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' REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE AGENCY RECORD

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INTRODUCTION[1]

Defendants' arguments confirm that the Rule rests on their policy disagreements with Congress. Their statutory arguments, straying far from the text, reveal the policy-driven basis for the Rule. And those policy justifications are identical to the ones Defendants offered and Congress rejected in 2009. Defendants' claim that their "interpretation" "harmonizes" the "beating heart" of the "drawback and excise-tax regimes," Opp. 15–16, is equally wrong and misguided. It is wrong because the Rule contravenes both statutory text and legislative intent. And it is misguided because it purports to further the "'broad purposes' of legislation at the expense of" faithfully interpreting "specific provisions." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986).

As for their legal arguments: Defendants concede that Congress added paragraph 1313(j)(2)'s "notwithstanding" clause in 2004 "to prevent CBP from denying" drawback claims "based on the view that excise taxes were governed solely by the Internal Revenue Code." Opp. 21. That concession alone should doom the Rule, which effectively re-imposes the pre-2004 regime that Congress rejected. Likewise, Defendants' textual arguments confirm that they want to label and treat as "drawback" things Congress deliberately chose *not* to call "drawback." But agencies must "give effect to Congress' express inclusions and exclusions" of statutory language. *NAM v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). The substance-over-form doctrine, Opp. 12–13, does not excuse Defendants from complying with that basic rule.

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[1] We cite the NAM's opening brief as "Br." and Defendants' brief as "Opp."

Nor can Defendants explain away the absurd results of their interpretation. They cannot dispute that if every untaxed export were a "claim for drawback," subsection (v)'s plain text would prohibit using those exports as "the basis of *any other* claim for drawback" for any duties, taxes, or fees. 19 U.S.C. § 1313(v) (emphasis added). Instead, they declare, with no textual support, that subsection (v) "merely prohibits double recovery of any particular assessment." Opp. 14, 28. But "any other" means "any other." These contortions underscore that Defendants' interpretation cannot be right. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

Ultimately, Defendants fall back on a broader claim: The Rule merely closes an "inadvertent" loophole for wine by codifying "CBP's longstanding *prohibition* on double drawback for spirits, tobacco, beer, and fuel." Opp. 31. But there is no such prohibition. No Customs ruling, regulation, or guidance document after Congress's 2004 amendment suggests that excise-tax drawback is prohibited for *any* goods. And Congress has consistently endorsed the opposite policy—in 2007, when it rejected statutory amendments that mirrored the current Rule; in 2008, when it broadened the wine substitution standard; in 2009, when many legislators firmly opposed the first, failed version of the Rule; and in 2015, when Congress relaxed the substitution standard for all goods in TFTEA and confirmed "that the existing treatment of wine … is preserved." H.R. Rep. No. 114-376, at 221 (2015) (Conf. Rep.), 2016 U.S.C.C.A.N. 42, 112. That is not an "inadvertent" loophole. It is a consistent, considered policy approach, and Defendants cannot override Congress's judgment.

ARGUMENT

I. The governing statutes foreclose the Rule's interpretation.

The Supreme Court recently emphasized that "the possibility of deference can arise only if a [text] is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). While *Kisor* dealt with agency regulations, the Court applies the "same approach for ambiguous statutes" under *Chevron*. *Id*. at 2415. Thus, "before concluding that a [statute] is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction"—"text, structure, history, and purpose." *Id*. "If genuine ambiguity remains, moreover, the agency's reading … must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id*. at 2415–16. "And let there be no mistake: That is a requirement an agency can fail." *Id*. at 2416.

This analysis forecloses the Rule. Congress has spoken, and in any event the Rule goes far beyond any reasonable interpretation.

A. Congress adopted paragraph 1313(j)(2)'s "notwithstanding" clause to reject Defendants' restriction of excise-tax drawback.

The Rule violates paragraph 1313(j)(2), which *requires* CBP to pay substitution drawback upon the timely exportation of "any other merchandise" with the same HTS code, whether taxed or not. Br. 20–21. And paragraph (j)(2) applies "notwithstanding any other provision of law." 19 U.S.C. § 1313(j)(2). Yet Defendants see no "conflict" between paragraph (j)(2)'s unqualified command and their position that subsection (v) prohibits excise-tax drawback. Opp. 19–22.

First, Defendants now concede that the Rule's interpretation of the "notwithstanding" clause—as merely "clarify[ing] that drawback of [the Harbor Maintenance Tax] is permitted," A.R. 2201–02—renders the clause superfluous, because Congress addressed the HMT separately. Opp. 21; *see* Br. 22–23. Their new position is that the "notwithstanding" clause "does have meaning" because Congress added it "to prevent CBP from denying otherwise eligible drawback claims under Title 19 based on the view that excise taxes were governed solely by the Internal Revenue Code." Opp. 21. That is, Defendants now agree that Congress adopted the "notwithstanding" clause *specifically to reject CBP's view* that excise taxes were not eligible for substitution drawback because the tax code already exempts exports from those taxes. That is essentially the same faulty rationale underlying the current Rule. *See, e.g.*, A.R. 891–92 (arguing that excise-tax drawback "is inconsistent with the broader statutory excise tax regime" because "exceptions to the required payment of Federal excise tax exist" under the tax code). Defendants' concession thus underscores that the "notwithstanding" clause prevents them from relying on earlier-enacted language elsewhere in the statute to restrict excise-tax drawback.

Defendants insist that when Congress rejected their view of excise-tax drawback, it did not mean to allow so-called "double drawback." Opp. 21. This is a distinction without a difference. The commodities "that are eligible for drawback" under § 1313—"distilled spirits, wines, beer, tobacco products, and certain … taxable fuel and petroleum products"—are all subject to excise-tax exemptions or refunds when exported. *See* A.R. 891. Thus, *every* excise-tax drawback claim implicates so-called "double drawback" because the exported substitute goods are never taxed. And the 2004 amendments were, as Defendants concede, enacted partly to override CBP's refusal to pay excise-tax drawback.

Indeed, if Congress intended to allow just one excise-tax benefit per exportation, as Defendants claim, it could have maintained or codified CBP's pre-2004 interpretation. *See* Br. 9; Opp. 5, 21. The only difference between that regime and the current Rule is that the Rule theoretically gives exporters a choice between recouping 100% of their excise taxes under the tax code, or just 99% under § 1313, *see* Opp. 7 n.4—a choice with only one rational answer. The Rule's restriction is thus functionally indistinguishable from the pre-2004 regime Congress threw out. The only sensible view of the 2004 amendment—and the only view that gives the "notwithstanding" clause "real and substantial effect," *see Stone v. INS*, 514 U.S. 386, 397 (1995)—is that Congress rejected the interpretation Defendants now claim was lurking in the statute all along.

Second, Defendants try to distinguish the binding cases holding 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), because they see "no statutory conflict" between paragraph (j)(2) and their interpretation of subsection (v). Opp. 22. But Defendants' key premise is that subsection (v)'s supposed "double-drawback prohibition" bars some substitution-drawback claims that paragraph (j)(2) would otherwise allow. *Id.*; *see id.* at 11–15. And the "notwithstanding" clause means that if such a conflict arises, paragraph (j)(2) prevails.

Defendants also accuse the NAM of not "tak[ing] its own argument seriously" because it agrees that, despite the "notwithstanding" clause, subsection (v) bars a claimant from using one export as the substitute for two imports. Opp. 19–20. That misses the point. All parties agree that the "notwithstanding" clause need not be taken to its logical extreme. *See* Br. 23. But as just explained, all also agree that Congress adopted the clause to reject nearly the same restriction the Rule would impose. The Court need not conclude that the "notwithstanding" clause overrides *all* other restrictions, *see* Opp. 20–21, to see that the clause forecloses *this* Rule.

B. An untaxed exportation is not a "claim for drawback" under subsection 1313(v).

The Rule treats every untaxed export authorized by the Internal Revenue Code as a "claim for drawback" that triggers subsection 1313(v). But when excisable goods are exported "without payment of tax," there is nothing to "drawback"; no tax is ever paid, determined, or (in some cases) even imposed. These exports—that is, most of the exports covered by the Rule—thus involve no "claim for drawback" under the plain meaning of that term. Br. 25–32.

Defendants first respond that the NAM's interpretation of subsection (v) is unclear. Opp. 18–19. Not so. Given the statutory text, structure, and history, the term "claim for drawback" in subsection (v) refers to a claim to recover charges on *imports*. Br. 24, 30. It does not include any tax exemption, remittance, or refund for charges on *exports*. *Id.* at 25, 28. This reading excludes a few (rarely used) domestic tax-refund mechanisms that Congress also labeled "drawback." But Defendants' reading of subsection (v) produces far more significant inconsistencies and absurdities, which confirms Congress's narrow purpose. *See id.* at 32–35; *infra* § I.C. And whatever "claim for drawback" could have meant when Congress adopted subsection (v) in 1993, the "notwithstanding" clause now prohibits Defendants from using this language to bar excise-tax drawback—regardless of the underlying tax-code provision.

At the very least, however, "claim for drawback" under subsection (v) is limited to things that Congress actually called "drawback." Under no circumstances can this language be read to reach untaxed exports that involve no "drawback" as Congress has used that term. And because the Rule reaches *all* untaxed exports, including those not termed "drawback," it is invalid.

Defendants' contrary arguments are unavailing. They concede that, for the Rule to be valid, "claim for drawback" must reach every excise-tax refund, remission, or exemption in the tax code—even those that by their terms are not "drawback," those that allow exportation "without payment of tax," and those that apply before tax is "imposed." Opp. 10–15. And they do not dispute that most exports fall under these non-"drawback" provisions. Br. 27. Yet they say that *all* exports under *any* of these provisions can be labeled "claim[s] for drawback" because (i) "drawback" "include[s] the remission of tax liability, not just refunds"; (ii) excise taxes are "typically" imposed upon production; and (iii) tax law favors substance over form. Opp. 11–15, 19–22. These arguments lack merit.

First, Defendants contend that "drawback," as used in the tax code and subsection 1313(d), includes the refund or remission of an internal-revenue tax that has been "paid or determined." Opp. 11–12, 25. But that does not help them, because spirits and wine can be exported "without payment of tax" where the tax "has *not* been paid or determined." 26 U.S.C. §§ 5214(a)(4), 5362(c)(1) (emphasis added). And "determined" refers specifically to situations "where the tax is determined and paid" upon withdrawal from bond, or "where the amount of the tax to be paid is computed and fixed … with payment to be made by return after such withdrawal." S. Rep. No. 85-2090, at 100 (1958), 1958 U.S.C.C.A.N. 4395, 4492. This happens, for example, if distilled spirits are withdrawn for *non*-export purposes. *Id.* at 118, 1958 U.S.C.C.A.N. at 4509; *see* 26 U.S.C. § 5213. But if the goods are withdrawn for export, the liability is not "computed and fixed" for later payment—it is never determined. *E.g.*, 26 U.S.C. §§ 5041(a) (wine tax is "determined as of the time of removal for consumption or sale"), 5703(b)(1) (same, for tobacco).

Congress thus used the word "drawback" narrowly to refer to the refund or cancellation of a tax that has already been paid, or computed and fixed for later payment. Yet most of the provisions the Rule treats as involving "drawback"—under which most exports occur—allow exportation where the excise tax is *never* paid or determined. The Rule's definition of "drawback" is thus inconsistent with Congress's. And upholding the Rule as to all untaxed exports because it also covers a few rarely used tax-code provisions that use the word "drawback" would be letting a tiny tail wag a very big dog.

Defendants' reliance on different definitions of "drawback" in "other authorities," Opp. 13, is misplaced. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and Congress consistently used "drawback" more narrowly in this context than Defendants claim. Regardless, Defendants' other authorities do not support them.

Defendants' lead authority—quoted seven times—is a 121-year-old case that is not about U.S. drawback law at all. Opp. 13. The question in *United States v. Passavant* was how to value imports subject to a German duty-remittance mechanism. 169 U.S. 16, 22–23 (1898). The Court merely noted that "one of the definitions of drawback" fit the German scheme. *Id.* But even setting aside that *Passavant* addressed foreign law, Defendants err by citing a definition from 1898 to establish the meaning of a provision Congress adopted in 1993. *E.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (statutory terms carry their "contemporary, common meaning").

Defendants also point to CBP regulations, which "have long understood 'drawback' to include both refunds and remissions." Opp. 13. But if the longstanding regulatory definition of "drawback" supported their position, Defendants would not have scrambled to change it between the NPRM and the final Rule. Br. 13–14, 30–31; *see* A.R. 2236 (adding the sentence: "More broadly, drawback also includes the refund or remission of other excise taxes pursuant to other provisions of law."). This eleventh-hour change shows that the Rule clashes with the common, preexisting understanding of "drawback." And regulations implementing the tax code again show that "drawback" does not encompass removal "without payment of tax." For example: "Allowance of drawback of tax shall apply only to tobacco products …

on which tax has been paid, when such articles are shipped to a foreign country ...." 27 C.F.R. § 44.221 (emphasis added); *see id.* § 44.61(a) (separately addressing removal "without payment of tax for direct exportation" without using the word "drawback").

Defendants fare no better with Black's Law Dictionary. The definitions they cite refer to a "refund on *import* duties" or "duties due on *imported* merchandise"—which simply confirms that the natural reading of "claim for drawback" in subsection (v) is limited to charges on imports. Opp. 13 (emphasis added).

Second, Defendants contend that because "[a]lcohol taxes on domestic products are typically imposed ... upon production," there is always a liability to be "drawn back" upon exportation. Opp. 24; *id.* at 11–12. But "typically" does not mean always. For example, tax is not "imposed" on beer until it is "removed for consumption or sale[ ] within the United States." 26 U.S.C. § 5051(a)(1)(A). Thus, tax is *never* imposed on exported beer—yet the Rule treats exporting beer as making a "claim for drawback." That makes no sense.

In any event, Congress's careful use of the term "drawback" in the tax code reflects that, even when tax is nominally "imposed" upon production, the evaporation of this inchoate liability before any tax is "paid or determined" is not a "drawback." For example, when a manufacturer produces spirits in the United States, "withdraw[s] [them] from the bonded premises ... for exportation," and then exports them, no tax is assessed—the manufacturer never owes the government money. 26 U.S.C. § 5214(a)(4). This scenario thus differs from the "drawback" of a determined tax liability. And while Defendants now object to calling this a "tax exemption," Opp. 24, both Congress and Defendants have used the same term. *E.g.*, 26 U.S.C. § 5053 (provision governing removal of beer for export "without payment of tax" captioned "Exemptions"); A.R. 892 ("the IRC imposes excise tax and provides exemptions from such tax").

Third, Defendants ultimately acknowledge that the key tax-code provisions "do not use the term 'drawback.'" Opp. 25. But they feel free to ignore that difference because all the provisions have "parallel structure[s]" and are "identical in economic substance," and in tax law, "substance over form is favored." *Id.* at 12, 25–26. But again, these provisions do not have parallel structures. Tax is never imposed on exported beer, 26 U.S.C. § 5051(a)(1)(A); that is very different from obtaining a refund of a tax already paid, or from cancelling a "computed and fixed" liability.

In any event, Congress does not consider these provisions "identical." It used the term "drawback" to describe refunds or remissions, but not exports "without payment of tax." And Defendants must "give effect to Congress' express inclusions and exclusions, not disregard them." *NAM*, 138 S. Ct. at 631. This rule is one of the "traditional tools of statutory construction" that applies at *Chevron* step one. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 446 (1987) (applying this rule to deny *Chevron* deference); *Brown*, 513 U.S. at 120 (same). That Congress used "drawback" in some of these provisions but not others "cannot be deemed unintentional or immaterial." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 666 (D.C. Cir. 1994) (en banc) (denying deference).

Defendants cannot rely on the substance-over-form doctrine. *Contra* Opp. 12–13. That doctrine merely counsels that "[w]hen mulling transactions between private parties, courts … typically look to substance … rather than to the form chosen by the parties." *Fresenius Med. Care Holdings, Inc. v. United States*, 763 F.3d 64, 70 (1st Cir. 2014). It does not allow Defendants to disregard Congress's choice of statutory language in tax cases. *E.g.*, *Tax Analysts v. IRS*, 350 F.3d 100, 100–01, 104 (D.C. Cir. 2003) (holding that IRS regulations "violate[d] the [code's] unambiguous language" because they ignored Congress's "disparate inclusion or exclusion" of language).

Separately, Defendants insist there is a "claim" even when goods are simply exported "without payment of tax," because the exporter must file TTB paperwork. Opp. 24–25. But doing paperwork is not necessarily a "claim." And Congress used the term "claim for drawback" more narrowly. Br. 26. Indeed, until the Rule, CBP's regulations correctly recognized that "drawback claim means the drawback entry and related documents" filed with Customs. 19 C.F.R. § 191.2(j) (2018). Thus, this term does not sweep in the TTB forms related to untaxed exports. And while Defendants emphasize that subsection (v) reaches "*any* claim for drawback," Opp. 25 (emphasis added), "the adjective 'any' can broaden the scope of [a term] to its natural boundary, but not beyond," *United States v. Stock*, 728 F.3d 287, 295 (3d Cir.

2013). Regardless, even if there were a "claim," there is no "drawback" for the reasons just explained, so an untaxed export is not a "claim for drawback."

C. Defendant's reading of subsection 1313(v) creates absurd results by barring drawback of any duties, taxes, or fees.

If Defendants were right that every untaxed export is a "claim for drawback" that triggers subsection (v), then such exports could never be "the basis of any other claim for drawback"—not only for excise taxes, but for *any* duties, taxes, or fees. 19 U.S.C. § 1313(v). And everyone agrees that Congress did not intend that absurd result. *See* Opp. 28; A.R. 2200.

Defendants respond that the Rule, following the statute, "merely prohibits double recovery of any particular assessment." Opp. 14, 28. But subsection (v)'s text does not contain that limit. Compare subsection (v)'s language with Defendants' characterization:

19 U.S.C. § 1313(v) (emphasis added):	**Opp. 14 (emphasis added):**
"Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be *the basis of any other claim for drawback* …."	"§ 1313(v) operates to prevent an export for which excise taxes have been extinguished (and thus subject to a 'claim for drawback') from serving as *the basis for a second 'claim for drawback' of excise taxes* on the corresponding import."

Where the statute says "*any other* claim for drawback," Defendants read "a second 'claim for drawback' *of excise taxes*." But that is not what the statute says. Rather, it says that subsection (v), once triggered, bars any drawback claims whatsoever. Br. 32–35.

Instead of grappling with this language, Defendants point to subsection (v)'s "proviso clause," which they say "*assumes* that multiple manufacturing-drawback claims may be submitted based on a single export." Opp. 28. That language is irrelevant. The "proviso" clause says that "appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments." 19 U.S.C. § 1313(v). This language merely states a narrow "except[ion]" to an otherwise-categorical rule. *Id.* And that exception is limited to "claims covering components or ingredients," which are not involved here. Nothing about this language supports Defendants' view that subsection (v) actually *allows* multiple drawback claims based on the same export, but only if the claims seek to recover different types of charges.

Nor does subsection 1313(u) help Defendants. It reads: "*Imported merchandise* that has not been regularly entered or withdrawn for consumption shall not satisfy any requirement for use, exportation, or destruction under this section." *Id.* § 1313(u) (emphasis added). This provision says nothing about untaxed *exports*, and Defendants fail to explain how it illuminates the scope of "claim for drawback" in subsection (v). Opp. 15.[2]

Defendants also say their view of subsection (v) "vindicates the core principle of drawback." Opp. 28 (citing *Passavant* again). But agencies cannot apply the

[2] Defendants also observe that "CBP regulations … have long prohibited" claimants from recovering the same excise taxes *on a single export* under both the internal revenue code and subsection 1313(d). Opp. 15. That is irrelevant. Drawback under subsection (d) is not substitution drawback, and this prohibition does not support Defendants' reading of "any other claim for drawback" in subsection (v).

"'broad purposes' of legislation at the expense of specific provisions," *Dimension Fin. Corp.*, 474 U.S. at 373–74, or "edit … statutory [language] to mitigate the unreasonableness" of their interpretations, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. And Defendants simply have no coherent account of subsection (v)'s text. "[T]he need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a wrong interpretive turn." *Id.*

Finally, Defendants contend that, "whatever force NAM's [absurd-results] argument has, it applies equally" to the NAM's interpretation of subsection (v). Opp. 28. In fact, interpreting "claim for drawback" to apply only to charges imposed on imports is the only way to *avoid* this problem. Any interpretation of "claim for drawback" that includes exports will prohibit all substitution drawback in at least some cases, Opp. 18, which concededly contravenes Congress's intent.

D. Defendants' account of the statute's history and CBP's "longstanding practice" is mistaken.

Defendants' account of subsection (v)'s history is essentially this: Congress adopted substitution drawback in 1984. At the time, excise taxes were ineligible for drawback. *See* Opp. 21, 29. In 1993, Congress passed subsection (v), barring "double drawback" of excise taxes (even though they were already ineligible). *Id.* at 29. In 2004, Congress made excise taxes eligible for drawback for the first time, and subsection (v)'s dormant "double drawback" prohibition finally sprung to life, simultaneously negating that eligibility. *See id.* at 29–30.

This story does not hang together. Congress cannot have intended subsection (v), enacted in 1993, to prohibit a practice that was impossible until 2004. And even if subsection (v) had created a dormant "double drawback" restriction in 1993, it makes no sense to treat the 2004 amendments as *reviving* that restriction rather than *abrogating* it. As Defendants now concede, Congress adopted the 2004 amendments to ensure that excise taxes would be eligible for drawback. *Supra* § I.A. That change would have been pointless if, as Defendants contend, subsection (v) immediately kicked in to essentially restore the pre-2004 *status quo*.

Defendants also try to brush aside the failed 2007 statutory amendments—which would have imposed the same restriction as the Rule, *see* Br. 36–37—because, they say, those amendments were just about imported ethanol. Opp. 30. That is incorrect. A separate paragraph dealing with commercial interchangeability was limited to "[e]thyl alcohol or mixture containing ethyl alcohol," but the reduction of drawback "by an amount equal to any Federal tax credit or refund of any Federal tax paid on the [substitute] merchandise" was not so limited. 153 Cong. Rec. S7909, S7941, § 832(b) (June 19, 2007). Thus, "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).

Defendants also neglect a different change Congress did make. By 2008, CBP had been paying excise-tax drawback for wine for at least four years. A.R. 2. And Congress, pointing specifically to CBP's existing practice of "pa[ying] drawback claims on wine," *expanded* the wine substitution standard without restricting excise-tax drawback in any way. H.R. Rep. No. 110-627, at 1094–95 (2008) (Conf. Rep.); Br. 9–10. Together with the 2004 amendments, the unsuccessful 2007 amendments, and the strong opposition to Defendants' failed 2009 proposal, this change reflects that Congress intended CBP to keep paying excise-tax drawback for wine. *See* A.R. 83–84 (House letter explaining that the 2009 proposal "ignore[d] the clear intent of Congress … entitling exporters to obtain drawback of all duties, taxes and fees"); A.R. 86 (Senate letter explaining that the proposal "run[s] counter to the current statutory scheme").[3] Yet Defendants ignore this significant legislation and consistent policy direction.

Defendants similarly overlook that Congress again endorsed paying excise-tax drawback for wine in TFTEA. The TFTEA conferees "clarif[ied] that the *existing treatment of wine under section 313(j)(2) of the Tariff Act of 1930 is preserved*, and that the amendments to the statute do not change this treatment." H.R. Rep. No. 114-376, at 221, 2016 U.S.C.C.A.N. at 112 (emphasis added). Thus, eleven years after CBP first started paying excise-tax drawback for wine, seven years after Congress expanded the wine substitution standard, and six years after Defendants' failed 2009 proposal, Congress—knowing all of this—remained adamant that "the existing treatment of wine" be "preserved." *Id.*

As this history shows, CBP's treatment of wine is not an "inadvertent" "anomaly"—it is what the statute requires and what Congress intended. But Defendants emphasize that CBP has no similar practice of paying excise-tax drawback for other goods. Indeed, they assert (without citation) that "to its knowledge … CBP has never permitted double drawback of excise taxes for *any other commodities* sub-

[3] Defendants' assertion that legislators opposed the 2009 proposal merely "due to then-pending legislation," Opp. 8, ignores these unequivocal statements.

ject to the same excise-tax framework." Opp. 7. And they claim that CBP has always enforced a "*prohibition* on double drawback for spirits, tobacco, beer, and fuel." *Id*. at 31. Even if that were true, Congress has plainly ratified CBP's payment of excise taxes for wine, not some contrary policy for other goods. But it is not true.

After the 2004 statutory amendments, there was no agency prohibition on excise-tax drawback. "[A]gency interpretations are only relevant if they are reflected in public documents," *United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) (Dyk, J., sitting by designation), and Defendants do not cite a single Customs ruling, regulation, or guidance document from 2004 onwards suggesting that so-called "double drawback" is improper, under subsection (v) or otherwise. The first hint that CBP took this view was the 2009 proposal—which failed. And that proposal did not say it was codifying an existing prohibition. Rather, it acknowledged that, "given the present statutory and regulatory structure … other products [than wine] … may also be the subject of such drawback claims where the excise taxes on the good have been refunded, remitted, or not paid." A.R. 2.

Likewise, a 2009 Customs ruling analyzed the agency's prior treatment of wine and the scope of Congress's 2008 legislation without hinting that excise-tax drawback was prohibited—or even mentioning subsection (v). The ruling explained that, in 2001, the San Francisco drawback office determined that same-color wine was commercially interchangeable if it was within 50 percent in value. HQ H036362, 2009 WL 980615, at *2 (Mar. 27, 2009). In 2007, CBP headquarters revoked that interchangeability determination. *See id.* And in 2008, Congress disagreed, reinstating and codifying the San Francisco office's prior practice. None of these agency documents—not the 2001 determination, the 2007 revocation, or the 2009 ruling—suggested that subsection (v) bars excise-tax drawback, which would have been a glaring omission given that CBP paid excise-tax drawback on wine under these authorities. The 2009 ruling even noted "numerous [pending] drawback claims … for various alcoholic beverages including dessert wine, sparkling wine, and hard liquor," *id.*, without so much as a word about "double drawback"—a term Defendants did not coin until 2018. The notion that CBP had an existing, binding policy against "double drawback" is simply wrong.

So why, then, was wine the only commodity receiving excise-tax drawback? Because, until TFTEA, only wine enjoyed a relaxed *substitution* standard—at first because of the 2001 CBP determination, and then under the 2008 legislation. *See* H.R. Conf. Rep. 110-627, at 1094–95; A.R. 77. All other goods were subject to the commercial-interchangeability standard, which CBP generally construed too narrowly to benefit commodities like spirits or beer. Br. 1–2; Compl. ¶ 3. CBP had emphasized that "[m]anufacturers use brand names to create brand recognition that allows the manufacturer to sell the branded product at a premium price," and thus generally denied substitution for products with different brand names. *E.g.*, HQ H026006, 2008 WL 2610936, at *6 (June 20, 2008) (holding that a chemical product "sold under [a] brand name" was not interchangeable with a very similar product sold "under no brand name"); HQ 229320, 2002 WL 31342505, at *9–10 (July 29, 2002) (noting that the fact that imported and exported products are both "beer made from malt" is "minimally persuasive" in establishing interchangeability, and emphasizing the "use of a unique trade name … that identifies a specific kind or brand of beer"). And individual alcohol brands are almost always produced in just one country,[4] meaning it is rarely possible to substitute alcohol exports for same-brand imports.

In sum, the reason CBP did not pay excise-tax drawback for non-wine commodities is not that policy prohibited those claims; it is that these goods were not substitutable. But under TFTEA, substitution drawback—and thus excise-tax drawback—is available for a much wider range of commodities, which is why this issue has come to a head now.

E. An "animating principle" cannot override specific statutory language.

Defendants' overarching theme is that the Rule follows the "principal objective"—or the "beating heart," or the "animating principle"—of the "drawback and excise-tax regimes." Opp. 15–16. That objective, they say, is "to enable a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all, while ensuring that every excise-taxable product consumed in the United States is taxed." *Id.* (quoting *Passavant*, 169 U.S. at 23) (citation omitted) (cleaned up). But Defendants' view of drawback's "beating heart" relies entirely on *Passavant*. *See id.* And as explained above, *Passavant* is not about U.S. excise taxes or drawback, let alone *substitution* drawback, which would

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[4] Int'l Ctr. for Alcohol Policies, *The Structure of the Beverage Alcohol Industry* 5 (Mar. 2006), https://tinyurl.com/y29bwcjg.

not exist for eight more decades. And this 1898 decision hardly suggests that Congress in 1984, 1993, 2004, 2008, or 2016 intended to prohibit excise-tax drawback.

In any event, this argument "manifests an interpretative error of long standing, one that apparently will never die: to treat a statute's primary or precipitating object as its sole object." *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1076 (D.C. Cir. 2008). In truth, "no legislation pursues its purposes at all costs … and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

The tax code is a prime example. It serves to raise revenue, but it is full of deductions, exemptions, credits, and other compromises. That is what drawback is: A policy decision by Congress, dating to the Founding, to forgo Treasury revenue to promote U.S. manufacturing, exports, and employment. H.R. Rep. No. 114-114(I) at 98–99 (2015); S. Rep. No. 114-45 at 12 (2015). Excise-tax drawback is the same: legislators emphasized that prohibiting excise-tax drawback "would significantly undercut the export programs of many U.S. businesses." A.R. 83 (House letter); *see also* A.R. 86 (Senate letter) ("Eliminating [excise-tax drawback] would significantly undermine the health of an industry that injects billions of dollars into the U.S. economy and employs tens of thousands of American workers."). Congress could have made a different policy choice. But it did not. And a "reviewing court 'must reject administrative constructions of [a] statute … that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'" *Secs. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 137, 143 (1984).

II. The Rule is arbitrary and capricious.

Defendants fail to defend the agency's decisionmaking process, which is unsupported by the record. Br. 41–52.

A. Defendants' export-incentive claim is unsupported.

Defendants' export-incentive claim rests solely on a "qualitative examination of trends" in the wine trade starting in 2004. A.R. 2205. But this "examination" contradicted Defendants' revenue-loss predictions; included no before-and-after comparison; and conflated high-priced bottled wine with low-priced bulk wine. *See* Br. 41–47.

Defendants largely repeat these errors. They first defend their decision to start the analysis in 2004—excluding all data from before the policy change—"because many wine firms were likely unaware that they could claim double drawback from 2004 onwards." Opp. 39. But that is not how the Rule justifies this choice. The Rule points to a "lag" effect *in the NAM's analysis*—which showed, contrary to Defendants' speculation, that excise-tax drawback significantly increased exports. A.R. 2205. And the only record support for a "lag" based on lack of knowledge appears in an economics paper, which similarly concluded that excise-tax drawback "contributed significantly to the subsequent growth in … exports." A.R. 425, 452. These economic analyses do not plug the gaps in Defendants' "qualitative examination"; they directly contradict Defendants' conclusions.

Defendants next claim that, in any event, they "found that beginning the analysis in 2000 does not change the qualitative conclusions." Opp. 39. But the cited pages of the NPRM do not analyze wine exports from 2000 to 2004. *E.g.*, A.R. 893 n.6 ("this analysis addresses trade statistics beginning in 2004"). And Defendants' brief supports this claim by citing an extra-record website. Opp. 39. A court "may not accept … *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

In any event, Defendants continue to rely on the supposedly "modest" growth of "total wine exports." Opp. 39–40. This approach improperly treats bulk wine the same as bottled wine, even though bulk wine has a much higher tax-to-value ratio and is thus more representative of the products affected by the Rule. Br. 44–45; A.R. 893, 2205. Defendants ignore this key point, again. *See Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 n.56 (D.C. Cir. 1983) (agencies cannot "ignore important factors in making predictions"). And the NAM did not rely on "growth in wine exports by value." *Contra* Opp. 39. It showed that, according to Defendants' own statistics, bulk-wine exports "increased 156.6 percent (by volume) in the period that substitution drawback has been in place." A.R. 1664; *see* A.R. 897. Defendants try to brush aside this change by observing that bulk-wine *imports* increased even more, Opp. 40, but that is irrelevant. What matters is whether excise-tax drawback promotes *exports*. And Defendants' own data shows that, for high tax-to-value products like bulk wine—and thus for the most imported spirits by volume—the answer is yes.

Defendants also attack the NAM's difference-in-difference analysis, which they say "failed to control" for other variables. Opp. 40. But this analysis *automatically* controls for variables that affect the test and control groups equally, and there is no evidence that the EU and Canada experienced different trends in wine demand, shipping costs, or any other relevant variable. Br. 46. Defendants continue to ignore the economics literature that comprehensively analyzed these control factors and rejected their conclusion. *See* A.R. 415–576, 780–872, 1662 n.24, 1666 n.38. They also repeat their claim that "Canada is a poor control for the EU" because EU bulk-wine imports increased more than Canadian imports, Opp. 40, again ignoring that EU bulk-wine imports from the United States increased *four times more* than imports from other countries—a clear sign of drawback's export-incentive effect. Br. 47; A.R. 2206–07.

Finally, Defendants continue to overlook that their export-incentive "examination" contradicts their revenue-loss claims. For Defendants' revenue-loss estimates to be possible, exports would have to skyrocket so there would be enough exports to substitute for imports. Br. 42; *see* A.R. 1671. Defendants have no answer.

B. Defendants' revenue-loss claims are unsupported.

All of Defendants' revenue-loss estimates are based on the "excise-tax refunds that CBP paid on wine in 2015." Opp. 33. The problem with using this data is not that Defendants failed "to account for uncertain changes in domestic wine consumption." *Id.* at 34. The problem is that they assumed that *all* of the wine imports in 2015 would have happened even without excise-tax drawback. *See* Br. 51. 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. *Id.* Defendants do not address this basic error, which infects all of their revenue-loss estimates. *See* A.R. 1669. Nor do they explain why they assumed that the drawback rate for spirits would be almost twice as high as for bulk wine (45% versus 25%), despite very similar tax-to-value ratios. Br. 48–49.

Defendants also fail to defend their far-fetched claims that manufacturers will reroute international shipments through the United States, or produce product just to destroy it. They insist that "rerouting already occurs" because statistics from 2015 show many re-exports of spirits. Opp. 36. But these numbers tell us nothing about the effects of excise-tax drawback, because (as explained above) CBP generally deemed spirits non-interchangeable. As for production-for-destruction, Defendants again insist that this unheard-of practice is possible because "[t]he Agriculture Department estimated in 2006 that producing neutral grain spirits costs only $0.53 per proof gallon." *Id.* at 37. But again, the Agriculture study estimated the cost of producing ethanol *as a replacement for gasoline*—not for human consumption. Br. 50; A.R. 894 n.10, 895, 1672. It does not even mention "spirits."[5] Defendants simply ignore this problem.

Defendants say they are under "no … mandate" to estimate the economic benefits of excise-tax drawback. Opp. 37; *see* Br. 49. But mandate or no, an agency cannot ignore information that undermines its conclusions. "Merely to look at only

[5] USDA, *The Economic Feasibility of Ethanol Production from Sugar in the United States* (2006), https://www.usda.gov/oce/reports/energy/EthanolSugarFeasibilityReport3.pdf.

one side of the scales, whether solely the costs or solely the benefits … ignore[s] 'an important aspect of the problem'" in violation of the APA. *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (quoting *State Farm*, 463 U.S. at 43); *see also, e.g.*, *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1092 (D.C. Cir. 1987) (en banc) (agency decision was arbitrary and capricious because it focused on one set of costs and ignored "countervailing … benefits").

Finally, Defendants say the Congressional Budget Office's estimate of TFTEA's costs suggests that TFTEA "was not intended to extend double drawback across the excise-tax regime." Opp. 32–33. This is not a defense of Defendants' economic analysis at all, but an attempt to bootstrap CBO's estimate into a sign of congressional intent. But "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009).

III. The Rule cannot prohibit drawback claims filed before its effective date.

Defendants assume that if the Court upholds the Rule, they will be free to deny non-wine transition-period claims—without improper retroactive effect—because the Court's ruling will confirm that subsection (v) "has always prohibited double drawback of excise taxes." Opp. 44. But a decision upholding the Rule would establish only that the Rule reflects a *permissible* interpretation, not that subsection (v) always meant what Defendants claim. An agency's statutory interpretation under *Chevron* "is not 'a once-and-for-always definition of what the statute means'" because, by definition, *Chevron* deference does not apply unless "traditional tools of statutory interpretation fail to reveal 'what the law has always meant.'" *De Niz Robles v. Lynch*, 803 F.3d 1165, 1173–74 & n.7 (10th Cir. 2015). "Even where a rule merely narrows 'a range of possible [statutory] interpretations' to a single 'precise interpretation,' it may change the legal landscape in a way that is impermissibly retroactive." *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010).

That is the case here. After 2004, no public, binding agency policy barred excise-tax drawback, under subsection (v) or otherwise. *Supra* pp. 18–19. The Rule thus "change[s] the legal landscape" by imposing "a single 'precise interpretation'" of subsection (v), and cannot apply retroactively. *Arkema*, 618 F.3d at 7.

Defendants also say "there has been no final agency action" on any transition-period claims. Opp. 42–43. But *the Rule itself* is final agency action. The Court thus has jurisdiction to set aside the Rule to the extent it is improperly retroactive. *See* Compl. ¶ 12.

CONCLUSION

The NAM's motion should be granted.

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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 6,994 words. This certification relies on the word-count feature of the word-processing software used to prepare the brief, Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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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