No. 20-1734

United States Court of Appeals for the Federal Circuit

THE NATIONAL ASSOCIATION OF MANUFACTURERS,
THE BEER INSTITUTE,

Plaintiffs–Appellees,

v.

DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, JOHN SANDERS, in his official capacity as Acting Commissioner of United States Customs and Border Protection,

Defendants–Appellants.

Appeal from the United States Court of International Trade,
No. 19-53, Judge Jane A. Restani

BRIEF FOR PLAINTIFF-APPELLEE THE NATIONAL ASSOCIATION OF MANUFACTURERS

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellee the National Association of Manufacturers certifies the following:

1. The full name of every party represented by me is:

National Association of Manufacturers.

2. The name of the real party in interest represented by me is:

National Association of Manufacturers.

3. All parent corporations that own 10 percent or more of the stock of the party represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Richard M. Belanger, Sidley Austin LLP

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5. A statement of related cases is set forth at page x.

October 1, 2020

/s/ *Peter D. Keisler*
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STATEMENT OF RELATED CASES

No other appeal in or from the same civil action was previously before this or any other appellate court. The National Association of Manufacturers is unaware of any case pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

INTRODUCTION

This case is about Defendants' attempt to restrict drawback—the refund of duties, taxes, or fees paid on *imported* goods when the same or similar goods are *exported*—in a manner Congress did not authorize.

Drawback encourages exports. This "critical export program" serves 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." H.R. Rep. No. 114-114, pt. I, at 98 (2015). Congress has repeatedly expanded the drawback regime to maximize these benefits.

One such expansion is "substitution drawback," introduced in 1984. It authorizes the refund of duties, taxes, or fees paid on imported goods when similar "substitute" goods are exported. For example, a U.S. company that 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 more U.S. exports, boosting employment, raw materials, and manufacturing.

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) expanded the substitution standard to encourage more exports. Pub. L. No. 114-125, 130 Stat. 122 (2016). Before TFTEA, with limited exceptions, exported goods could be substituted for imported goods only if they were "commercially interchangeable," a subjective and restrictive standard that effectively barred many U.S. manufacturers from using substitution drawback. Under TFTEA, imports and exports can now be substituted whenever they share the same 8-digit Harmonized Tariff Schedule (HTS) classification. This simple standard will boost U.S. employment and manufacturing because the only way to benefit is to make and export a U.S. product to substitute for a tax-paid import.

Purporting to implement TFTEA, Defendants issued a regulation creating a new restriction on Congress's substitution-drawback regime (the Rule). With no textual basis, the Rule prohibits refunds of excise taxes paid on *imported* goods unless the manufacturer has paid excise taxes on the substitute *exported* goods. But manufacturers need not pay excise taxes when they export certain goods, including beer, wine, and spirits. So in the example above, the Rule would, for the first time,

bar the drawback (refund) of *any* excise taxes paid on the imported Spanish wine because the exported California wine was untaxed.

The Court of International Trade (CIT) correctly invalidated the Rule because it contradicts clear statutory language and congressional intent. Appx018. Defendants offer various challenges to the CIT's thorough and cogent analysis—including some they never offered below. None supplies any reason to reverse the CIT's judgment. At bottom, Defendants are trying to apply a specific statutory term—"claim for drawback"—in a way that clashes with how Congress uses that term. That is impermissible. *E.g.*, *NAM v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

Defendants also portray the Rule as merely closing a loophole, citing a "longstanding prohibition" on so-called "double drawback" of excise taxes, from which wine was "inadvertently" exempted—albeit for over a decade. Br. 13–15 & n.4, 24. No such prohibition exists. Defendants have never cited a single Customs ruling, guidance document, or regulation suggesting that it exists. And it is Defendants' treatment of wine that Congress consistently endorsed. Appx020.

Defendants also rely heavily on policy arguments. But as the CIT recognized, Congress's consistent view is that substitution drawback, including excise-tax drawback, encourages exports and is worth the price in lost revenue. Appx020. Defendants cannot "frustrate the policy that Congress sought to implement." *Secs. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 137, 143 (1984). The judgment should be affirmed.

STATEMENT OF THE ISSUES

I. Whether the CIT correctly invalidated the Rule because it unambiguously conflicts with the governing statutes.

II. If the governing statutes are genuinely ambiguous, whether the Rule reflects an unreasonable construction.

III. If the Rule is otherwise valid, whether it can apply retroactively.

STATEMENT OF THE CASE

A. Federal excise taxes.

Spirits, beer, wine, tobacco products, and petroleum products are all subject to federal excise taxes when sold or consumed domestically—but not 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 does not apply if spirits are exported. In-

stead, two different statutory provisions govern the excise-tax treatment of exported spirits.

Typically, spirits are withdrawn from bonded spirits plants directly for export. In that situation, no excise tax has "been paid or determined," and spirits may simply "be withdrawn from the bonded premises … without payment of tax for exportation." *Id.* § 5214(a)(4).

By contrast, if spirits are initially withdrawn for domestic sale—and thus the excise tax *has* been "paid or determined"—but the manufacturer changes its plans and exports those spirits, it may recover "drawback": "On the exportation of distilled spirits … on which an internal revenue tax has been paid or determined … there shall be allowed … a drawback" in that amount. *See id.* § 5062(b). The tax code refers only to this second situation as "drawback." And this scenario is much less common: Most spirits are directly exported "without payment of tax."[1]

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[1] *See* Office of Inspector Gen., Dep't of Treasury, OIG-18-033, *Audit of the Alcohol and Tobacco Tax and Trade Bureau's Fiscal Years 2017 and 2016 Financial Statements* 8, 26 (Dec. 20, 2017) (Audit Report) (estimating that "non-taxpaid removals of alcohol and tobacco products" total around $1.55 billion annually, while "Excise Tax Refunds" for the same products totaled around $55 million in 2017), https://bit.ly/2ECco7O.

B. Congress adopts substitution drawback to promote exports and rejects attempts to limit it.

Congress adopted substitution drawback in 1984. As its proponents explained, substitution drawback lets U.S. manufacturers operate "more efficiently and permit[s] savings." *Hearings and Written Comments Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 98th Cong. 255 (1983) (statement of Rep. Bill Frenzel). It thus "put[s] United States exports in the best possible competitive position" and encourages employment. *Id.* at 174–75 (statement of Howard J. Henke, National Committee on International Trade Documentation).

The original version of the substitution-drawback provision, 19 U.S.C. § 1313(j)(2), allowed drawback of duties, taxes, or fees paid on imported merchandise "upon the exportation or destruction" of "fungible" merchandise. Pub. L. No. 98-573, § 202, 98 Stat. 2948, 2973 (1984). Regulations defined "fungible" to mean commercially "identical and interchangeable in all situations." 19 C.F.R. § 191.2(*l*) (1990).

In 1993, Congress essentially adopted this standard, allowing substitution drawback if imported and exported goods were "commercially interchangeable." Pub. L. No. 103-182, § 632, 107 Stat. 2057, 2193–94 (1993). It also added subsection 1313(v): "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). As Congress explained, this provision means simply "that only one drawback claim per exportation or destruction of goods would be allowed." *See* H.R. Rep. No. 103-361, pt. I, at 130 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2680.

In 2004, Congress abrogated a series of judicial and agency rulings that had restricted substitution drawback of federal taxes, including excise taxes. Before then, paragraph (j)(2) allowed drawback of taxes imposed "because of" the merchandise's importation. 19 U.S.C. § 1313(j)(2) (2000). This Court read "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, 1297 (Fed. Cir. 1999). *Texport* thus held the Harbor Maintenance Tax, which applied to "all shipments utilizing ports," ineligible for drawback. *Id.* at 1296. But Congress abrogated *Texport* by replacing "because of … importation" in paragraph (j)(2) with "upon entry or [importation]." Pub. L. No. 108-429, § 1557(a), 118 Stat. 2434, 2579 (2004). This change "allowed drawback for any

duty, tax, and fee imposed upon entry," including excise taxes. *See Shell Oil Co. v. United States*, 688 F.3d 1376, 1380 (Fed. Cir. 2012).

Also in 2004, Congress amended the statute to require that substitution-drawback claims complying with paragraph (j)(2) be paid "notwithstanding any other provision of law." Pub. L. No. 108-429, § 1557(a), 118 Stat. at 2579. As Defendants acknowledged below, Congress added this "notwithstanding" clause "to prevent" Customs & Border Protection (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." ECF 30 at 21. This addition thus overruled a series of Customs rulings holding that excise taxes were not eligible for substitution drawback. *E.g.*, HQ 227916 (Jan. 6, 1999).

In 2007, Congress rejected statutory amendments that would have established the same restriction as 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) (daily ed. June 19, 2007); 153 Cong. Rec. S13774, S13927, § 12318(b) (daily ed. Nov. 5, 2007).

And in 2008, Congress expanded the substitution standard for wine. The new standard, still effective today, allows substitution if imported and exported wine are "the same color" and within 50 percent of the same price. Pub. L. No. 110-234, § 15421, 122 Stat. 923, 1547 (2008). This standard was first adopted in a 2001 decision by the San Francisco drawback office. *See* HQ H036362 (Mar. 27, 2009). After the 2004 amendments described above, CBP began paying substitution drawback of excise taxes on wine under this substitution standard. Appx057. In 2007, CBP headquarters revoked this wine substitution standard, without questioning the agency's ongoing practice of paying excise-tax drawback. *See* HQ H036362. The next year, Congress disagreed with CBP headquarters, codifying this wine substitution standard and noting with approval the agency's practice of paying "drawback claims on wine." *See* H.R. Rep. No. 110-627, at 1094–95 (2008) (Conf. Rep.), *reprinted in* 2008 U.S.C.C.A.N. 536, 514–15. CBP thus continued paying excise-tax drawback on wine. *See* Appx167.

By contrast, CBP generally deemed other alcohol beverages not to be "commercially interchangeable." *E.g.*, HQ 229320 (July 29, 2002). Thus, while Congress's 2004 amendments overruled CBP's view that

excise taxes were ineligible for substitution drawback, only wine benefitted from that change because (until TFTEA) only wine was deemed substitutable—first under the 2001 CBP action and then under the 2008 statutory amendment.

C. Defendants try and fail to reinstate their prohibition of 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. Appx264. Despite Congress's then-recent amendments allowing excise-tax drawback and expanding substitution drawback for wine, Defendants asserted that excise-tax drawback claims on wine improperly "'piggyback[ ]' a previously existing Federal excise tax exemption benefit … onto the drawback benefits" of § 1313. Appx266. They thus sought to end the practice.

This proposal generated significant opposition. 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. Appx349. The Senators 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" and "would reduce wine exports." Appx273. They described the proposal as "an attempt by the administering agencies to change existing law via rulemaking, pre-empting and negating the role of Congress." Appx274.

Defendants withdrew the proposal.

D. Congress expands the substitution standard in TFTEA.

In 2016, Congress passed TFTEA, greatly expanding substitution drawback. Now, all commodities can use an HTS-based standard. Wine, however, can still use the special color-and-value standard. Congress specifically noted that "the existing treatment of wine … is preserved" in TFTEA. H.R. Rep. No. 114-376, at 221 (2015) (Conf. Rep.).

Because TFTEA allows many more commodities to benefit from drawback, it also necessarily reduces Treasury revenue, since charges on certain imports can now be refunded for the first time. But Congress deemed that a fair price "to permit U.S.-made products to compete more effectively in world markets" and "encourage[ ] domestic production." S. Rep. No. 114-45, at 12 (2015); *see* H.R. Rep. No. 114-114, pt. I, at 98 (drawback "promote[s] U.S. exports and jobs").

After TFTEA, the statute thus mandates that CBP "shall" pay substitution drawback if three criteria are met: (1) there is "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation"; (2) there is "any other merchandise" with "the same 8-digit HTS subheading"; and (3) the other merchandise is 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).

E. The Rule purports to restrict substitution drawback based on the exported goods' tax status.

Defendants proposed rules to implement TFTEA in August 2018. Appx159. This proposal included a restriction on excise-tax drawback *identical* to their failed 2009 proposal: "For purposes of drawback of internal revenue tax imposed under … 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." Appx205. Defendants offered two justifications for this prohibition on what they now label "double drawback." First, they said it is required by subsection 1313(v). Appx168. 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. Appx169–174.

Many commenters, including the National Association of Manufacturers (NAM), opposed the proposal. *E.g.*, Appx287. The NAM explained that the Rule rests on an erroneous legal interpretation, including because it misreads subsection 1313(v) and clashes with longstanding regulatory definitions of "drawback" and "drawback claim." Appx289–300.

The NAM also explained that Defendants' policy arguments contradicted Congress's repeated policy choices. And in any event, the NAM submitted an expert economist's report showing that Defendants'

export-incentive and revenue-loss theories are unsupported by the evidence and inconsistent with proper economic analysis. Appx304–315. Indeed, Defendants conceded that they "lack[ ] sufficient data to control for [other] variables in [their] analysis" and cannot make "strong causal statements" about changes in export volumes. Appx058.

The NAM also explained that Defendants' speculative revenue-loss claims ignore the positive economic effects of increased domestic production, use the wrong baseline for comparison, and depend on the absurd notion that U.S. manufacturers will produce massive volumes of spirits simply to destroy them. Appx309–315.

Defendants nevertheless issued the final Rule in December 2018. Appx033. The Rule made only one relevant change to the proposed regulatory text. Apparently to address the Rule's inconsistency with the longstanding regulatory definitions of "drawback" and "drawback claim," Defendants redefined both terms 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." Appx089.

F. The CIT invalidates the Rule because it unambiguously conflicts with the statute.

The NAM and plaintiff-intervenor the Beer Institute challenged the Rule. The NAM argued that the Rule is invalid because it conflicts with the governing statutes and reflects faulty and unsupported economic conclusions. And both plaintiffs asserted that, even if the Rule were otherwise valid, applying it to drawback claims filed before its February 19, 2019 effective date would be impermissibly retroactive.

The CIT held the entire Rule invalid at step one of the *Chevron* framework. Appx008–009. The court identified three main reasons for its ruling.

First, the Rule requires Defendants to "redefin[e]" the term "drawback," as used in subsection 1313(v), to include "the 'refund or remission' of excise taxes that occurs when merchandise is *exported*." Appx009–010. The CIT explained that this "new understanding is not supported by the statute, which almost exclusively uses the term drawback in relation to duties and fees imposed upon importation." Appx011. And while both section 1313 and the tax code sometimes use "drawback" to refer to the refund or cancellation of taxes on exports that have been "paid or determined," *no* statutory provisions "use drawback

to refer to instances in which excise tax is never paid or determined." Appx011–012. The CIT held that this "glaring discrepancy" between Congress's use of "drawback" and Defendants' reading of the term forecloses their construction. Appx012.

Second, the Rule's expanded definition of "drawback" "creates irreconcilable conflicts" with other statutory provisions. Appx013. In particular, paragraph 1313(j)(2) sets forth the criteria for substitution drawback, which are "not conditioned on the tax status of the substituted merchandise." Appx014. And paragraph (j)(2) applies "notwithstanding any other provision of law." *Id.* By relying on an "other provision of law"—subsection (v)—the Rule would trump paragraph (j)(2), despite its "categorical" language. *Id.*

The court also explained that applying the Rule's "drawback" definition would produce an "absurd result." Appx017. Because subsection (v), once triggered, bars "any other claim for drawback" based on the same goods, Defendants' interpretation would "prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity," including for "non-excise tax charges assessed at import." *Id.* The way to avoid that result, the court

explained, is to "maintain the consistent interpretation of section 1313(v)" as merely "prohibit[ing] a single export from serving as a basis for multiple drawback claims, as the term 'drawback' in this context has long been understood." Appx014.

Third, the drawback statute's history bolstered the CIT's conclusion. Appx018. That history includes Congress's 2004 amendments to add the "notwithstanding" clause, its 2007 rejection of amendments that would have implemented a restriction like the Rule, its 2008 expansion of the wine substitution standard, and legislators' strong opposition to Defendants' failed 2009 proposal. Appx018–019. The court noted that "Congress is presumed to know that the wine industry was filing substitution drawback claims in situations where no excise tax had been paid and … appears to have at least indirectly sanctioned the practice." Appx020. "This history demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax." *Id.*

Finally, the court noted that, even if the Rule were valid, applying it "to claims filed before its effective date runs afoul of fair notice." Appx020.

The CIT thus held the Rule invalid. Appx022. Almost 60 days later, Defendants appealed and sought to stay the judgment, apparently having done nothing to implement it. The court denied the stay and issued a deadline to comply with the judgment. ECF 66.

SUMMARY OF ARGUMENT

I. The CIT correctly held the Rule invalid at *Chevron* step one.

A. Paragraph 1313(j)(2) states the criteria for substitution drawback, which "do not include a requirement that a company paid tax on its exports." Appx015. When these criteria are met, CBP must pay substitution drawback "notwithstanding any other provision of law." 19 U.S.C. § 1313(j)(2). As Defendants conceded below, Congress added this "notwithstanding" clause in 2004 specifically to overrule a series of Customs rulings holding excise taxes ineligible for substitution drawback. Yet the Rule would reinstate nearly the same regime—relying on an "other provision of law," subsection 1313(v).

Defendants' appellate brief omits this concession, but their inconsistent explanations for the "notwithstanding" clause neither make sense in context nor give the clause any effect. Thus, even accepting Defendants' argument that the "notwithstanding" clause should not override *every* limitation on drawback, that does not help them; the Rule seeks to do precisely what Congress adopted the clause to forbid.

B. In any event, subsection 1313(v) cannot be read to restrict excise-tax drawback based on the substitute goods' tax status. That provision bars multiple "claim[s] for drawback" based on the same exported goods. And "claim for drawback" is best read, in context, to refer only to claims to refund or cancel charges *on imports*. It does not reach exports at all. But even if "claim for drawback" extends further, to include everything Congress classified as "drawback" in any statute, the Rule is still invalid because it sweeps far more broadly—ignoring Congress's choices to label only certain transactions as "drawback."

The Rule's premise is that a "claim for drawback" under subsection 1313(v) includes any "excise-tax relief conditioned on exportation." Br. 33. But Congress used the term "drawback" in a more specific, narrow way. A "drawback" is either (i) the refund of a tax that has already

been "paid," or (ii) the cancellation of a tax liability that has already been "determined." *E.g.*, 19 U.S.C. § 1313(d); 26 U.S.C. § 5062(b). And "determined" means the tax is calculated and fixed for payment with the exporter's next tax return. By contrast, an exportation "without payment of tax" occurs when tax "has not been paid or determined" and is not called a "drawback" in *any* statute. *E.g.*, 26 U.S.C. § 5214(a)(4). Such an exportation also involves no "claim," because when an export is made "without payment of tax," the exporter need not "claim" anything.

As Defendants concede, the Rule treats all untaxed exports as "drawback," whether they involve a "determination" or not. Br. 32. By indiscriminately treating exports under all of these provisions as "claim[s] for drawback," the Rule "disregard[s]" "Congress' express inclusions and exclusions." *NAM*, 138 S. Ct. at 631. That is improper.

Defendants' interpretation also produces a result that everyone agrees Congress did not intend. Because subsection (v), once triggered, bars "any other" claim for drawback using the same exported goods, Defendants' interpretation would not merely bar recovery of excise taxes—it would prohibit using untaxed exports to recover any duties, taxes, or fees at all. Defendants dispute that their reading has this effect, but

they have no reading of subsection (v)'s text that avoids it. As the CIT recognized, this "irrational" outcome further undermines Defendants' position. Appx017.

Defendants also contend that the Rule reasonably "harmonizes" what they see as the "the principal goal of drawback" (fair competition abroad) and the "principal objective of the excise-tax regime" (taxing domestic consumption). Br. 34. But agencies cannot apply "'broad purposes' of legislation at the expense of specific provisions." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986). And Defendants' view of Congress' purpose is too narrow. Congress expanded drawback not merely to enable fair competition, but also to affirmatively encourage exports. Congress thus made a policy choice to further that purpose at the acknowledged expense of excise-tax revenue.

C. History bolsters the CIT's conclusions. Nothing in the legislative history supports Defendants' new reading of subsection (v). And Congress has consistently expanded substitution drawback and rejected efforts to impose restrictions like the Rule. That includes the 2004 amendment to add the "notwithstanding" clause, the failed statutory

amendments in 2007, the codification of CBP's treatment of wine in 2008, the opposition to Defendants' failed 2009 proposal, and Congress's decision in TFTEA to "preserve" the "existing treatment" of wine while broadening the substitution standard for other products.

Defendants' alternative history—that the treatment of wine was an accidental exception to a longstanding "prohibition"—is fiction. There is no such prohibition. Other commodities did not receive the same treatment as wine, but that is because wine enjoyed a more lenient *substitution* standard.

D. Defendants invoke two other provisions that supposedly provide independent authority for the Rule, *see* 19 U.S.C. §§ 1313(*l*)(1), 1484(a)(2)(C), but these theories are waived twice over. A party cannot raise a new argument on appeal, and a court cannot uphold agency action on a theory the agency did not advance. In any event, the general gap-filling authority these provisions confer cannot override specific statutory provisions.

II. Even if the statute were ambiguous, Defendants' interpretation would fail *Chevron* step two because it thwarts Congress's consistent policy judgment and produces absurd results.

III. Even if the Rule were otherwise valid, it could not apply retroactively.

STANDARD OF REVIEW

The Administrative Procedure Act requires a court to "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

Courts review regulatory interpretations of statutes using the two-step *Chevron* framework. 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 not, the Court asks whether the regulation reflects "a permissible construction." *Id.* at 843.

The Supreme Court recently emphasized that deference requires "genuine ambiguity." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). While *Kisor* dealt with regulations, the Court applies the "same approach" under *Chevron*. *Id.* 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.* Deference is proper "only when [the] legal toolkit is empty and the interpretive question has no single right answer." *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.

ARGUMENT

I. The CIT correctly invalidated the Rule at *Chevron* step one.

The CIT rightly invalidated the Rule because it clashes with "the clear intent of Congress as expressed in the language and structure of the statute." Appx018. And the statute's history confirms that Congress rejected Defendants' view.

A. Congress amended paragraph 1313(j)(2) to require drawback of "any" tax imposed on importation, "notwithstanding any other provision of law."

Paragraph 1313(j)(2), which governs substitution drawback, does not allow the Rule. Indeed, Congress amended this provision in 2004 to reject essentially the same restriction the Rule tries to impose.

Paragraph (j)(2) states the conditions that trigger CBP's statutory obligation to pay substitution 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" with "the same 8-digit HTS subheading"; 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, "an amount calculated pursuant to regulations … under subsection (*l*) *shall* be refunded as drawback." *Id.* (emphasis added). As the CIT observed—and Defendants do not dispute—these conditions "do not include a requirement that a company paid tax on its exports." Appx015.[2]

Subsection (*l*) is equally clear about the amount of drawback that CBP must pay when paragraph (j)(2) is satisfied. *See* Appx015–016. CBP's rules "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)(i).

[2] Subsection (j) also states three narrow exceptions, irrelevant here. *See* 19 U.S.C. § 1313(j)(4)–(6).

Thus, as the CIT recognized, the statute requires that 99 percent of "any" federal charges on imported goods (including excise taxes) "shall" be subject to drawback upon the timely exportation of "any other" goods with the same HTS code—"whether or not certain taxes were paid on" those other goods. Appx003. 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 bar substitution-drawback claims that paragraph (j)(2)'s language requires CBP to pay. *E.g.*, Appx054 (asserting that subsection (v) "expressly prohibits" excise-tax drawback). The "notwithstanding" clause forecloses that reading, for two reasons.

First, a "notwithstanding" clause "shows which of two or more provisions prevails in the event of a conflict." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017). 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). Yet the Rule sees a conflict between paragraph (j)(2) and another provision, subsection (v)—and asserts that the *other*

provision prevails. That result, as the CIT recognized, would "render the word 'notwithstanding' meaningless." Appx014.

Second, as Defendants conceded below, Congress added the "notwithstanding" clause in 2004 specifically "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." ECF 30 at 21. A series of Customs rulings had held that excise taxes were not subject to drawback under section 1313 because the tax code's "exclusive provisions" governed the refund of those taxes. HQ 227916; *see also* HQ 229320; HQ 229322 (Dec. 19, 2001); HQ 229276 (Dec. 10, 2001). By adding the "notwithstanding" clause, Congress abrogated these decisions and made excise taxes eligible for substitution drawback, like other federal charges imposed "upon entry or [importation]." Pub. L. No. 108-429, § 1557(a), 118 Stat. at 2579.[3]

The Rule, however, tries to reinstate essentially the same regime Congress rejected in 2004. When they proposed the Rule, Defendants argued that excise-tax drawback "is inconsistent with the broader stat-

[3] Defendants are thus wrong to say that, "as amended in 2004," paragraph (j)(2) allowed recovery of "*most* duties, fees, and taxes paid on imported merchandise." Br. 12 (emphasis added). The statute covers "any" such charges. 19 U.S.C. § 1313(j)(2).

utory excise tax regime" because the tax code already contains "exceptions to the required payment of Federal excise tax" for exports. Appx167–168. That is little different from saying that an excise tax is "not refundable under § 1313(j) inasmuch as the tax … and drawback thereof [are] specifically provided for in the Internal Revenue Code," *e.g.*, HQ 229322—the view Congress rejected.

Indeed, there is no real daylight between CBP's abrogated pre-2004 regime (which barred all substitution drawback of excise taxes) and the Rule (which bars substitution drawback of excise taxes if the substitute goods are untaxed). All the commodities at issue—"distilled spirits, wines, beer, tobacco products, and certain … taxable fuel and petroleum products"—enjoy excise-tax exemptions or refunds when exported. *See* Appx167. Thus, *every* substitution-drawback claim for these goods implicates so-called "double drawback," because exporters never need to pay taxes on them. So if Congress meant to adopt the Rule's regime, it could have simply left the old Customs rulings in place. Manufacturers could then export these goods without paying excise taxes, but could not use those exports to claim substitution drawback under § 1313—just as Defendants insist is proper. Br. 34–35. Instead,

Congress adopted the "notwithstanding" clause specifically to *overrule* these Customs rulings, as Defendants admitted. ECF 30 at 21.[4]

Defendants now retreat from their concession by offering two different explanations for the "notwithstanding" clause. They first assert that the 2004 amendments were focused "solely" on making the Harbor Maintenance Tax eligible for drawback by reversing *Texport*, 185 F.3d at 1296. *See* Br. 12. But as they conceded below, Congress made the HMT eligible for drawback by replacing "because of … importation" in paragraph (j)(2) with "upon entry or importation," and *separately* made all excise taxes eligible by adding the "notwithstanding" clause. ECF 30 at 21. Indeed, the "notwithstanding" clause cannot have been an answer to *Texport* because *Texport* interpreted paragraph (j)(2) itself, not some "other provision of law." 185 F.3d at 1296. And the "notwithstanding" clause was not otherwise necessary to make the HMT drawback-eligible because, as Defendants observe, the tax code does not "authoriz[e] refunds (or drawback) [of the HMT] upon exportation," so

[4] The only difference between the pre-2004 regime and the current Rule is that the Rule theoretically gives exporters a "choice" between avoiding 100% of their excise taxes under the tax code, or recouping just 99% under § 1313, *see* Br. 25, 41—a choice with only one rational answer.

there was no argument that HMT refunds were governed exclusively by the tax code. *See* Br. 13.

Defendants also say the "notwithstanding" clause merely "makes clear" that paragraph (j)(2)'s "rules governing refunds based on exports of substituted goods supersede the rules that generally prescribe taxes and duties for imported products." *Id.* at 39. But this unsupported claim contradicts both their concessions below *and* their current argument about the HMT. In any event, Congress had no reason to make this "clear." It was already clear—and unquestioned. Defendants identify no conflict that Congress could have been responding to. This explanation thus posits that Congress addressed a non-existent problem, violating the presumption that Congress "intends its amendment[s] to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

The only explanation that makes sense in context *and* gives effect to the "notwithstanding" clause is the one Defendants conceded below: Congress made excise taxes eligible for substitution drawback, whether or not the export was taxed. Indeed, CBP itself apparently thought so. As Defendants admit, CBP began paying excise-tax drawback on wine

after the 2004 amendments. Br. 13. Although Defendants protest that this practice—which continued for around fifteen years—was "without reasoned consideration or endorsement," *id.*, the more plausible explanation is that CBP began paying excise-tax drawback after 2004 because that is what the statute requires. (CBP made these payments only for wine because it did not deem the other goods at issue substitutable until TFTEA, *infra* p. 67.)

In short, applying subsection (v) to prohibit excise-tax drawback conflicts with Congress's intent in adopting the "notwithstanding" clause in 2004. And the Court need not be detained by Defendants' arguments that, under the CIT's logic, the "notwithstanding" clause also "override[s] a host of other anti-abuse provisions." Br. 40. Everyone agrees that the "notwithstanding" clause need not be taken to its logical extreme, and that both subsection (v) and other provisions in section 1313 can appropriately limit substitution drawback in other ways. As the CIT explained, the "notwithstanding" clause does not prevent subsection (v) from "prohibit[ing] a single export from serving as a basis for multiple drawback claims" under § 1313, as the statute has long been understood. Appx014. Defendants criticize the CIT for failing to

"explain how the 'notwithstanding' clause uniquely undermine[s] the Rule[ ]," Br. 40–41, but the explanation is clear: The Rule would resurrect essentially the same restriction Congress *specifically* adopted this language to reject. The CIT was therefore correct that the Rule "directly conflict[s] with" paragraph (j)(2). Appx014.

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

In any event, subsection 1313(v) does not support the Rule. Subsection (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). As the CIT explained, this language prohibits two or more substitution-drawback claims based on the same substitute goods. Appx014. So, for example, it would prevent a U.S. company 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. *See* H.R. Rep. No. 103-361, pt. I, at 130, 993 U.S.C.C.A.N. at 2680 ("Section 632 provides that only one drawback claim per exportation or destruction of goods would be al-

lowed ….”). 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 discovered that subsection (v)’s “evident purpose” extends much further. Appx168. They argue that, since its enactment in 1993—and unbeknownst to all—subsection (v) has prohibited substitution drawback of excise taxes paid on imported goods if the substitute exported goods were untaxed. *Id.* This theory depends on the idea that *every untaxed export* is a “claim for drawback” that triggers subsection (v)’s bar on “any other claim for drawback” based on the same goods. 19 U.S.C. § 1313(v). But subsection (v)’s language cannot stretch that far.

1. An exportation “without payment of tax” is not a “claim for drawback.”

All agree that “claim for drawback” under subsection (v) includes a claim filed with CBP for the refund of duties, taxes, or fees paid on

imported goods. *See* Appx160. But Defendants contend that a "claim for drawback" also includes any "excise-tax relief conditioned on exportation." Br. 33. As the CIT held, this "new understanding is not supported by the statute." Appx011.

1. The tax code and section 1313 both use "drawback," as relevant here, to describe two narrow situations: (i) the refund of a tax that has already been "paid," or (ii) the cancellation of a tax liability that has already been "determined," *i.e.*, calculated and fixed for later payment by tax return. By contrast, an exportation "without payment of tax" occurs when tax has *not* been "paid or determined" and is not called a "drawback" in any statute (or preexisting regulation).

For example, the tax code provides that if the excise tax on distilled spirits has "been paid or determined," the manufacturer is entitled to "a drawback" of that tax upon exportation. 26 U.S.C. § 5062(b). The same is true for wine, *id.*, beer, *id.* § 5055, and tobacco, *id.* § 5706. By contrast, "[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." *Id.* § 5214(a)(4) (emphasis added). Again, the same is true for wine, *id.* § 5362(c)(1),

beer, *id.* § 5053(a), and tobacco, *id.* § 5704(b). None of the provisions allowing exports "without payment of tax" refers to "drawback."

The tax code thus uses "drawback" only to describe the refund of excise taxes already "paid" or the cancellation of a "determined" tax liability. And these "drawback" provisions are rarely used: Most untaxed exports occur "without payment of tax" when product is withdrawn directly from a bonded facility (like a distillery) for export. *See supra* p. 5 & n.1.

Section 1313 uses "drawback" in the same precise way. Subsection 1313(d) addresses "drawback" of internal-revenue taxes when spirits and wines are exported. 19 U.S.C. § 1313(d). Like the equivalent tax-code provision, it applies only when the tax "has been paid or determined." *Id.* And like the tax code, section 1313 never uses "drawback" to refer to an exportation "without payment of tax." Indeed, apart from subsection (d), section 1313 does not use "drawback" to refer to *exports* at all. *See* Appx011.

And "determined" has a specific meaning in these provisions. It refers to situations where "tax is determined and paid at the time the [goods] are withdrawn from bond," or where "the amount of the tax to

be paid is computed and fixed" upon withdrawal, "with payment to be made by return" later. S. Rep. No. 85-2090, at 100 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4395, 4492. Thus, a manufacturer must "determine the tax that is due on … all spirits on which the tax will be *either prepaid or deferred*." 27 C.F.R. § 19.225 (emphasis added). If the manufacturer opts to prepay the tax, it must do so "before withdrawal." *Id.* § 19.229(b). Or, "[u]nder the deferred payment system, the proprietor may withdraw spirits from bond after tax determination but before payment of tax," *id.* § 19.229(a), with payment to follow with the proprietor's next "[a]nnual, quarterly, [or] semimonthly" excise-tax return, *see id.* § 19.235(a); *see id.* § 19.234 (under deferred payment, proprietor "must pay the full amount" of tax determined "during the period covered by the return"). But if the tax will be neither "prepaid" nor "deferred"—as when spirits are withdrawn for export without payment of tax—tax is never "determine[d]." *See id.* § 19.225.

So as Congress uses the term, "drawback" refers only to a refund or cancellation of a tax that has already been "paid or determined." And "determin[ation]" is the moment when the exporter owes the government a fixed sum of money by a specific deadline. When such a

"paid or determined" tax is refunded or forgiven, there is a "draw-back"—but not otherwise. As the CIT said, "there is no statutory support for the expansive definition in the Final Rule that extends draw-back to situations in which tax is never paid or determined." Appx013.

This limitation dooms the Rule. As Defendants admit, the Rule does not "distinguish between situations involving a determination and those without one." Br. 32. It instead treats *all* untaxed exports as "drawback"—even "instances in which excise tax is never 'paid or determined.'" Appx013; *see, e.g.*, Appx052 (Rule asserting that "drawback includes export from a TTB-bonded facility" "without payment of tax"). And as the CIT recognized, an agency must "give effect to Congress' express inclusions and exclusions, not disregard them." *NAM*, 138 S. Ct. at 631; *see* Appx012 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

This interpretive principle 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); *Brown v. Gardner*, 513 U.S. 115, 120 (1994). In *Eurodif S.A. v. United States*, for example, the statute said that a foreign "subsidy" included providing goods or services at

below-market prices or buying goods at above-market prices—but it did not mention buying *services* at above-market prices. 411 F.3d 1355, 1364 (Fed. Cir. 2005). The government argued that these purchases still must be treated as subsidies to "defeat unfair competitive advantage." *Id.* at 1365. This Court disagreed, explaining that the statute's "plain language" foreclosed that reading. *Id.* "Congress could have easily included" these purchases, but it did not, and a court "must assume that the omission was intentional." *Id.* Thus, "deference under *Chevron*" was unavailable. *Id.* So too here. By treating as "drawback" provisions that do not use that term, *see* 26 U.S.C. §§ 5053(a), 5214(a)(4), 5362(c)(1), 5704(b), the Rule conflicts with the statute.

2. Exports "without payment of tax" also involve no "claim." "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). CBP's regulations tracked that everyday understanding until now. *See* 19 C.F.R. § 191.2(j) (2018) ("claim" is the paperwork containing the "request for drawback payment"). That understanding also matches how Congress used that term: A "drawback claim" is a demand "for [a] refund" that

the claimant makes to CBP. *See* 19 U.S.C. § 1313(r)(1)–(2). By contrast, a company that exports goods before the tax has been paid or determined need not make a "demand" of the government; there is simply no "payment of tax." *E.g.*, 26 U.S.C. § 5053(a).

Defendants respond that when exporting goods "without payment of tax," "the producer files a form with Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB)." Br. 7. This, in their view, is a "claim." But comparing these forms with an actual "claim" for drawback confirms Defendants' error.

The TTB form for "drawback" on exported spirits requires a "CLAIM," in which the exporter must certify that "tax equal to the amount of drawback claimed has been determined as provided by law and regulations, and I am justly entitled to drawback of tax in the amount claimed herein." Appx278. It also includes a box for the "AMOUNT CLAIMED." *Id.* So too the form for "drawback" on wine. Appx281. By contrast, the form for "withdrawal of spirits … or wines for exportation" does not use the word "claim." *See* Appx285 (capitalization omitted). It merely requires the exporter to "declare that the

[goods] are truly intended to (or have been) withdrawn for the purpose indicated." *Id.* (emphasis omitted).

These forms thus reflect (and respect) Congress's distinction between exports that involve a "determination" and a "drawback" and those that do not. When goods are exported "without payment of tax" using the latter form, there is no "claim for drawback."

3. The statutory context bolsters the CIT's conclusion. Section 1313 uses the word "drawback" almost 100 times, and it "almost exclusively" refers to refunds of "duties and fees imposed upon *importation*." Appx011 (emphasis added). (The exception is subsection 1313(d), discussed above, which refers to exports, but only those for which taxes have been "paid" or "determined.") Likewise, section 1313 uses some variant of the phrase "drawback claim" 21 times, invariably referring to a claim to recover charges on imports. For example, as noted, the procedure for "[f]iling drawback claims" refers only to the process for filing a "drawback entry" with CBP. 19 U.S.C. § 1313(r)(1)–(2).

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." 19 C.F.R. § 191.2(i) (2018); *see id.* § 191.2(j). Congress relied on this definition when enacting TFTEA, adding the observation that "[g]enerally speaking, [drawback] refers to a refund of 99 percent of duties and/or Internal Revenue taxes *paid on certain imported merchandise* … entering the United States." S. Rep. No. 114-45, at 12 (emphasis added).

Indeed, if untaxed exports were "claims for drawback," those amounts should appear in the Government Accountability Office's statutorily mandated report on drawback modernization. *See* Pub. L. No. 114-125, § 906(p), 130 Stat. at 233. They do not. Using CBP data, the GAO report breaks down the "amount[s] of drawback refunds of duties, taxes, and fees claimed by claim type" from 2009–2019. GAO, *Report to Congressional Committees: Risk Management for Tariff Refunds Should Be Improved* 11 tbl. 1 (Dec. 2019), https://www.gao.gov/assets/710/703287.pdf (GAO Report) (initial capitals omitted). It does not include a category for excise-tax drawback or cancellation on exports under the tax code. *Id.* Nor are the sums in the report large enough to include the values of withdrawals "without payment of tax." *Compare id. with*

Audit Report 8. Defendants are thus telling this Court something different from what they told the GAO.

This context indicates that, when Congress wrote "claim for drawback" in subsection (v), it meant a claim for drawback *under section 1313*—that is, a claim submitted to CBP for a refund or cancellation of a charge on an *import*. As the CIT said, this is how "the term 'drawback' in this context has long been understood." Appx014. But even if "claim for drawback" in subsection (v) reaches *some* exports, it cannot apply to exportations under tax-code provisions that do not use the word "drawback."

2. Defendants cannot justify ignoring Congress's precise usage of "drawback."

Defendants acknowledge that the Rule treats exportations "without payment of tax"—which are "not expressly labeled 'drawbacks'" in any statute—as "claim[s] for drawback." Br. 26–28. Their arguments in support of this redefinition are unavailing.

1. Defendants' main contention is that "drawback," as used in section 1313 and the tax code, "encompasses both the refund and cancellation of an excise tax that was paid, determined, or otherwise imposed by federal law." Br. 26; *see* Appx052. That goes too far. As ex-

plained above, "drawback" *does* include the refund or cancellation of a tax that has been "paid or determined"—but that is all.

Defendants' examples confirm this bright line. They point to subsection 1313(d) and 26 U.S.C. § 5062(b), Br. 27, but as already explained, those provisions apply only to taxes "paid or determined." *See* Appx011–012. Defendants also note the phrase "refunded, waived, or reduced" in subsections 1313(n) and (o). Br. 27. But as the CIT explained in denying their motion to stay the judgment, these provisions are irrelevant. ECF 60 at 3 n.1. They implement specific treaty obligations by providing for "NAFTA drawback" (now "USMCA drawback") and "Chile FTA drawback. *See* 19 U.S.C. § 1313(n)(1)(B), (D), (o)(3)(B), The phrase "refunded, waived, or reduced" comes from those treaties. *See, e.g.*, NAFTA, art. 303 § 4, Dec. 17, 1992, 32 I.L.M. 289 (1993). And these provisions apply only to "customs duties," not excise taxes. *E.g.*, 19 U.S.C. § 1313(n)(2). They do not suggest that "claim for drawback" in subsection (v) refers to untaxed exportations of domestic goods.

Defendants are thus correct that "drawback" can "include cancellations [of taxes] on exports," Br. 28, but that is not the issue. As Congress uses the term, "drawback" includes the cancellation of a *deter-*

mined tax liability. *Supra* p. 36. And an exportation "without payment of tax" involves no "determination" and no "drawback." *E.g.*, 26 U.S.C. § 5214(a)(4). Subsection (v)'s reference to "*any* claim for drawback," Br. 31, does not change that. "[T]he 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).

Nor does it matter that subsection (v) itself "does not use the phrase 'paid or determined.'" Br. 33. Subsection (v) requires a "claim for drawback," and Congress used "drawback" exclusively to describe situations where tax has been "paid or determined"—as when, for example, an exporter withdraws goods from bond for domestic sale and then decides to export them instead. *See supra* p. 5.

2. Indeed, Defendants concede that the Rule treats all "excise-tax relief conditioned on exportation" as "drawback"—"regardless of whether the applicable provision of the Internal Revenue Code expressly uses the term" or "involv[es] a determination." Br. 28, 32. This is appropriate, Defendants argue, because these transactions are all "materially indistinguishable." *Id.* at 28. The Rule thus declares that De-

fendants are free to ignore what they dismiss as "Congress's inconsistent use of the term 'drawback.'" Appx052.

Even if these transactions were truly indistinguishable, it would not matter. "Congress's inconsistent use" of a statutory term, *id.*, is another way to say that "Congress include[d] particular language in one section of a statute but omit[ted] it in another section," *NAM*, 138 S. Ct. at 631. And as already explained, agencies cannot ignore Congress's "disparate inclusion or exclusion" of language. *Id.* Defendants believe exports "without payment of tax" are properly classed as "drawback," but Congress doesn't. *See* Appx012 (rejecting Defendants' "argument for 'substance over form' in regard to this glaring discrepancy").

In all events, these transactions *are* materially different. For one thing, Defendants' claim that all "products exported 'without payment of tax' carry a tax liability," Br. 32, is wrong. 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); *see also id.* § 5054(a)(1) (tax on beer is "determined at the time it is removed for consumption or sale"). And the term "removed for consumption or sale" does not include "removal of beer without payment of tax." *Id.* § 5052(c). Thus, tax is *never imposed*

on beer exported without payment of tax—yet the Rule treats these exports as "claims for drawback." That result clashes even with Defendants' own position that "drawback" requires a tax "paid, determined, *or otherwise imposed*." Br. 26 (emphasis added).[5]

As to other commodities, there is still a material difference between an exportation "without payment of tax" and a "drawback." As explained above, the dividing line is tax "determination"—the moment when the exporter owes the government a concrete obligation (the determined tax amount) by a fixed deadline (with the exporter's next excise-tax return). *See supra* p. 36. Liability may be "imposed" upon production, *e.g.*, 26 U.S.C. § 5001(a)(1), but until determination, the obligation is inchoate. And avoiding a *potential* liability is different from cancelling a sum-certain obligation that must imminently be paid to the government.

Likewise, the fact that all these exports "require submissions to TTB," Br. 28, does not bolster Defendants' position. Defendants can hardly contend that both sets of forms involve a "claim for drawback"

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[5] Defendants are also mistaken that this point was undisputed below. Br. 32. The NAM pointed out three times that tax is not imposed on exported beer. ECF 20-1 at 29; ECF 31 at 10; ECF 52 at 8. Defendants have never had an answer.

when one set refers to "drawback" and requires a "claim," and the other does neither. *Supra* p. 39.

3. Defendants say their interpretation "harmonizes the statutory drawback and excise-tax schemes." Br. 34 (initial capitals omitted). They say the "principal goal of drawback is to relieve tax burdens so that U.S. exports may compete abroad on an equal footing," and the "principal objective of the excise-tax regime is to ensure that commodities consumed in the United States are taxed." *Id.* (emphasis omitted). In their view, the Rule serves both goals by allowing goods to be exported without taxation while "prevent[ing] the availability of substitution drawback from distorting the excise-tax regime." *Id.* at 34–36.

Even assuming Defendants' premise, 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). 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." *Dimension*, 474 U.S. at 373–74. So even if Defendants were right about the statutes' general

purposes, those "purpose[s] cannot exceed the metes and bounds of the subsidy statute as established by its text." *Eurodif*, 411 F.3d at 1365 (rejecting government's argument to construe statutory provision to "defeat unfair competitive advantage").

The tax code is a prime example. It raises revenue, but 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, pt. I, at 98–99; S. Rep. No. 114-45, at 12. Excise-tax drawback is the same: legislators emphasized that prohibiting excise-tax drawback "would significantly undercut the export programs of many U.S. businesses." Appx273 (House letter); *see also* Appx349 (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."); Appx020–021 (noting Congress's "policy choice").

Defendants also misconstrue these regimes, relying mainly on *Texport*. Br. 11, 34, 48. But Congress abrogated *Texport* precisely *because* it construed substitution drawback too narrowly. Congress estab-

lished drawback not only to enable competition abroad, but also to affirmatively encourage exports. H.R. Rep. No. 114-114, pt. I, at 98–99. And there is strong evidence that substitution drawback, including excise-tax drawback, does so. *See* Appx306–307; Appx349. Defendants disagree, Br. 37, but Congress made its choice.

4. Defendants also emphasize that "the statute does not define" "drawback" or "any claim for drawback." Br. 25. But that is not a ticket to *Chevron* step two. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown*, 513 U.S. at 118, and thus a "phrase appearing in the context of a statute may be unambiguous … even though it is not explicitly defined," *Gardner v. Brown*, 5 F.3d 1456, 1459 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115. Congress used the term-of-art "drawback" in a particular, narrow way. Defendants cannot apply it differently just because it lacks an express definition. *See, e.g.*, *Russello*, 464 U.S. at 21, 23 (construing a term that was "not specifically defined" in the statute based on Congress's "disparate inclusion or exclusion").

For the same reason, Defendants err by relying on definitions of "drawback" in "other authorities." *See* Br. 29. Those authorities do not

address the statutory structure and context here. In any event, they do not support the Rule. The 122-year-old decision in *United States v. Passavant* is not about U.S. drawback law at all. 169 U.S. 16 (1898) (cited at Br. 26, 29–30, 48). The question there was how to value imports subject to a German duty-remittance mechanism. *Id.* at 22–23. The Court merely noted that "one of the definitions of drawback" fit the German scheme. *Id.* at 23. The CIT rightly found this case uninstructive, "as it interprets foreign law and was issued long-before" the relevant statutory provisions. Appx009 n.13. Defendants rejoin that "the Tariff Act was enacted only 32 years after *Passavant*," Br. 30, but *substitution* drawback did not exist until 1984 and subsection (v) until 1993. And nothing in *Passavant* suggests that federal agencies can treat something as "drawback" "regardless of whether it is labelled as such" by Congress. *Contra id.* at 29.

Defendants fare no better with Black's Law Dictionary or CBP's regulatory definition of "drawback." *See id.* Defendants cite both authorities to show that "drawback" "include[s] the cancellation of tax liability, not just refunds." *Id.* As explained above, that is both uncontested and immaterial. The statutes uniformly provide that "drawback"

includes cancellation *only* when the tax has been "determined." In any event, the dictionary definition refers to an "allowance or refund on *import duties*," *id.* (emphasis altered), not the avoidance of an unfixed (or for beer, unimposed) domestic tax obligation. And 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. *See* Appx009–010; *supra* p. 14.

5. Defendants also make the remarkable assertion that "removals 'without payment of tax' do entail a 'determination.'" Br. 32. Defendants forfeited this argument twice over. They "waived this argument by failing to raise it in the proceedings below." *Charles v. Shinseki*, 587 F.3d 1318, 1323 n.2 (Fed. Cir. 2009). Nor does the Rule say this, even though a comment pointed out that these exports "never require[ ] determination of the tax," Appx052—and the Rule cannot be upheld based on a theory the agency did not articulate. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Even now, Defendants make this argument in just two sentences.

There is good reason for this halfhearted presentation: Defendants' new position would read entire provisions out of the Internal Rev-

enue Code. Again, the code sections allowing exports "without payment of tax" expressly apply when—and only when—the tax "has *not* been paid or determined." 26 U.S.C. § 5214(a)(4) (emphasis added). So, by definition, an export "without payment of tax" involves no determination. And if Defendants were right that *all* exports "entail a 'determination," Br. 32, these statutory provisions would describe a situation that never occurs. Defendants' interpretation would thus obliterate the statutory distinction between a tax that has been "paid or determined," *id.* § 5062(b), and one that "has not been paid or determined," *id.* § 5214(a)(4), rendering the latter provisions a dead letter. Courts do not read statutes that way. *E.g.*, *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 510 (Fed. Cir. 1995) (rejecting Customs interpretation under which specific statutory references "would serve no purpose").

In any event, Defendants' new position rests on a misunderstanding. They assume that calculating the tax that would be due if products were not exported, for purposes of the TTB forms discussed above, is a "determination." Br. 8. Not so. As already explained, tax is "determined" only if it is "computed and fixed" upon withdrawal from bond, for either prepayment or deferred payment. *See supra* p. 36. If goods

are withdrawn *for export*, tax liability is not fixed for prepayment or deferred payment—tax will never be paid at all. There is thus no "determination." *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).[6]

But even assuming some question about how many exports involve "determinations" and how many do not, the Rule would still be invalid. Defendants *admit* that the Rule does not "distinguish between situations involving a determination and those without one," Br. 32, and argue that it applies to exports under the tax-code provisions that explicitly involve no "determination," *id.* at 27–28 (citing 26 U.S.C. §§ 5214(a), 5362(c), 5053(a)). Because "drawback" requires a "determination," the Rule is invalid—whatever precisely "determined" means.

6. Finally, Defendants complain that the CIT "struck down the Rule even in those clear instances where the Internal Revenue Code has

[6] At one point, Defendants go further, suggesting without citation that "paid or determined" actually means "paid or not yet paid." Br. 8. But there is no ordinary usage—let alone one consistent with the statute, legislative history, and existing regulations—in which "determined" means "not yet paid." And again, if this reading were correct, the provisions referring explicitly to taxes that have "not been paid or determined" would be superfluous.

expressly provided for … 'drawback.'" Br. 3. But they did not urge a narrower remedy below. And as already explained, "claim for drawback" in subsection (v) is best read, in context, not to refer to exports at all. In any event, the APA requires a reviewing court to "set aside" unlawful agency action. 5 U.S.C. § 706(2). A court cannot rewrite the Rule's limitation of drawback "to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise," Appx205, to apply in a narrower set of circumstances, based on a rationale the agencies did not advance during the rulemaking. *See Chenery*, 318 U.S. at 87; *Dep't of Air Force v. FLRA*, 952 F.2d 446, 452 n.6 (D.C. Cir. 1991) ("Courts cannot rewrite regulations at will to avoid conflicts with underlying statutes."). The CIT was thus correct to invalidate the entire Rule.

3. The government's interpretation would bar substitution drawback of *any* duties, taxes, or fees.

Because the Rule stretches the term "claim for drawback" too far, applying its interpretation of subsection (v) would produce a result that all parties agree Congress did not intend: It would "prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity"—meaning it would bar recov-

ery not only of the excise tax on the corresponding import, but of *any* duties, taxes, and fees on the import. Appx017. As the CIT recognized, this "irrational" outcome shows that Defendants' reading cannot be right. *Id.*; *see Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 829 (D.C. Cir. 2009) (an interpretation producing "absurd" results "fails at *Chevron* step one").

This problem arises because, once triggered, subsection (v) prohibits "any other claim for drawback" using the same exported goods. 19 U.S.C. § 1313(v). So once exported merchandise has been used "to satisfy [one] claim for drawback," *id.*, it cannot be used for that purpose again. And as discussed above, Defendants contend that every untaxed exportation of domestic goods is itself 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." *Id.* (emphasis added). And everyone agrees that a "claim for drawback" at least includes a request for a refund or remission of duties, taxes, and fees imposed on *imported* goods. *See* Appx160. The upshot is that, under Defendants' reading, goods exported "without payment of tax" can never serve as the basis

for a refund or remission of *any* duties, taxes, and fees imposed on imports.

Consider this example. A U.S. winemaker exports 100 liters of California wine and imports 100 liters of Spanish wine. Domestic wine can be "withdrawn from bonded wine cellars ... without payment of tax for export." 26 U.S.C. § 5362(c)(1). On Defendants' view, exporting the California wine "without payment of tax" is a "claim for drawback" that triggers subsection (v). Br. 17. If that is true, these 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 winemaker 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.[7] So the manufacturer would be liable for, and could not obtain a refund of, roughly $20 in duties per 100 liters of imported wine.

In the Rule and their brief below, Defendants agreed that "limit[ing] drawback in [this] manner" is "inconsistent with" the statute. Appx053. They insisted, however, that their interpretation does not

[7] *See* U.S. Int'l Trade Comm'n, *Harmonized Tariff Schedule of the United States Revision 9*, Heading 2204 (2018).

produce this result because subsection (v)'s bar on multiple drawback claims need not be "applied *across* all types of taxes, duties, and fees rather than *within* each class." *Id.*; *see* ECF 30 at 28. That is, where Congress wrote "any other claim for drawback," Defendants read "any other claim for drawback [of the same type of charge]."

The CIT rightly rejected this explanation because it "reads into section 1313(v) a restriction that does not exist." Appx017. There is simply no way to slice and dice the statutory language so it *allows* multiple drawback claims based on the same export, but only if the claims seek to recover different types of charges.

In this Court, Defendants again dispute that their interpretation produces this effect, but they still have no reading of "any other claim for drawback" that avoids it. While they point to subsection (v)'s "proviso clause," Br. 47, that language is irrelevant. It merely states a narrow "except[ion]" to subsection (v) for "claims covering components or ingredients." 19 U.S.C. § 1313(v). Subsection 1313(u) is equally irrelevant, as the CIT explained. Appx016; *contra* Br. 47. And Defendants' argument that "the line the agencies drew is reasonable," Br. 46, misses the point. Agencies cannot "edit … statutory [language] to mitigate the

unreasonableness" their interpretations would otherwise cause. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). And the fact that Defendants feel compelled to do so—to avoid an absurd result that their underlying interpretation would require—confirms that they have "taken a wrong interpretive turn." *Id.*

Defendants also seem to suggest, for the first time, that the NAM lacks standing to make this argument because it "is not injured by the agencies' failure to adopt a more sweeping multiple-drawback ban." Br. 46. But the question here is not whether *the Rule* should prohibit recovery of all duties, taxes, or fees; it is whether *the legal interpretation underlying the Rule* necessarily does so—and so must be wrong. The NAM has standing to challenge the Rule, and thus to "raise … any relevant question of law" that affects its validity. *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940); *see, e.g.*, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446 (holding an agency interpretation "impermissible under *Chevron*" based on a similar argument).

Defendants also now contend that this result of their interpretation is not "absurd" because an exporter "could simply choose to pay the excise tax and use the act of exportation to avoid duties, taxes, and fees

on the corresponding imported merchandise." Br. 48–49. But an absurd result is one that "Congress could not plausibly have intended," *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012), and Defendants have never disputed—including in this Court—that Congress did not intend this result. Indeed, it is particularly implausible that Congress meant the availability of *duty* drawback to depend on exporters forfeiting a separate *tax* benefit that is (at least sometimes) constitutionally mandated. *See* U.S. Const. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). And if Defendants really thought this result was sensible, they would not turn interpretive backflips to try to avoid it.

Finally, Defendants say this problem is not a basis to reject their interpretation because even if subsection (v) were not triggered by exports "without payment of tax," it would still be triggered by exports under the tax-code provisions that expressly say "drawback"—so it would still bar recovery of duties and fees, just in a smaller set of cases. Br. 45. But this problem does not arise *at all* if "claim for drawback" in subsection (v) is interpreted to refer only to imports, not exports. *See supra* p. 42.

In any event, Defendants' argument fails on its own terms. If subsection (v) is read to reach into the tax code, but treats as "drawback" only those transactions that Congress said involve "drawback"—if it applies to the small set of exports for which tax *has* been "paid or determined"—then the statute will, in a few cases, bar substitution drawback not only of excise taxes but also of duties, fees, and other taxes on imports. By contrast, under Defendants' interpretation of subsection (v), the statute would require that absurd result for *every untaxed export*. Courts read statutes to minimize absurd results, not maximize them. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Thus, even if subsection (v) is read to reach into the tax code, it can reach no further than the provisions that actually say "drawback." And again, the Rule, which extends far more broadly, is invalid on that reading too.

C. The statutory history supports the CIT's conclusion.

The statute's history also supports the CIT's decision—and disproves Defendants' claim that the Rule merely closes an "inadvertent" loophole for wine.

1. Congress has consistently expanded substitution drawback and rebuffed efforts to impose the restriction Defendants claim was lurking in the statute all along.

Congress passed subsection (v) in 1993. It gave no hint that "claim for drawback" includes exports "without payment of tax." 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. No. 103-361, pt. I, at 130, 993 U.S.C.C.A.N. at 2680.

Indeed, from 1993 to 2009, CBP never described subsection (v) the way it now does. As the CIT noted, Customs rulings addressing subsection (v) explained it in the same limited terms as the House Report. Appx014; *supra* p. 33. And while other Customs rulings held that excise taxes were not eligible for drawback, they did not invoke subsection (v). Instead, they reasoned that the tax code's "exclusive provisions" governed the refund of excise taxes, *supra* p. 27—the position Congress overruled in 2004 by adding the "notwithstanding" clause. Also in 2004, Congress replaced "because of … importation" in paragraph (j)(2) with

"upon entry or importation," thus "allow[ing] drawback for *any* duty, tax, and fee imposed upon entry," including excise taxes. *Shell Oil*, 688 F.3d at 1380 (emphasis added).

On Defendants' view, these events make no sense. According to the now-abrogated Customs rulings, excise taxes were ineligible for substitution drawback from 1984 to 2004. Yet in 1993, Congress supposedly adopted subsection (v) in part to bar a practice that was already prohibited. Thus, when Congress made excise taxes eligible for drawback in 2004, subsection (v)'s dormant "double drawback" prohibition purportedly sprung to life, reinstating essentially the same regime Congress had just rejected. That does not follow. No wonder, then, that Defendants' historical account skips over 2004 entirely. Br. 49–53.

In 2007, Congress rejected legislative proposals much like the Rule. The proposals would have reduced "the amount of the refund as drawback under" section 1313 "by an amount equal to any Federal tax credit or refund of any Federal tax" on the export. 153 Cong. Rec. S7941, § 832(b); *accord* 153 Cong. Rec. S13927, § 12318(b). Defendants say these proposals merely "related to imported ethanol," Br. 51, but they would have applied "[f]or purposes of subsections [1313](b), (j)(2),

and (p)," and limited "the amount of the refund as drawback under this section"—section 1313. *See* 153 Cong. Rec. S7941, § 832(b). And while failed legislative proposals can support multiple inferences, Br. 51, these amendments show what language a statute would use if Congress had adopted the sort of restriction Defendants urge—language that appears nowhere in any statute.

In 2008, Congress liberalized the substitution standard for wine. *Supra* p. 9. By then, CBP had paid substitution drawback of excise taxes on wine for at least four years. Appx057. Defendants say the 2008 legislative history "said [no]thing about excise taxes or double drawback," Br. 51, but the Conference Report specifically noted CBP's practice of paying "drawback claims on wine" and explained that the 2008 amendment "carries forward" that treatment. *See* H.R. Rep. No. 110-627, at 1094–95, 2008 U.S.C.C.A.N. at 514–15.

In 2009, Defendants proposed to adopt a restriction mirroring the Rule. *See* Appx267. This failed proposal prompted fierce opposition from legislators, who explained that Defendants "have been heard many times on this issue," and that the proposal was "an attempt … to change existing law via rulemaking, pre-empting and negating the role of Con-

gress." *See* Appx273–274. The Senators' letter noted specifically that the proposal was an "ill-advised" attempt to "revisit" the issue Congress settled in 2004. *See* Appx349–350. That remains true.

Defendants mischaracterize these letters as merely "request[ing] that the agencies not proceed with the proposed regulation due to then-pending legislation." Br. 52. While the Representatives' letter mentioned "Congressional action" in passing, it also said the proposal was an improper attempt "to change existing law." Appx274. The Senators' letter was equally clear that the proposal "run[s] counter to the current statutory scheme." Appx349. While Defendants fault the CIT for relying on these letters, the court recognized that such statements "are by no means dispositive." Appx019. The letters show, however, that at least since 2009, everyone involved has known that CBP was paying excise-tax drawback on alcohol beverages that met the substitution standard (at the time, wine) and allowed it to go on. *See* Appx020.

Finally, Congress again expanded substitution drawback through TFTEA without restricting excise-tax drawback. Instead, as the CIT explained, Congress noted that "the existing treatment of wine … is preserved." Appx020 (quoting H.R. Rep. No. 114-376, at 221). Thus, at

least twelve 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 endorsed "the existing treatment of wine" and expanded the substitution standard for other products, "with the knowledge that industries may then avoid some payment of excise tax." *Id.*

2. Defendants' alternative history is mistaken. *See* Br. 49–53. They say there is a "longstanding prohibition on double drawback," from which wine was "inadvertently" exempted from 2004 until the Rule issued. *Id.* at 13–15 & n.4, 24. Thus, CBP has "never afforded" the same treatment to other goods. *Id.* at 15. And, Defendants say, if Congress knew about their treatment of wine, it also knew about the broader prohibition for other goods, which "involve substantially larger trade flows and tax dollars." *Id.* at 49–50. They thus contend that "Congress's inaction" is better understood as ratifying the "prohibition," not the exception. *Id.* at 50.[8]

There are two problems with this argument. First, it overlooks that wine, not other goods, was the subject of legislative debate and ac-

[8] The figures Defendants recite (at 50) stem from the Rule's flawed economic analysis. *See* Appx309–315.

tion. It was CBP's practice of paying "drawback claims on wine" that Congress codified and "carrie[d] forward" in 2008. H.R. Rep. No. 110-627, at 1094–95, 2008 U.S.C.C.A.N. at 514–15. Wine was the subject of the 2009 legislators' letters. Appx273–274; Appx349–350. And by the time Congress passed TFTEA, wine had openly received excise-tax drawback for over a decade, and Congress "preserved" this "existing treatment." Appx020.

Second, Defendants' "longstanding prohibition" does not exist. "[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.), and Defendants do not cite a single Customs ruling or regulation suggesting that "double drawback" is improper, under subsection (v) or otherwise. *See* Br. 24. 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, under "the present statutory and regulatory structure," "other products" than wine "may also be the subject of such drawback claims," including "distilled spirits and beer." Appx265.

Indeed, it is not clear that Defendants even *could* have denied claims on this basis. As they admit, section 1313 "does not require CBP to verify whether substitute exported merchandise is tax paid," so "CBP does not have records" of such claims. Appx169. CBP simply never had a policy against "double drawback."

So while Defendants are correct that CBP generally has not paid excise-tax drawback on goods other than wine, Br. 15, they are wrong about why. The true reason is that only wine enjoyed a relaxed *substitution* standard. Other goods were subject to the restrictive commercial-interchangeability standard, which CBP construed narrowly. *See* GAO Report 18 (CBP denied substitution of light-blue underwear for dark-blue underwear of the same size and style). In particular, CBP often denied substitution for products with different brand names. *E.g.*, HQ 229320 (July 29, 2002) (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, meaning it is rarely possible to substitute alcohol exports for same-brand im-

ports.[9] But under TFTEA, substitution drawback is now available for many more commodities, which is why this issue has come to a head now.

D. Defendants' other arguments are forfeited and lack merit.

Defendants' remaining arguments are forfeited and mistaken. *First*, Defendants assert that "because 'drawbacks are a privilege, not a right,' any residual doubt must be resolved in the government's favor." Br. 22 (quoting *Shell Oil,* 688 F.3d at 1382). They did not make this argument below until they unsuccessfully sought to stay the judgment. ECF 50 at 8. And this Court has apparently never given this principle significant weight in statutory interpretation—let alone applied it to uphold an agency interpretation that would otherwise fail under *Chevron*. *Cf. Thomas v. Nicholson*, 423 F.3d 1279, 1284 n.5 (Fed. Cir. 2005) (declining to apply the canon in favor of veterans because the principle "that Congress acts intentionally in an exclusion" foreclosed any ambiguity). Drawback is, as the 2009 Senators' letter observed, "a clearly

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

articulated statutory right," which an "agency cannot change by regulation." Appx349.

Second, Defendants argue that paragraph 1313(*l*)(1)—which says that "[a]llowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe"—"provides an independent basis for the Rule." *See* Br. 23, 44, 48. Defendants "waived this argument by failing to raise it" below. *Charles*, 587 F.3d at 1323 n.2. And both the NPRM and the final Rule asserted that the Rule is *required* by subsection (v)'s supposed "Statutory Prohibition." Appx054; Appx168. The Rule cannot now be upheld on a different theory. *See Chenery*, 318 U.S. at 94 ("an order may not stand if the agency has misconceived the law").

In any case, a regulation "may fill gaps in the statutory scheme left by Congress *if* it does so in a manner that is consistent with the policies reflected in the statutory program." *Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000) (emphasis added). This gap-filling power does not allow Defendants to prohibit substitution-drawback claims that Congress said "shall" be paid. 19 U.S.C. § 1313(j)(2); *see Nat'l Mining Ass'n v. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir.

1997) (an agency "cannot rely on its general authority to make rules" to override "a specific statutory directive").

Third, Defendants assert that 19 U.S.C. § 1484(a)(2)(C)'s command to "provide, to the maximum extent practicable, for the protection of the revenue" "would alone likely justify the double-drawback prohibition in the Rule." Br. 47–48. But even if "this subsection" applies here, *see* 19 U.S.C. § 1484(a)(2)(C), this argument is both forfeited and wrong. Neither the NPRM nor the final Rule mentioned § 1484. Even setting aside the resulting *Chenery* problem, an NPRM must identify "the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2). Defendants also did not mention § 1484 below. And again, an agency cannot rely on this kind of general gap-filling power to override specific statutory provisions.

Defendants also say a 1944 Treasury Decision "supports" their reading of subsection (v). Br. 47–48; *id.* at 10–11. But as they admit, this decision merely "prohibit[s] the double recovery of the *same* tax," *id.* at 47 (emphasis added)—it bars an exporter from recovering the excise tax *on a single export* under both the tax code and subsection 1313(d). 9 Fed. Reg. 14,275 (Nov. 30, 1944); *see* 19 C.F.R. § 190.106. It

does not address the scenario here, which was impossible until Congress adopted substitution drawback four decades later.

* * *

The CIT correctly held that the Rule clashes with "the clear intent of Congress." Appx018. The term "claim for drawback" in subsection (v) properly refers only to claims for drawback *on imports*. But in any event, "claim for drawback" cannot reach beyond the things Congress specifically called "drawback," to reach exportations that involve no "determination" and no "payment of tax." Under either reading, the Rule is invalid at *Chevron* step one.

II. Even if the statutes were ambiguous, the Rule is not reasonable.

Even if the statutes were ambiguous, the Rule still "'contravenes clearly discernible legislative intent' [and] is otherwise unreasonable." *Wassenaar v. OPM*, 21 F.3d 1090, 1092 (Fed. Cir. 1994). Since Congress first adopted substitution drawback, it has consistently rejected efforts to constrain the program—including by rejecting proposals and agency rulings mirroring the Rule. This history reflects Congress's policy judgment that substitution drawback is a boon for U.S. manufactur-

ing and employment, and that any accompanying loss of tax revenue is a fair price to pay. Defendants cannot defy that judgment.

Nor would statutory ambiguity avoid the fact that Defendants' interpretation would bar drawback of *all* duties, taxes, or fees. *Supra* § I.B.3. An interpretation that produces "internal inconsistency" and "absurd results" "is unreasonable." *Int'l All. v. NLRB*, 334 F.3d 27, 34–35 (D.C. Cir. 2003).

III. Even if the Rule is otherwise valid, it cannot apply retroactively.

If the Court disagrees with the arguments above, it should hold that the Rule cannot apply to substitution-drawback claims filed before its effective date. As the CIT recognized—and as the Beer Institute explains—such a retroactive application "runs afoul of fair notice." Appx020. The NAM joins the Beer Institute's arguments on this point.

CONCLUSION

The judgment should be affirmed. Alternatively, the Rule cannot be applied to pre-effective-date drawback claims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2020, I caused a copy of this brief to be filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ *Peter D. Keisler*
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the rules of this court, because this brief contains 13,872 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

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