and negating the role of Congress." A.R. 84. Defendants withdrew the proposal.

3. Congress further expands the substitution standard in TFTEA.

In 2016, Congress passed TFTEA, the culmination of a years-long process to modernize the drawback regime. TFTEA again expanded the substitution standard. Now, all commodities can use the 8-digit HTS-based standard that applied only to petroleum products before. (Wine can still use the special color-and-value standard.) These changes were designed to expand the availability of drawback and "make drawback applications less burdensome on both claimants and CBP." *Tabacos de Wilson, Inc. v. United States*, 324 F. Supp. 3d 1304, 1307–08 (C.I.T. 2018).

As amended by TFTEA (setting aside irrelevant exceptions), paragraph 1313(j)(2) sets forth specific conditions for substitution drawback:

> [I]f there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation, any other merchandise (whether imported or domestic), that—
>
> > (A) is classifiable under the same 8-digit HTS subheading number as such imported merchandise;
> >
> > (B) is [within 5 years] … either exported or destroyed under customs supervision; and
> >
> > (C) before such exportation or destruction—
> >
> > > (i) is not used within the United States, and
> > >
> > > (ii) is … under the operational control of, the party claiming drawback under this paragraph, …
>
> then, notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (*l*) shall be refunded as drawback.

19 U.S.C. § 1313(j)(2). In turn, subsection 1313(*l*) says that CBP's regulations "shall" provide for substitution drawback "equal to 99 percent of the lesser of" the charges paid for the imported merchandise or the charges that would apply to the exported merchandise if it were imported. *Id.* § 1313(*l*)(2)(B).

C. The Rule.

Although Congress passed TFTEA in 2016, claimants could not begin filing claims under the new standard until February 24, 2018. *See* 19 U.S.C. § 1313(*l*)(2)(A), (*l*)(3), (r)(4). TFTEA thus required Defendants to issue implementing regulations by that date. *See id.* § 1313(*l*)(2)(A). They did not. Instead, CBP issued interim guidance that allowed TFTEA drawback claims to be electronically filed, but stated that the yet-to-be-issued regulations would govern those claims: "After the finalized regulations are implemented, claims that were filed during the interim period"—February 24, 2018 to February 19, 2019—"must be perfected and corrected as necessary to comply with the finalized regulations." U.S. Customs & Border Protection, *Drawback: Interim Guidance for Filing TFTEA Drawback Claims* at 7 (Mar. 2018). Thus, there is a significant backlog of drawback claims filed under TFTEA's expanded substitution standard since February 2018.

In August 2018, Defendants issued a notice of proposed rulemaking to implement TFTEA. A.R. 929. This proposal included a restriction on excise-tax drawback identical to Defendants' failed 2009 proposal:

> For purposes of drawback of internal revenue tax imposed under Chapters 32, 38, 51, and 52 of the Internal Revenue Code … drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise.

Id.; *accord* A.R. 4 (2009 proposal). Defendants offered two justifications for this prohibition on what they now call "double drawback." *First*, they said it is required by subsection 1313(v), the prohibition on multiple drawback claims discussed above. A.R. 892; *see supra* pp. 7–8. *Second*, they argued that this restriction is good policy because (a) excise-tax drawback supposedly does not encourage exports and (b) the Treasury would forgo significant revenue by allowing excise-tax drawback under TFTEA's broader substitution standard. A.R. 893–898.

Many commenters, including Plaintiff the National Association of Manufacturers (the NAM), opposed the proposal. *E.g.*, A.R. 1645. The NAM explained that Defendants' interpretation clashed with the statute's text, structure, and history and the longstanding regulatory definitions of "drawback" and "drawback claim." A.R. 1647–1659. It also observed that Congress has considered and rejected precisely the sort of restriction the Rule would impose. A.R. 1656. And the NAM showed, with a supporting report by an expert economist, that Defendants' export-incentive and revenue-loss theories were unsupported by the evidence and inconsistent with proper economic analysis. A.R. 1662–1673.

Defendants issued the final Rule in December 2018. A.R. 2180. The final Rule made just one relevant change to the proposed regulatory text. Apparently to address the Rule's inconsistency with CBP's longstanding definitions of "drawback" and "drawback claim," Defendants transformed both definitions by adding a sentence saying that "drawback" includes (and "drawback claim" includes a claim for) a "refund or remission of other excise taxes pursuant to other provisions of law." A.R.

2236. (Defendants also altered the Rule to permit drawback of oil spill liability taxes, A.R. 2200–2201.)

The final Rule provides that the "effective date for amendments regarding the drawback of excise taxes … is February 19, 2019." A.R. 2180. But the preamble reiterates the interim guidance's assertion that the Rule governs claims filed before that date. It describes claims filed under TFTEA before the Rule issued as "interim" claims that must now be "perfect[ed]." A.R. 2180–2181.

LEGAL STANDARD

The Administrative Procedure Act (APA) governs actions brought, like this one, under 28 U.S.C. § 1581(i). 28 U.S.C. § 2640(e). Thus, the Court "shall … hold unlawful and set aside agency action, findings, and conclusions" that are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). A "Rule 56.1 motion is the appropriate vehicle" for an APA challenge. *Mittal Canada, Inc. v. United States*, 30 C.I.T. 1565, 1566 (2006).

RULE 56.1 STATEMENT AND SUMMARY OF ARGUMENT

A. *Administrative determination to be reviewed*: This case challenges portions of *Modernized Drawback*, 83 Fed. Reg. 64,942 (Dec. 18, 2018) (A.R. 2180), specifically (i) the restriction on drawback of internal revenue taxes in 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), 191.32(b)(4), and (ii) the expanded definitions of "drawback" and "drawback claim" in 19 C.F.R. § 190.2 (together, the Rule).

B. *Issues of law presented and summary of argument*: The Rule limits substitution drawback of excise taxes "to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." A.R. 2246. Thus, if a claimant exports substitute merchandise without paying excise tax—as the Internal Revenue Code allows—the Rule bars drawback of the excise tax paid on the imported merchandise. This restriction violates the governing statutes and is arbitrary and capricious. The Rule also is unlawful because it purports to have impermissibly retroactive effect.

I. The governing statutes unambiguously foreclose the Rule's restriction on excise-tax drawback. Substitution drawback claims that meet paragraph 1313(j)(2)'s criteria "shall" be paid, "notwithstanding any other provision of law." Yet Defendants contend that an "other provision of law"—subsection 1313(v)—requires the Rule's restriction on excise-tax drawback. That is wrong.

1. Defendants' reliance on subsection (v) runs headlong into paragraph (j)(2)'s "notwithstanding any other provision of law" clause. This language "clearly signals [Congress's] intention that the provisions of [paragraph (j)(2)] override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Defendants' alternative interpretation of this language—as merely clarifying that the Harbor Maintenance Tax is subject to drawback—is untenable. Congress changed other language, in paragraph (j)(2) itself, to achieve that result. The "notwithstanding" clause must be given independent effect.

2. Subsection 1313(v) cannot be read to support the Rule. That provision says that "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback." 19 U.S.C. § 1313(v). Defendants contend that every excise-tax-exempt exportation of goods is a "claim for drawback"—even if no money changes hands and no claim is ever filed with the government. On this view, goods exported without paying excise taxes have already been the subject of a "claim for drawback," and thus cannot "be the basis of any other claim for drawback," including for excise taxes on similar imported goods. But there is no "claim" and no "drawback" when domestic goods are simply exported "without payment of tax." *E.g.*, 26 U.S.C. § 5214(a)(4). A "claim" is a demand or an assertion of a right; there is no such demand when goods are exported under a tax exemption. Likewise, a "drawback" is the refund or cancellation of a paid or fixed tax, duty, or fee. But under most of the tax code provisions governing exports, no tax is ever paid or determined, and thus there is nothing to draw back.

3. Defendants' contrary argument relies heavily on the fact that a minority of the relevant tax code provisions use the word "drawback." But most do not, and Defendants' attempt to paper over these important linguistic differences simply confirms that the Rule reflects their policy disagreements with Congress. Likewise, the broader statutory context does not support the Rule. Consistent with the longstanding meanings of "drawback" and "drawback claim," Congress generally uses these terms in § 1313 to refer to drawback of charges on *imported* goods under

the customs laws. Nothing in the statute suggests that Congress intended "claim for drawback" in subsection 1313(v) to sweep more broadly.

4. Defendants' reading of subsection 1313(v) also produces absurd results. If their interpretation were correct, subsection (v) would prohibit drawback not only of excise taxes, but also of all duties and fees. Subsection (v) prohibits using exported merchandise as the basis for more than one "claim for drawback." And everyone agrees that "claim for drawback" at least includes a claim filed with CBP to obtain a refund of import duties and fees. Thus, if an untaxed export is a "claim for drawback" that triggers subsection (v), then that same export cannot be "the basis for any other claim for drawback"—including a substitution drawback claim for duties or fees paid on similar imported goods. Defendants agree that this would be unlawful, but they insist that subsection (v) applies only "*within* each class" of taxes, duties, and fees and not "*across* all types." A.R. 2200. The statute's language, however, cannot be read that way. This consequence of Defendants' position shows that their interpretation cannot be right.

5. The statutory and regulatory history confirm that Congress has rejected Defendants' position. Congress has consistently expanded substitution drawback and rejected administrative and legislative attempts to impose the sort of restrictions Defendants now propose. This history includes the 2004 amendments to reach all federal taxes, including excise taxes, and to require drawback "notwithstanding any other provision of law"; the failed 2007 statutory amendments that would have imposed the restriction Defendants now say was there all along; the

strong congressional opposition to the failed 2009 proposal; and TFTEA's 2016 expansion of the substitution standard without restricting excise-tax drawback.

6. Even if the governing statutes were ambiguous, the Rule is not a reasonable interpretation. Congress's policy choices in this area are clear. Defendants may not reject those choices based on their own view of better policy. And an agency may not interpret a statute—ambiguous or not—to produce absurd results.

II. The Rule is also arbitrary and capricious. Defendants say the Rule is justified because excise-tax drawback (a) does not meaningfully promote exports and (b) would cause a significant loss of tax revenue. But the first claim is based entirely on a "qualitative examination" that includes no data from before the policy change whose effect it supposedly measures, rendering the results useless. Defendants' analysis also conflates bottled and bulk wine, which (as Defendants elsewhere concede) have very different tax-to-value ratios and thus very different incentives. Applying Defendants' own approach to a proper data set shows—and a proper econometric analysis confirms—that excise-tax drawback promotes exports. Indeed, Defendants largely concede that they lack enough data to draw competent causal conclusions. Likewise, Defendants' revenue-loss claims (i) are based on speculation rather than actual experience with substitution drawback; (ii) fail to account for the positive economic effects of increased domestic production; (iii) use the wrong baseline for comparison; and (iv) depend on the unsupported notion that U.S. manufacturers will produce massive volumes of product simply to destroy it. The Rule is thus unsupported by competent evidence.

III. Even if the Rule were otherwise valid, it suffers from an independent flaw: It purports to apply to—and thus to foreclose—excise-tax drawback claims filed before the Rule took effect. This is quintessentially retroactive rulemaking, since it "would render invalid a [drawback claim] that was valid when filed." *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005). And an agency may not apply a regulation retroactively absent clear authorization from Congress. Not only is that authorization missing here, but Congress went out of its way to require Defendants to complete the rulemaking *before* claims were filed under TFTEA. 19 U.S.C. § 1313(*l*)(2)(A). But the Court need not reach this issue if it concludes, as it should, that the Rule's drawback restriction is invalid.

ARGUMENT

I. The Rule is invalid because it conflicts with the governing statutes.

This Court reviews regulatory interpretations of federal statutes using the two-step *Chevron* framework. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999). The Court first uses "traditional tools of statutory construction" to determine whether Congress has "directly spoken to the precise question at issue"; if so, "that is the end of the matter." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 & n.9 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the Court asks whether the regulation reflects "a permissible construction." *Id.* at 843. Here, the Rule fails both tests.

A. The governing statutes unambiguously foreclose the Rule's interpretation.

The drawback statute cannot be read to restrict excise-tax drawback based on the substitute goods' tax status. If paragraph 1313(j)(2)'s conditions are satisfied, CBP must pay substitution drawback—full stop. Defendants claim that a major exception to that rule lurks in subsection 1313(v), but that minor provision cannot bear the weight Defendants place on it.

1. Paragraph 1313(j)(2) requires drawback of "any duty, tax, or fee" upon the exportation of "any" qualifying merchandise, "notwithstanding any other provision of law."

Paragraph 1313(j)(2), which governs substitution drawback, does not permit the Rule's restriction. Paragraph (j)(2) states the conditions that trigger CBP's obligation to pay drawback: (1) there must be "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation"; (2) there must be "any other merchandise … classifiable under the same 8-digit HTS subheading number"; and (3) the other merchandise must be exported or destroyed within five years, must not be used, and must be within the claimant's control. 19 U.S.C. § 1313(j)(2). If these three conditions are met (and the exceptions in paragraphs (4), (5), and (6) do not apply), then "an amount calculated pursuant to regulations … under subsection (*l*) shall be refunded as drawback." *Id.*[1]

[1] Paragraphs (4), (5), and (6) respectively address exportation to NAFTA countries and Chile; HTS subheading numbers that begin with the term "other"; and using of the first 8 digits of the Schedule B number to determine substitution. *See* 19 U.S.C. § 1313(j)(4)–(6). These exceptions show that "where Congress has intended to provide regulatory exceptions to [paragraph (j)(2)'s requirements], it has done so clearly and expressly." *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003).

These conditions do not depend on the substitute merchandise's tax status. The broad phrase "any duty, tax, or fee imposed under Federal law upon entry or importation" easily encompasses federal excise taxes, which attach to goods "imported into the United States." *E.g.*, 26 U.S.C. §§ 5001(a)(1) (spirits), 5041(a) (wine), 5051(a)(1)(A) (beer). The term "any other merchandise (whether imported or domestic)" is equally clear and broad. It encompasses *all* "other merchandise," without regard to tax status. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("any" means "one or some indiscriminately of whatever kind"). And the remaining criteria—when merchandise is exported, whether it is unused, and whether it is in the claimant's control—are unrelated to the substitute merchandise's tax status. Indeed, the Rule's preamble nowhere suggests that excise taxes do not qualify for drawback under paragraph (j)(2) alone.

Subsection (*l*) is equally clear about the amount of drawback that CBP must pay when paragraph (j)(2) is satisfied. CBP's regulations "shall" provide for substitution drawback "equal to 99 percent of the lesser of" the charges paid for the imported merchandise or the charges that would apply to the exported merchandise if it were imported. 19 U.S.C. § 1313(*l*)(2)(B). This language speaks with mathematical precision.

Together, then, these provisions require that 99 percent of "any" federal charges (including excise taxes) "shall" be subject to drawback upon the timely export or destruction of "any other merchandise" with the same HTS code—whether or not duties or taxes have been paid on those other goods. And paragraph (j)(2) imposes this requirement "*notwithstanding any other provision of law*." 19 U.S.C. § 1313(j)(2) (emphasis added).

Even so, the Rule relies on an "other provision of law"—subsection 1313(v)—to create a massive exception to paragraph (j)(2). That reliance is unavailing. "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Paragraph (j)(2) thus reflects "a legislative intent to displace any other provision of law that is contrary to" its requirements. *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004).

The final Rule tries to brush aside the "notwithstanding" clause, declaring that "[c]ourts have cautioned against literal constructions of [these] clauses." A.R. 2201. In Defendants' view, this clause merely "clarif[ies] that drawback of [the Harbor Maintenance Tax] is permitted." *Id.* It is true that Congress added the clause in 2004 when it abrogated the Federal Circuit's ruling in *Texport* that drawback is unavailable for "generalized Federal charges" like the Harbor Maintenance Tax. 185 F.3d at 1297. But Defendants' account of this change is mistaken.

As explained above, Congress abrogated *Texport* by replacing "because of its importation" in § 1313(j)(2) with "upon entry or importation." Pub. L. No. 108–429, § 1557(b), 118 Stat. at 2579; *see supra* pp. 8–9. That language was part of paragraph (j)(2) *itself*—it was not in an "other provision of law." So the separate "notwithstanding" clause was not an answer to *Texport*. Yet on Defendants' account, that clause has no other function. Their reading thus violates both the presumption that "Congress … intends its amendment[s] to have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), and the "basic interpretive canon[ ]" that "[a] statute should be construed so that effect is given to all its provisions," *Corley v. United States*, 556 U.S. 303, 314 (2009). Defendants "cannot ignore the nullifying clause … 'Notwithstanding any other provision of law ….'" *Stoll v. Nicholson*, 401 F.3d 1375, 1380 (Fed. Cir. 2005).

The final Rule also offers a parade of horribles that would result if the "notwithstanding" clause applied literally and categorically. *See* A.R. 2201–2202. But the Court need not take the "notwithstanding" clause to its logical extreme to see that it weighs heavily against Defendants' position. A statute's "express inclusion of … precise requirements"—like those in paragraph (j)(2)—"counsels against discovering an additional requirement in the implications of a phrase tucked away … elsewhere in the statute." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 728 (6th Cir. 2013). That principle applies even more strongly where Congress uses a "notwithstanding" clause, whose entire purpose is to "override conflicting provisions." *See Cisneros*, 508 U.S. at 18. At the very least, then, this clause is a strong thumb on the scales in favor of any interpretation that preserves paragraph (j)(2)'s full effect. A strained reading of "a phrase tucked away … elsewhere" should not overcome this congressional directive. *Carter*, 736 F.3d at 728. Yet, as explained next, that is all Defendants can offer.

2. Subsection 1313(v) cannot be read to restrict excise-tax drawback based on the substitute goods' tax status.

Subsection 1313(v), captioned "Multiple drawback claims," provides: "Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback …." 19 U.S.C. § 1313(v). This language merely prohibits two or more substitution drawback claims based on the same substitute goods. So, for example, it would prevent a claimant from exporting a single case of California wine and claiming substitution drawback for two different cases of imported Spanish wine. That is how Congress explained this provision when enacting it in 1993. *See* H.R. Rep. 103-361(I), at 130 ("Section 632 provides that only one drawback claim per exportation or destruction of goods would be allowed …."). And that is how Customs rulings have described it. "The section prevents the identification of the same merchandise on more than one drawback claim … if the identified export articles were not claimed more than once, the provisions of [subsection] 1313(v) would not preclude drawback." HQ 229892 (July 3, 2003); *see also* HQ H025565 (July 22, 2010) (noting that subsection (v) "precludes claimants from double-dipping on their drawback claims").

Defendants, however, claim to have belatedly discovered that subsection (v)'s "evident purpose" extends much further. A.R. 892. They claim that, since 1993, subsection (v) has secretly prohibited substitution drawback of excise taxes paid on imported goods if the substitute exported goods were subject to a separate tax exemption under the Internal Revenue Code. *Id.* Subsection (v)'s language cannot be stretched that far. In fact, Defendants' interpretation would push the text past the breaking point, with the absurd result that subsection (v) would bar drawback of any duties, taxes, or fees at all. Unsurprisingly, then, the statutory context and history do not support their novel claim.

a. An untaxed exportation is not a "claim for drawback."

Subsection (v)'s key phrase is "claim for drawback": Only one "claim for drawback" is allowed for each exportation. 19 U.S.C. § 1313(v). Everyone agrees that this phrase includes a claim filed with CBP for the refund of duties, taxes, or fees paid on *imported* goods. *See* A.R. 884. But Defendants contend that a "claim for drawback" under subsection (v) also includes every untaxed exportation of domestic goods that would otherwise be subject to excise tax. They say that "claim" means "a legal claim or entitlement, the elements of which may be satisfied (in part) by the exportation or destruction of merchandise," A.R. 2198, and "drawback" "encompasses both refunds and remission of unpaid tax liabilities that were determined or otherwise imposed by Federal law," A.R. 2199. But their "claim" is not a claim, and their "drawback" is not a drawback.

1. An exportation of domestic goods "without payment of tax" does not involve any "claim." "Because [§ 1313] does not define ['claim,'] the ordinary meaning of the words chosen by Congress provides the starting point …." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 539 (2009). "In ordinary English, a 'claim' is merely a demand for something, or an assertion of a right where the right has not been established." *United States v. Shumway*, 199 F.3d 1093, 1099 (9th Cir. 1999); *see also Black's Law Dictionary*, Claim (11th ed. 2019) (a claim is a "demand for

money, property, or a legal remedy to which one asserts a right"). That everyday understanding matches how CBP's regulations defined the term "drawback claim" until now. *See* 19 C.F.R. § 191.2(j) (2018) ("Drawback claim means *the drawback entry and related documents* required by regulation which together constitute the *request for drawback payment*." (emphasis added)). It also matches how Congress used that term in § 1313. A "drawback claim" is a demand "for [a] refund" that the claimant makes to CBP under § 1313.[2] *See* 19 U.S.C. § 1313(r)(1)–(2). By contrast, where domestic goods are exported under a tax exemption, the exporter need not make a "demand" of the government; there is simply no "payment of tax." 26 U.S.C. §§ 5053(a), 5214(a)(4), 5362(c)(1), 5704(b). It makes no sense to say that every untaxed exportation is a "claim for drawback" when nothing is claimed.

As for "drawback," Defendants emphasize that "when wine, distilled spirits, or beer are exported *after payment or determination of tax*, the [Internal Revenue Code] provides for 'drawback' in an amount equal to the tax paid." A.R. 891 (emphasis added). Since these tax code provisions use the term "drawback" to describe excise-tax refunds on exports, Defendants conclude that they can also treat *tax-exempt* exports as "claim[s] for drawback" under subsection (v). *See id.*; A.R. 2199. This argument is unavailing.

The Internal Revenue Code draws a clear distinction between tax *refunds* on exports and tax *exemptions* for exports. The former is "drawback." The latter is

[2] The phrases "drawback claim" and "claim for drawback" are synonyms. Congress, courts, and CBP use them interchangeably. *E.g.*, 19 U.S.C. § 1313(k)(1); *Aurea Jewelry Creations, Inc. v. United States*, 932 F.2d 943, 945 (Fed. Cir. 1991); *Shell Oil Co. v. United States*, 35 C.I.T. 673, 674–76 (2011); HQ 229892 (July 3, 2003).

not. For example, "[d]istilled spirits on which the internal revenue tax has not been paid or determined may … be withdrawn from the bonded premises … without payment of tax for exportation." 26 U.S.C. § 5214(a)(4). The same is true for wine, *id.* § 5362(c)(1), beer, *id.* § 5053(a), and tobacco, *id.* § 5704(b). The tax code does not describe these untaxed exports as "drawback." By contrast, where the tax on spirits *has* "been paid or determined," the manufacturer is entitled to "a drawback" of that tax upon "exportation." *Id.* § 5062(b). Again, the same is true for wine, *id.*, beer, *id.* § 5055, and tobacco, *id.* § 5706. These provisions thus use the term "drawback" to describe the narrow circumstance of a refund of excise taxes already paid or an extinguishment of a tax liability already "determined." *See* 26 U.S.C. §§ 5055, 5062(b), 5706. And this type of "drawback" is rare: Most untaxed exports occur "without payment of tax" when product is withdrawn directly from a bonded facility for export. *See id.* §§ 5053(a), 5214(a)(4), 5362(c)(1), 5704(b).

For Defendants' interpretation to be correct, the term "claim for drawback" in subsection (v) must extend to *all* of these provisions—even though only three of them use the term "drawback," those three refer narrowly to tax refunds, and most untaxed exports fall under the other provisions. Indeed, the final Rule concedes that "not every IRC provision concerning remission of excise tax liability expressly uses the term drawback," but declares that "Congress's inconsistent use of the term 'drawback' in the Internal Revenue Code does not preclude CBP from construing that term … to encompass transactions that are identical in economic substance." A.R. 2199. But what Defendants dismiss as "Congress's inconsistent use of [a statutory] term," *id.*, is another way of saying that "Congress include[d] particular language in one section of a statute but omit[ted] it in another section." *See NAM v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). And agencies, like courts, "are required to give effect to Congress' express inclusions and exclusions, not disregard them." *Id.*

In the same vein, the final Rule says that "it would be anomalous for [subsection] 1313(v) to prevent revenue loss only when it arose in the form of a refund of amounts already paid and not because it arose from withdrawal without payment of tax." A.R. 2199. But again, Defendants cannot treat Congress's deliberate use of different language as a pesky "anomal[y]" to be reformed. *NAM*, 138 S. Ct. at 631. And the solution to Defendants' "anomal[y]" is not to treat only *some* untaxed exports as "claim[s] for drawback" under subsection (v); it is to recognize that Congress never intended subsection (v) to reach into the tax code at all.

In all events, even accepting Defendants' premise would not sustain the Rule. Defendants contend that subsection (v) reaches exports under all of these Internal Revenue Code provisions—including the ones that allow export "without payment of tax"—because "drawback" can "refer to an unpaid tax liability that is extinguished." A.R. 892. Thus, they say, "the extinguishment of tax liability upon export is best understood as a form of drawback." *Id.* In support of this claim, they point to "Congress's use of the term 'drawback' in 19 U.S.C. 1313(d), which refers to export of domestic products on which tax has been paid *or determined*." A.R. 2199. This explanation does not withstand scrutiny.

"The term 'determined' … with respect to the tax on distilled spirits is used in instances where the tax is determined *and paid* at the time the spirits are withdrawn from bond, as well as in instances where *the amount of the tax to be paid is computed and fixed* at the time the spirits are withdrawn from bond … with payment to be made by return after such withdrawal pursuant to regulations …." *See* S. Rep. 85-2090, 1958 U.S.C.C.A.N. 4395, 4492 (emphasis added) (capitalization omitted). Thus, "paid or determined," in this context, refers to taxes that have actually been paid to the government or whose amounts have been "computed and fixed" for later payment by tax return.

Here, by contrast, the tax code explicitly allows spirits or wine to be exported "without payment of tax" where "the internal revenue tax has *not* been paid or determined." 26 U.S.C. §§ 5214(a)(4), 5362(c)(1) (emphasis added). Indeed, the excise tax on wine is "determined as of the time of removal for consumption or sale." *Id.* § 5041(a). Where wine is exported, such a determination *never occurs*. *See id.* § 5362(c)(1). Likewise, tax is "imposed" only on beer "removed for consumption or sale[ ] within the United States." *Id.* § 5051(a)(1). If beer is exported instead, *tax is not "imposed." Id.* Thus, under these provisions, no tax is ever "computed and fixed," much less paid. As a result, several of the governing excise-tax provisions do not fit even within *Defendants'* expansive definition of "drawback." These mismatches simply confirm that subsection (v)'s language cannot be stretched to cover every untaxed export authorized by the tax code.

2. The statutory context does not support Defendants' reading. Section 1313 uses the word "drawback" almost 100 times, and the phrase "drawback claim" 21 times. In almost every instance, these terms refer to a *refund* of duties, taxes, or fees on *imported* goods. For example, § 1313(r) lays out the procedure for "[f]iling drawback claims." This provision refers only to the process for filing a "drawback entry" under § 1313 with CBP. 19 U.S.C. § 1313(r)(1)–(4). Paragraph (j)(2) itself uses the phrase "drawback claim" the same way: It provides that substitute merchandise must be "exported or destroyed" "before the drawback claim is filed." 19 U.S.C. § 1313(j)(2)(B). If the exportation itself constituted a drawback claim, this directive would be nonsensical.[3]

Section 1313's consistent, narrow use of "drawback" and "drawback claim" is unsurprising. Until the Rule, CBP's regulations reflected the settled understanding that these terms refer merely to a "refund or remission" of duties or taxes "imposed on *imported* merchandise," following customs procedures and using customs paperwork. 19 C.F.R. § 191.2(i) (2018) (emphasis added); *see id.* § 191.2(j) ("Drawback claim means the drawback entry and related documents required by regulation which together constitute the request for drawback payment."). Congress relied on this definition when it enacted TFTEA, adding the observation that "[g]enerally speaking, [drawback] refers to a refund of 99 percent of duties and/or Internal Rev-

[3] As Defendants emphasize, subsection 1313(d) refers to a "drawback" of "internal-revenue tax … paid or determined" "[u]pon the exportation of bottled distilled spirits and wines." 19 U.S.C. § 1313(d). But this sort of explicit reference to "an internal-revenue tax" is missing in subsection (v). And as just explained, Defendants claim that a drawback occurs even where tax has *not* been "paid or determined." *Supra* p. 29. Thus, subsection (d) does not help them.

enue taxes *paid on certain imported merchandise* … entering the United States." S. Rep. 114-45, at 12 (emphasis added). *Exported* domestic merchandise, of course, is not "imported merchandise … entering the United States," *id.*, and the taxes imposed on such exports are not "imposed on imported merchandise," 19 C.F.R. § 191.2(i). And this definition has a long pedigree: As far back as 1862, Treasury Regulations defined a drawback claim as requiring a drawback entry filed with Customs: "To entitle the exporter to such allowance of drawback, he must … lodge with the collector of customs for the district from which such exportation is made, an entry …." *Campbell v. United States*, 107 U.S. 407, 407 (1883). Congress's continued "reenacting [and expansion] of the drawback provision," knowing of CBP's longstanding definitions of these terms, "amounts to an implied legislative recognition and approval of [this] executive construction of the statute." *Nat'l Lead Co. v. United States*, 252 U.S. 140, 146 (1920).

Finally, Defendants' reading of subsection (v) overlooks that excise-tax exemptions for exports are not a matter of legislative grace. They are constitutionally required. The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. This prohibition on "federal tax[es] on goods in export transit," *United States v. IBM Corp.*, 517 U.S. 843, 845 (1996), applies to at least some of the excise taxes covered by the Rule, *see, e.g.*, 26 U.S.C. § 5051(a)(1)(A) ("A tax is hereby imposed on all beer brewed or produced, and removed for consumption or sale, within the United States …."). On Defendants' view, then, subsection (v) conditions the availability of one statutory benefit (drawback under § 1313(j)(2)) on the forfeiture of a different statutory benefit that may be constitutionally required (tax-free exportation)—all without saying a word about the Internal Revenue Code or tax exemptions for exports. It is implausible that Congress put domestic manufacturers to this choice when it used the anodyne phrase "claim for drawback." "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

b. Defendant's reading of § 1313(v) would prohibit drawback of all duties, taxes, or fees—a result Defendants concede Congress did not intend.

Defendants' attempt to stretch the phrase "claim for drawback" also produces absurd results. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). If the Rule's interpretation of subsection (v) were correct, the statute would not just bar drawback of excise taxes. It would prevent the use of untaxed exports as the basis for drawback of *any taxes, duties, or fees at all.*

This is the inevitable consequence of Defendants' attempt to redefine "claim for drawback" so broadly. Subsection (v) uses the term "claim for drawback" to describe both what triggers this provision and what it prohibits once triggered: "Merchandise that is exported or destroyed to satisfy *any claim for drawback* shall not be the basis of *any other claim for drawback* …." 19 U.S.C. § 1313(v) (emphasis added). That is, once a set of exported goods has been used "to satisfy [one] claim for drawback," it cannot be used for that purpose again. And Defendants contend that every excise-tax-exempt exportation of domestic goods is a "claim for drawback" that triggers this restriction. Thus, on their view, such goods can never "be the basis of any other claim for drawback." And everyone agrees that a "claim for drawback"—which Defendants say these goods cannot be used to satisfy—at least includes a request for a refund or remission of duties, taxes, and fees imposed on *imported* goods. *See* A.R. 884. The upshot is that, under Defendants' reading of subsection (v), tax-exempt exported goods can never serve as the basis for a refund or remission of *any* duties, taxes, and fees imposed on imported goods. *See id.*

Consider this example. A manufacturer exports 100 liters of California wine and imports 100 liters of Spanish wine. *Cf.* A.R. 891. As already explained, domestic wine is generally subject to an excise tax, 26 U.S.C. § 5041(a), but can be "withdrawn from bonded wine cellars … without payment of tax for export," *id.* § 5362(c)(1). On Defendants' view, the mere exportation of the California wine "without payment of tax" is itself a "claim for drawback" that triggers subsection (v). A.R. 2199. If that is true, the 100 liters of California wine cannot "be the basis of *any other* claim for drawback." 19 U.S.C. § 1313(v) (emphasis added). That means the manufacturer cannot use the California wine as substitute merchandise to obtain drawback of *any* charges it paid on the Spanish wine—including import duties, which can reach 19.8 cents per liter for wine.[4] So the manufacturer would be liable for, and could not obtain a refund of, roughly $20 in duties per 100 liters of imported

[4] *See* U.S. Int'l Trade Comm'n, *Harmonized Tariff Schedule of the United States Revision* 9, at Subheading 2204.10 (2018).

wine, despite not having introduced, in net effect, any additional wine into the domestic market.

Defendants agree that "limit[ing] drawback in [this] manner" would be unlawful. A.R. 2200. But they seek to avoid this consequence of their interpretation. They say their reading does not "limit a claimant to only one duty, tax, or fee upon which to claim drawback." *Id*. That is, "[n]othing about CBP's interpretation of section 1313(v) implies that the prohibition on double drawback should be applied *across* all types of taxes, duties, and fees rather than *within* each class." *Id*.

That response misunderstands the issue. Only one "claim for drawback" is allowed for any exported merchandise. And Defendants' reading treats all excise-tax-exempt exports as *already* having been the subject of a "claim for drawback." That means such exports "shall not be the basis of *any other* claim for drawback" *for any type of charge*. In other words, a manufacturer that has exported goods without paying excise taxes cannot file a "claim for drawback" with CBP that identifies those exported goods as the basis for substitution drawback of "any" payment of "duties, taxes, and fees imposed" on imported goods.

For Defendants' construction to be possible, the statute would have to limit the phrase "any other claim for drawback," as in: "Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback [for the same type of charge]." But Congress did not write the statute that way. And "the need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a wrong interpretive turn. Agencies are not free to 'adopt … unreasonable interpretations of statutory provisions and then edit [the] statutory [language] to mitigate the unreasonableness.'" *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

It is irrelevant that Defendants do not "inten[d] to limit drawback" of charges other than excise taxes. A.R. 2200. If Defendants' interpretation of "claim for drawback" were right, *the statute itself* would require this result—a result Defendants concede would be improper. That is reason enough to vacate the Rule.

c. Defendants' interpretation conflicts with the statute's history.

Finally, Defendants' interpretation clashes with the statutory and regulatory history, which shows that Congress has consistently expanded access to substitution drawback and rebuffed efforts to impose the restriction Defendants now claim was lurking in the statute all along.

For one thing, Congress adopted subsection (v) in 1993, almost a decade after it first allowed substitution drawback in 1984. On Defendants' account, then, the excise-tax drawback forbidden by the Rule was permissible between 1984 and 1993. If Congress meant to prohibit in 1993 what was allowed before, the legislative history presumably would say so. It does not. The House Report's entire explanation for subsection (v) is this: "Section 632 provides that only one drawback claim per exportation or destruction of goods would be allowed, but provides for appropriate credit and deduction for claims covering components or ingredients." H.R. Rep. 103-361(I), at 130. If Congress meant "claim for drawback" to include exports "without payment of tax" under the Internal Revenue Code, there should be some hint of it.

Indeed, CBP itself did not describe subsection (v) the way it now reads that provision. As already explained, Customs rulings addressing subsection (v) explain it in the same limited terms as the legislative history. *Supra* p. 24. And while other rulings held that excise taxes were not subject to drawback under § 1313, they did not rely on subsection (v). Instead, they reasoned that the "exclusive provisions" of the Internal Revenue Code governed the refund of excise taxes—a position Congress overruled in 2004 by adding the "notwithstanding" clause. *Supra* p. 9.

Also in 2004 came Congress's clarification of paragraph (j)(2). As explained above, the Federal Circuit in *Texport* interpreted paragraph (j)(2)'s phrase "because of" to mean that "generalized Federal charges"—which included excise taxes, *see George E. Warren Corp. v. United States*, 201 F. Supp. 2d 1366, 1368 n.2 (C.I.T. 2002), *aff'd,* 341 F.3d 1348 (Fed. Cir. 2003)—were not eligible for substitution drawback. *Texport*, 185 F.3d at 1297. Congress amended the statute to "allow[ ] drawback for any duty, tax, and fee imposed upon entry." *Shell Oil*, 688 F.3d at 1380. Congress thus restored drawback eligibility for excise taxes, again without suggesting that those claims were improper.

Perhaps the most damning aspect of this history, however, is the failed 2007 statutory amendments. In June 2007, several Senators proposed an amendment that would have added to § 1313 a new subsection (z), providing that "the amount of the refund as drawback under this section shall be reduced by an amount equal to any Federal tax credit or refund of any Federal tax paid on the merchandise with respect to which the drawback is claimed." 153 Cong. Rec. S7909, S7941, § 832(b).

In November 2007, four Senators offered an amendments package that contained the same proposed addition. 153 Cong. Rec. S13774, S13927, § 12318(b). The final legislation, however, omitted this proposed change. Instead, it liberalized the substitution standard for wine, making it easier for wine producers to claim drawback—including drawback of excise taxes, which Congress noted that CBP had been paying for several years. *See* H.R. Conf. Rep. 110-627, at 1094–95, 2008 U.S.C.C.A.N. at 514–15; *see also* A.R. 2.

These failed amendments carry three lessons. *First*, "drafting history show[s] that Congress cut out the very language … that would have authorized" the restriction Defendants seek to impose. *See Doe v. Chao*, 540 U.S. 614, 622 (2004). This "deletion … is fairly seen, then, as a deliberate elimination" of the Rule's drawback restriction. *Id.* at 623. And "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has … discarded in favor of other language." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442–43 (1987).

Second, the proposed-but-abandoned language contrasts starkly with subsection (v)'s language. While the actual statute refers only to "claim[s] for drawback," the rejected amendments would have specifically addressed "any Federal tax credit or refund of any Federal tax"—just the sort of language Congress would have used in subsection (v) if Defendants' reading were correct. Thus, "a comparison of the language in the amendments with the language of [subsection (v)] serves only to underscore the difference" between the statute as written and as Defendants construe it. *Dellmuth v. Muth*, 491 U.S. 223, 229 (1989).

Third, the proposed amendments would have left subsection (v) alone and added a new subsection (z). If subsection (v) were meant to restrict excise-tax drawback, the natural course would have been to propose amending *that provision* to make the restriction clearer. Instead, the Senators proposed to add a new subsection—which would have been, on Defendants' new view of the statute, redundant.

Finally, Defendants' 2009 proposal to impose the same restriction failed. As explained above, it prompted fierce opposition from Members of both Houses of Congress, who explained that Defendants "have been heard many times on this issue," and thus the proposed rules were "an attempt by the administering agencies to change existing law via rulemaking, pre-empting and negating the role of Congress." A.R. 84; *see supra* pp. 10–11. This failed proposal also undermines Defendants' repeated claims that "CBP Headquarters" did not approve excise-tax drawback for wine. *E.g.*, A.R. 2204, 2198. At least since 2009, everyone involved—CBP, Treasury, and Congress—has known of this practice and allowed it to go on. And despite Defendants' continued advocacy, Congress again expanded substitution drawback in TFTEA in 2016 *without* restricting excise-tax drawback.

* * *

In sum, the Rule's restriction is "found nowhere in the statute," and to engraft it by regulation would "violate the congressional command" that CBP must pay drawback whenever the "statutory criteria" are satisfied. *Jordan v. Sec'y of Educ.*, 194 F.3d 169, 171 (D.C. Cir. 1999). An agency may not "impose limitations on the scope of [a statute] beyond those specifically dictated by Congress," *Viegas v. Shinseki*, 705 F.3d 1374, 1379 (Fed. Cir. 2013), or add a "carve out" to a "comprehensive [statutory] scheme" that defines "eligibility" for a benefit, *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). Such an attempt fails at *Chevron* step one. *See Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73–74 (D.C. Cir. 2016); *Succar*, 394 F.3d at 10; *Jordan*, 194 F.3d at 171–72.

B. Even if the governing statutes were ambiguous, the Rule does not reflect a reasonable construction.

Even if the relevant statutory language were ambiguous, the Rule is still "'untethered to Congress's approach' and thus fails at *Chevron* step two." *NRDC v. EPA*, 777 F.3d 456, 469 (D.C. Cir. 2014); *see also Wassenaar v. OPM*, 21 F.3d 1090, 1092 (Fed. Cir. 1994) ("an agency's interpretation should not stand if it 'contravenes clearly discernible legislative intent' or is otherwise unreasonable'"). The final Rule declares Defendants' view that, "to the extent section 1313(v) may be considered ambiguous, CBP has adopted a reasonable construction of the prohibition on double drawback that appropriately advances the policies of the excise tax regime." A.R. 2198. This argument echoes the proposed rule's repeated claims that "*the broader statutory excise tax regime*,[ ] (on net) generally imposes excise taxes on all subject goods consumed in the United States," and so "double drawback" must be prohibited as inconsistent with this "general[ ]" goal. A.R. 891–892 (emphasis added).

This is not a proper way to interpret statutes. Applying "'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986). And statutory ambiguity is not a license to disregard these limitations. "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

The statutory context here is clear, and has grown clearer at every turn. Ever since Congress first adopted substitution drawback in 1984, it has consistently rebuffed efforts to constrain the program—including by rejecting legislative proposals that mirrored the Rule's restriction. This history reflects Congress's consistent policy judgment that substitution drawback is a boon for U.S. manufacturing, and that any accompanying loss of tax revenue is a fair price to pay for those substantial benefits. Defendants cannot defy Congress's judgment based on their contrary policy views.

In any event, statutory ambiguity would not solve one of the most fundamental problems with Defendants' interpretation: It would bar drawback of any duties, taxes, or fees at all. *See supra* § I.A.2.b. An agency interpretation that produces "internal inconsistency" and "absurd results" "is unreasonable under *Chevron* step two." *Int'l All. of Theatrical & Stage Emps. v. NLRB*, 334 F.3d 27, 34–35 (D.C. Cir. 2003). The Rule is thus invalid.

II. The Rule is arbitrary and capricious because the record evidence does not support it.

The Rule also fails APA review because it is arbitrary and capricious. An agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It may not "offer[] an explanation … that runs counter to the evidence," *id.*, and must respond to relevant comments that "cast doubt on the reasonableness of [its] position," *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011).

Defendants say the Rule is justified because excise-tax drawback (a) does not meaningfully promote exports and (b) would cause a significant loss of tax revenue. A.R. 893. Neither claim is sound.

A. Defendants' export-incentive claim is unsupported.

Defendants' central claim is that excise-tax drawback does not promote exports. A.R. 894. This claim is not based on any sort of econometric model, but on what Defendants call a "qualitative examination of trends in aggregate trade data" for wine. A.R. 2205. According to Defendants, CBP paid "double drawback" on wine starting around 2004. A.R. 893 n.6. Defendants thus looked at "U.S. trade statistics" for wine "from 2004 to 2016." *Id.* According to Defendants, the "total volume of wine exports only grew by 5.5 percent" over that period, and the "export volumes to countries for which substitution drawback was available" (non-NAFTA countries) grew even less. *See* A.R. 893–894. Thus, Defendants conclude, excise-tax drawback "has not been an effective export promotion measure." A.R. 894.

To start, this conclusion contradicts Defendants' revenue-loss claims, which assume that drawback *will* cause "increasing exports." *See, e.g.*, A.R. 2209 (predicting a "combination of matching pre-existing imports and exports, and increasing exports"). Indeed, for Defendants' revenue-loss estimates to be possible, exports would have to increase significantly. Right now, imports of beer and many spirits far exceed exports, and thus "many of the imports of these products would go unmatched [to a substitute export] unless exports increased dramatically." A.R. 1671 (NAM comments). Defendants cannot claim both that drawback fails to promote exports and that it will cause large revenue losses because so many claimants will use it. *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (agency's "internally inconsistent" market analysis was arbitrary and capricious).

What is more, Defendants' approach flouts basic economic principles—and, indeed, common sense. *First*, "[t]o be able to estimate the causal effect" of a policy change, "any method chosen must estimate … what the outcome would have been" without the change. Paul J. Gertler et al., World Bank Grp., *Impact Evaluation in Practice* 8 (2011). Economists do this by comparing data from before and after a policy change, or by comparing the affected population to a control group, but a truly robust analysis requires drawing both comparisons at once. *See id.* at 14, 40, 98. Thus, a sound economic analysis requires, *at a minimum*, "information about the past—before [the] policy changed." Gov't Accountability Office, *Program Evalua-*

tion: A Variety of Rigorous Methods Can Help Identify Effective Interventions 27 (2009). This makes sense: Comparing data from before and after an event can "help rule out the influence of unrelated" factors. *Id.* at 29. By choosing to begin their analysis *in 2004*—when "CBP believes the practice of double drawback [for wine] began," A.R. 893 n.6—Defendants deliberately *excluded* any pre-event data. As a result, their analysis fails to compare a world in which excise-tax drawback is available to one in which it is not.

The final Rule notes the criticism that Defendants' analysis "is flawed because it does not extend far enough into the past" but declares, without evidence, that "starting a comparison [before] 2004 would have little effect on [Defendants'] findings" because *the NAM's economic analysis*—which Defendants otherwise reject—suggests that "the effect on exports operates with a strong lag." A.R. 2205. Defendants cannot paper over the flaws in their own methodology, which purports to find no increase in exports, by pointing to the results of the NAM's analysis, which reaches the opposite conclusion.

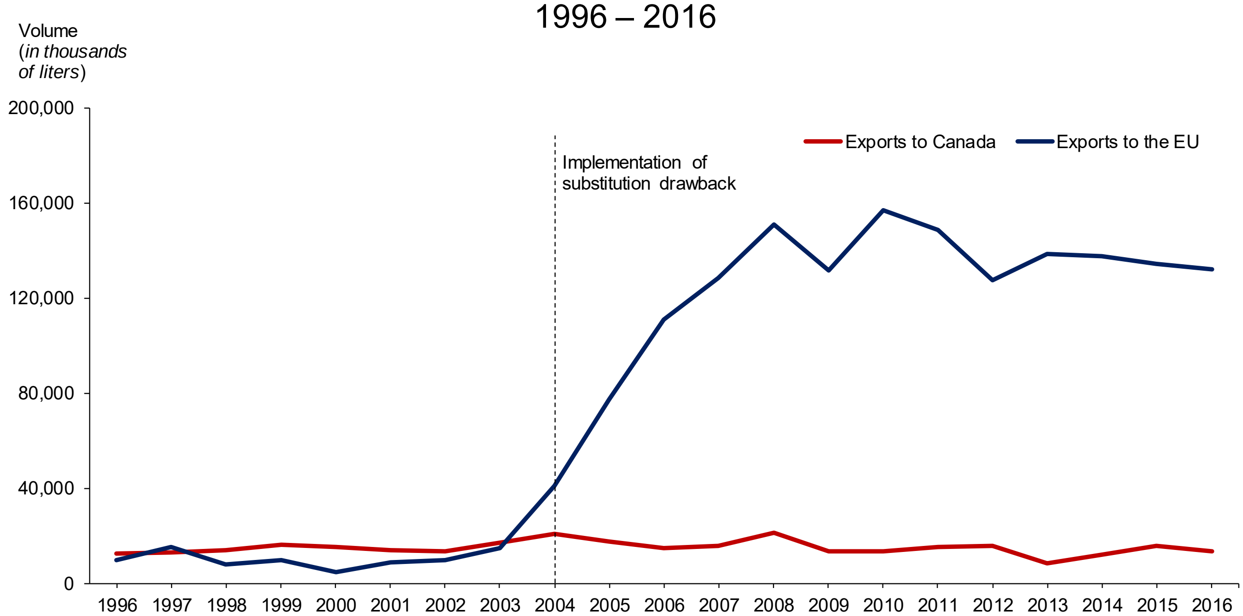
Second, sound empirical economic analysis "controls for all factors that might also explain the outcome of interest." Gertler et al., *supra*, at 53. Any number of factors could impact wine exports, including exchange rate movements, change in relative prices, economic fluctuations, technological changes, or shifts in consumer tastes. Defendants, however, simply asked whether total export volumes over several years trended up or down. A.R. 893–894. Defendants' approach is thus "unable to distinguish whether changes in U.S. imports or exports of wine can be explained by substitution drawback or instead by any other factor." A.R. 1663 & n.30 (NAM comments); *see Impact Evaluation*, *supra*, at 42. Compounding this problem, Defendants ignored prior economic analyses of substitution drawback *in the wine industry* cited by the NAM, which comprehensively analyzed control factors like these and rejected Defendants' conclusion. *See* A.R. 1662 n.24, 1666 n.38 (citing literature).

Third, Defendants lumped together all wine exports, finding "little evidence that *total* wine exports by volume increased." A.R. 893 (emphasis added). But bottled wine and bulk wine (shipped in larger containers and plastic "flexitanks") are subject to different incentives. As Defendants readily acknowledged about wine *imports*, bulk wine is much cheaper than bottled wine, and thus "excise tax levied by volume comprises a greater percentage of its average price, meaning that producers have a stronger economic incentive to claim … drawback on bulk wine." 83 A.R. 893; *accord* A.R. 2205 (final Rule). Defendants also acknowledged this important distinction for spirits, treating "spirits … with low tax-to-value ratio" (brandy, liqueurs, and cordials) differently from "high tax-to-value products, namely vodka, gin, and grain alcohol." A.R. 2209. Yet Defendants analyzed bulk and bottled wine together, obscuring this significant difference.

Applying Defendants' own "qualitative" approach while correcting for just one of these errors—the conflation of bottled and bulk wine—shows that excise-tax drawback *does* promote exports. Defendants' own statistics show that "bulk wine exports increased from 68 million liters in 2004 to 175 million liters in 2016. Bulk wine exports therefore *increased 156.6 percent* (by volume) in the period that substitution drawback has been in place." A.R. 1664 (emphasis altered); *see* A.R. 897 tbl. B. And bulk wine is more representative of the affected products than bottled wine, because four of the top five imported spirits (by volume) have tax-to-value ratios "similar to that of bulk wine." A.R. 1670. The increase in bulk-wine exports thus shows that excise-tax drawback will promote spirits exports—as Defendants themselves assume in the revenue-loss context.

The NAM bolstered this conclusion with "one of the most frequently used impact evaluation methodologies," a "difference-in-difference" model. *See* Gertler et al., *supra*, at 103. This method conducts the simultaneous before-and-after and test-versus-control comparisons required to support a robust causal inference. *Id.* at 95. The NAM's analysis, performed by an agricultural economist with deep knowledge of wine economics, treats drawback-ineligible wine exports to Canada as a "control group" to drawback-eligible wine exports to the European Union and uses data from before and after 2004. The results are clear:

Figure 1: Volume of U.S. Bulk Wine Total Exports to Canada and the European Union [1][2][3]
1996 – 2016



Source: U.S. International Trade Commission, "Interactive Tariff and Trade DataWeb"

Note:
[1] Bulk wine is defined as wine in containers of greater than two liters.
[2] USITC defines total exports as "domestic exports plus foreign exports."
[3] Wine trade data in the table includes the Harmonized Tariff Schedule (HTS) 10-digit exports code: 2204290020.

A.R. 1665. This analysis reveals a highly statistically significant (more than 99 percent confidence) and economically large (726,000 more liters per year) impact. A.R. 1701–1702. And it offers precisely the economic rigor that Defendants' approach lacks. *See* A.R. 1664–1666.

The final Rule faults the NAM's model for "fail[ing] to control for" decreased "[b]ulk wine shipping costs." A.R. 2205. But the final Rule cites no authority for this claim, let alone for the idea that shipping costs decreased at precisely the right moment and in the right manner to explain the results of the NAM's analysis. In any case, a difference-in-difference model *automatically* controls for any factors (like shipping costs) that affect the test and control groups equally. Gertler et al., *supra*, at 96. The final Rule also asserts that Canada and the EU are poor comparators because they "experienced very different trends in bulk wine imports" during the relevant period. A.R. 2206–2207. But Defendants' own data belies this claim. That data shows a gradual four-fold increase in *non-U.S.* bulk-wine exports to the EU between 2000 and 2013. A.R. 2207. *U.S.* exports to the EU, by contrast, increased *by a factor of sixteen* by 2011. A.R. 2206. Thus, "trends" do not explain why U.S. exports to drawback-eligible countries increased so dramatically.

In any event, the final Rule ultimately *admits* "that double drawback may promote exports for some firms," that Defendants "lack[ ] sufficient data to control for [other] variables in [their] analysis," and that "strong causal statements would require considerably more data and exhaustive economic analysis … , controlling for a wide range of economic factors." A.R. 2204–2205. These concessions are sensible. But Defendants do not take them seriously. Although Defendants disclaim any "categorical causal statements," A.R. 2205, the final Rule's *entire premise*, as a policy matter, is that Defendants "evaluat[ed] the impact of double drawback" and found that it "does not appear to be an effective measure for promoting exports," A.R. 2203. "Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgments must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (cleaned up) (citations omitted). The Rule does not clear that bar.

B. Defendants' revenue-loss claims are overstated and unsupported.

Defendants assert that "[m]aintaining the current double drawback treatment of wine and extending that treatment to other products subject to excise tax … would cause significant revenue loss to the U.S. Government." A.R. 894. But even if this were true, it would not, by itself, be a proper basis to restrict drawback. Congress has consistently concluded that drawback is worth the loss in revenue because it promotes exports and manufacturing. H.R. Rep. 114-114(I); S. Rep. 114-45; *see State Farm*, 463 U.S. at 43 (an agency may not "rel[y] on factors which Congress has not intended it to consider"). In any event, this claim is unsupported.

Defendants' revenue-loss claim depends on the "estimated rate at which firms are projected to take advantage of double drawback," which is "informed by the economic incentives" for each product, especially the tax-to-value ratio. A.R. 894. Based on the relatively high tax-to-value ratio for some products, like certain distilled spirits, the notice predicts "strong behavioral responses … including purposeful destruction of inexpensive distilled spirits and routing of goods destined for other countries through the United States." A.R. 895. Overall, the notice predicts much "higher rates" of excise-tax drawback than in the wine industry. A.R. 894–895.

This analysis is flawed and incomplete. To start, it is unclear why Defendants resorted to speculative estimations in place of actual experience. As noted above, bulk wine and many high-import-volume spirits have roughly the same tax-to-value ratio. Thus, the incentive created by drawback for these products is roughly the same. Yet Defendants do not rely on the history of bulk-wine drawback, instead speculating that the drawback rate for spirits would be almost twice as high as for bulk wine (45% versus 25%). *See* A.R. 895. That does not follow.

What is more, Defendants considered only potential lost excise-tax revenue, and not potential economic benefits that would *increase* other tax revenues. For example, the notice asserts that drawback would increase domestic production of vodka, given vodka's high tax-to-value ratio. A.R. 895 n.19. Even at the lower end of Defendants' own estimate, U.S. vodka production would increase four-fold, which would "generate demand for 28,700 tons of glass for bottling, over 8.4 million additional corrugate shipping cases, and an additional 9,600 acres of grain cultivation." A.R. 1668 (NAM comments). In turn, this would boost not just employment, but also business and income tax revenues. Defendants' analysis ignores these well-understood and often-quantified positive effects. This oversight is all the more glaring because the final Rule declares—with no analysis and no citation—that a "reduction in excise taxes … would produce a change to overall economic output that varies from modestly negative to minimal." A.R. 2208. This sort of one-sided evaluation is improper. *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1222 (D.C. Cir. 2004) ("Without … accounting for benefits as well as costs, we do not understand how the remainder of the agency's explanation, all of which focuses solely on the costs of the rule, could pass muster ….").

Defendants' revenue-loss figures also rest on unrealistic and unsupported assumptions. Defendants assume that distilled-spirits manufacturers will respond to drawback by producing "inexpensive distilled spirits" solely to destroy the product to claim drawback. A.R. 895. For this to make any sense, "the production costs must be much smaller than the tax," since destruction necessarily means forgoing any profit from a sale. A.R. 1672 (NAM comments). But Defendants cited no authority and no real-world examples of this production-for-destruction scenario, even while agreeing that "destruction of goods is an unusual act." A.R. 2209. And Defendants do not merely predict a few isolated instances of production-for-destruction; their estimates assume massive quantities of it. A.R. 895; *see also* A.R. 1671 (NAM comments).

Moreover, Defendants' conclusion that the production costs for spirits are low enough to make this production-for-destruction scheme worthwhile rests entirely on a 2006 Department of Agriculture study estimating the cost of production of ethanol from sugar and other crops *as a replacement for gasoline*. *See* A.R. 894 n.10, 895 n.18. As the NAM pointed out, the study said nothing about the cost of producing spirits for human consumption. A.R. 1672. Yet the final Rule relied on this study without acknowledging this problem. A.R. 2210.

Defendants' assumption that producers will re-route shipments through the United States also lacks support. They offer no evidence that this practice is economical for the affected industries. Their sole concession to feasibility is to limit their assumption to shipments from Canada or Mexico. A.R. 895 & n.19. But even for those countries, Defendants offer no basis to conclude that re-routing is realistic given transportation, transaction, and logistics costs, the resulting delays in products reaching the market, and the need to split profits with foreign exporters. *Id.* ("we *assume* that *all* spirits exports from Canada and Mexico to non-NAFTA countries could be re-routed through the United States" (emphasis added)); *see also* A.R. 1672–1673 (NAM comments). Nor do Defendants try to explain why, if this practice is feasible, producers of bulk wine (which has similar a tax-to-value ratio) have not adopted it already.

Finally, Defendants' revenue-loss calculation for wine reflects a basic conceptual error that vastly inflates their estimate. That calculation is based on CBP's payment of excise-tax refunds in 2015; Defendants project this number forward to estimate total lost revenue over ten years. A.R. 895. But this approach assumes that all of the wine imports in 2015 would have happened even *without* excise-tax drawback—a premise directly contrary to Defendants' own assertion that drawback increases imports. *See* A.R. 893. If a given import would not have occurred without the drawback incentive, the refund of excise taxes on that import is not a "loss" *caused by* drawback. Without drawback, the import would not have happened and the tax would not have been paid in the first place. Thus, Defendants again failed to measure the effect of allowing drawback against a counterfactual baseline where it is *not* allowed. A.R. 1669 (NAM comments). And the same conceptual error leads to inflated revenue-loss estimates for those products that Defendants assume will see increased export volumes. *Id.* Although the NAM explained this in detail, the final Rule offers no response.

None of this is to say that expanding excise-tax drawback will not cause some drop in tax revenues. Any tax exemption or refund will have that effect (although it may be offset by revenue gains elsewhere). And again, Congress has already decided that drawback's export-promoting effects are worth the forgone revenue. But if this is a proper consideration, Defendants' revenue-loss figures are too overstated and unsupported to be reliable. The Rule is arbitrary and capricious.

III. Even if the Rule is otherwise valid, it cannot apply to claims filed before its effective date.

Finally, even if the Rule is otherwise valid, applying it to deny claims filed before its February 19, 2019 effective date would be impermissible retroactive rulemaking.

TFTEA provides for a transition year, from February 24, 2018 to February 23, 2019, during which claimants could file drawback claims under the prior substitution standard or under TFTEA's expanded standard. *Tabacos de Wilson*, 324 F. Supp. 3d at 1308. Congress thus directed Defendants to issue implementing regulations by the start of the transition year. 19 U.S.C. § 1313(*l*)(2)(A). As the Court knows, however, these regulations were "withheld in violation of the law." *Tabacos de Wilson*, 324 F. Supp. 3d at 1315–16.

Defendants ultimately missed Congress's deadline by almost a year. In the meantime, they issued interim guidance declaring that TFTEA drawback claims "are being placed on hold until the TFTEA's implementing regulations are passed." *Id*. at 1312; *see supra* p. 12. The final Rule says the same thing. A.R. 2180–2181. Thus, Defendants apparently intend to apply the Rule to deny claims for excise-tax drawback filed during the transition year (although they may grant such claims for wine alone, *see* A.R. 2198).

Applying the Rule to deny claims filed before it took effect would constitute retroactive rulemaking. A law is retroactive if it "would impair rights a party possessed when he acted … or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Thus, "[a]pplying the [Rule] … would have impermissible retroactive effect if it would render invalid a [claim] that was valid when filed." *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005).

That is the case here. As this Court recognized in holding that Defendants unlawfully withheld the implementing regulations, TFTEA created statutory rights to drawback in accordance with the statute's terms: "[R]ights related to an entire statutory section … are being deprived due to Defendants' failure to act." *Tabacos de Wilson*, 324 F. Supp. 3d at 1315. And those rights kicked in on February 24, 2018. *See id.*; Pub. L. No. 114–125, § 906, 130 Stat. at 234. So, for example, a claimant who filed a TFTEA drawback claim on March 1, 2018 that complied with all of the statute's requirements had—and still has—a *statutory right* to payment on that claim. Thus, denying that claim based on a Rule that took effect almost a year later would "render invalid a [claim] that was valid when filed." *Durr*, 400 F.3d at 1380.

An agency may not promulgate retroactive rules without "express" congressional authorization. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208

(1988). This "demanding" standard typically requires "statutory language that was so clear that it could sustain only one interpretation." *Bernklau v. Principi*, 291 F.3d 795, 805 (Fed. Cir. 2002).

There is no such language here. Congress gave the Secretary of the Treasury the power "to make such rules and regulations as may be necessary to carry out the provisions of" the Tariff Act of 1930, which includes § 1313. *See* 19 U.S.C. § 1624. This general grant of rulemaking power says nothing about retroactivity. *See id.* More to the point, TFTEA required Defendants to complete their rulemaking *before* any claims would be filed under the statute. 19 U.S.C. § 1313(*l*)(2)(A). Far from *authorizing* retroactive rulemaking, Congress sought to ensure against it.

Thus, even if the Rule is not categorically invalid, Defendants' attempt to apply it to transition-year claims is unlawful.

CONCLUSION

The Court should hold unlawful and set aside, and permanently enjoin Defendants from enforcing, the Rule's restriction on excise-tax drawback and its expanded definitions of "drawback" and "drawback claim." Alternatively, the Court should hold that the Rule cannot apply to drawback claims filed before its effective date.

June 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Standard Chambers Procedure 2(b)(1)(a) because it contains 13,976 words. This certification relies on the word-count feature of the word-processing software used to prepare the brief, Microsoft Word 2016.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, a true and accurate copy of the document above was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of this filing to all counsel of record.

/s/ Peter D. Keisler
Peter D. Keisler

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

THE NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al., Defendants.	No. 19-00053 Hon. Jane A. Restani

[PROPOSED] ORDER

Upon consideration of Plaintiff the National Association of Manufacturers' Motion for Judgment on the Agency Record, Defendants' responses, the oral argument, and the record of this case, it is hereby **ORDERED** that Plaintiff's Motion for Judgment on the Agency Record is **GRANTED** and the following portions of *Modernized Drawback*, 83 Fed. Reg. 64,942 (2018), are held unlawful, set aside, and enjoined from enforcement: (i) the restriction on drawback of internal revenue taxes in 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), 191.32(b)(4), and (ii) the expanded definitions of "drawback" and "drawback claim" in 19 C.F.R. § 190.2

Dated:____________
New York, New York

____
The Hon. Jane A. Restani

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, a true and accurate copy of the document above was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of this filing to all counsel of record.

/s/ Peter D. Keisler
Peter D. Keisler