

Federal Circuit Bar *Journal*



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An Overlooked Claim: The Survivor Benefit Plan as a Continuing Claim

Janeal Beck*

Introduction

Jewell Hart was one of many widows denied monthly payments under the Survivor Benefit Plan (“SBP”) because the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) misapplied the continuing claims doctrine.¹ Jewell Hart was married to Gene Hart, a Sergeant in the U.S. Air Force.² Gene Hart passed away on October 15, 1980, initiating Mrs. Hart’s rights to monthly annuity payments under the SBP.³ Although the government should have paid Mrs. Hart that very month, they did not.⁴ Mrs. Hart did not even learn about the existence of the SBP until seven years later, when she read about the SBP in a news article.⁵ Because she did not know this plan existed, she did not know that she should have been receiving payments every month since her husband’s death seven years prior.⁶ On October 18, 1988, Mrs. Hart filed a claim for the benefits she was supposed to have been receiving for eight years.⁷ The general statute of limitations for filing a claim against the United States in the U.S. Court of Federal Claims (“Court of Federal Claims”) is six years, but it had been eight years since Mrs. Hart’s rights to payments had begun.⁸ Therefore, without a way to extend the statute of limitations, Mrs. Hart could not file a claim for any of the payments the government owed. Under the well-established continuing claims doctrine, the statute of limitations should have restarted after each missed payment, and Mrs. Hart should have received payment for the prior six years.⁹ However, the

* J.D. Candidate, May 2026, The George Washington University Law School. Special thanks to Professor Eleanor Ross and Claire Housley for their guidance in writing this Note, and to my husband, family, and friends for their unwavering support.

¹ See *Hart v. United States*, 17 Cl. Ct. 481, 481 (1989), *rev’d*, 910 F.2d 815 (Fed. Cir. 1990).

² See *id.*

³ See *id.*

⁴ See *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990).

⁵ See *Hart*, 17 Cl. Ct. at 482.

⁶ See *id.*

⁷ See *id.*

⁸ See 28 U.S.C. § 2501; *Hart*, 17 Cl. Ct. at 482.

⁹ See *Hart*, 17 Cl. Ct. at 483.

Federal Circuit refused to apply the continuing claims doctrine¹⁰ even though it had been consistently applied to many other pay claims in the court.¹¹ Mrs. Hart was therefore denied any payments based on the SBP.¹²

Servicemembers are automatically enrolled in the SBP, but Gene Hart elected out of the program.¹³ Because Mr. Hart opted out, the government had an obligation to notify Mrs. Hart that she would not receive benefit payments under the SBP.¹⁴ However, the government failed to provide this notification to Mrs. Hart.¹⁵ When the government fails to provide this notice, the surviving beneficiary has an automatic right to benefit payments.¹⁶ Mrs. Hart therefore had a right to SBP payments, and the government breached their duty to make those payments.

In determining that SBP claims are not a continuing claim, the Federal Circuit focused on the incorrect statutory violation. The court focused on the government's failure to notify Mrs. Hart that her husband had elected out of the plan, but the court should have focused on the government's failure to pay Mrs. Hart.¹⁷

Most cases in the Court of Federal Claims and the Federal Circuit now follow the conclusion in the Federal Circuit case *Hart v. United States*¹⁸ that SBP claims are not continuing claims.¹⁹ *Hart* should not be followed because the case bases its analysis on the incorrect statutory violation and has scant analysis of the continuing claims doctrine.²⁰ Although the question of whether SBP claims are continuing was not taken up again by the Federal Circuit, it should be.²¹ Not only was *Hart* incorrect to begin with, but a subsequent case in The United States Supreme Court ("Supreme Court") shows that the continuing claims doctrine should apply to SBP claims.²² The Supreme Court

¹⁰ See *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990).

¹¹ See discussion *infra* Part II.

¹² See *Hart*, 910 F.2d at 816.

¹³ See *id.* at 818.

¹⁴ See *id.* at 817.

¹⁵ See *id.* at 818.

¹⁶ See *id.*; *Barber v. United States*, 676 F.2d 651, 654 (Ct. Cl. 1982).

¹⁷ See discussion *infra* Section IV.A.

¹⁸ 910 F.2d 815 (Fed. Cir. 1990). All references in this Note to "*Hart*" refer to this Federal Circuit opinion, unless explicitly referring to the trial level opinion in the then-named U.S. Claims Court found at 17 Cl. Ct. 481 (1989).

¹⁹ See *Hart*, 910 F.2d at 818; discussion *infra* Section III.C.

²⁰ See *Nicholas v. United States*, 42 Fed. Cl. 373, 376-79 (1998).

²¹ See *id.* *Nicholas* was not appealed to the Federal Circuit. See Docket, *Nicholas v. United States*, 42 Fed. Cl. 373 (1998) (No. 96-cv-394).

²² See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 200 (1997).

decided *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*²³ two years after *Hart* and clarified the application of the continuing claims doctrine.²⁴ In the subsequent Court of Federal Claims case *Nicholas v. United States*,²⁵ the court applied *Bay Area Laundry* to SBP claims and correctly held SBP claims are continuing.²⁶

The rulings in *Hart* and *Nicholas* have created confusion in the Court of Federal Claims and the Federal Circuit.²⁷ The Federal Circuit case *Hart* is the precedent-setting case for this type of claim.²⁸ However, the Court of Federal Claims case *Nicholas* recognized that *Hart* was incorrect in light of the subsequent Supreme Court case *Bay Area Laundry*.²⁹ The Federal Circuit did not hear *Nicholas*, which would have allowed the court to reevaluate the continuing claims doctrine under *Bay Area Laundry*.³⁰ This has created two lines of cases in the Court of Federal Claims and Federal Circuit—one based on *Hart*, and the other based on *Nicholas* and *Bay Area Laundry*.³¹ While courts erroneously continue to use *Hart* as precedent, *Nicholas* is the correct reasoning and incorporates Supreme Court precedent.³² Some cases have therefore referred to *Nicholas* even though it is from a lower court.³³

The Federal Circuit should clarify that the continuing claims doctrine does apply to SBP claims. To do this, the court should first clarify that the continuing claims doctrine applies to claims where a party violates a payment-requiring statute, regulation, or contract, even if the party commits a separate wrong which contributes to the violation of the payment-requiring statute. Second, the court must overrule *Hart*.

Part I of this Note first describes the continuing claims doctrine. Part II then describes pay claims and SBP claims. Part III of this Note outlines the various arguments and cases currently used in the Court of Federal Claims and the Federal Circuit regarding whether SBP claims are continuing, concluding that, despite some confusion, the Federal Circuit currently does not view SBP claims to be continuing. Finally, Part IV of this Note shows that SBP claims are continuing under Supreme Court precedent, and that each month the government fails to pay is a separate claim accrual. Part IV also

²³ 522 U.S. 192 (1997).

²⁴ See *id.* at 195–202.

²⁵ 42 Fed. Cl. 373 (1998).

²⁶ See *id.* at 376–79.

²⁷ See discussion *infra* Section III.C.

²⁸ See *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990).

²⁹ See *Nicholas*, 42 Fed. Cl. at 376–79; *Bay Area Laundry*, 522 U.S. at 195–202.

³⁰ See Docket, *Nicholas v. United States*, 42 Fed. Cl. 373 (1998) (No. 96-cv-394).

³¹ See *Hart*, 910 F.2d at 818; *Nicholas*, 42 Fed. Cl. at 379.

³² See discussion *infra* Part IV.

³³ See *infra* notes 165–70 and accompanying text.

concludes that the Federal Circuit should clarify the application of the continuing claims doctrine and overrule *Hart*.

I. Continuing Claims Doctrine

The continuing claims doctrine allows plaintiffs to sue based on violations that occur later in time, even if the statute of limitations for the initial violation has already run.³⁴ Once a claim accrues it must be filed within the statute of limitations, which in the Court of Federal Claims generally means within six years.³⁵ The continuing claims doctrine can apply if there are repeated individual violations of a statute, regulation, or contract, referred to collectively as “violations” or “wrongs.”³⁶ If the continuing claims doctrine applies, then each wrong has its own time of accrual.³⁷ This allows a plaintiff to bring a claim for a wrong that occurred later in time, even though the statute of limitations has lapsed for the initial wrong.³⁸

A. Statute of Limitations and Accrual

Plaintiffs can only bring a case if they bring it within the statute of limitation, a period which begins at the time of accrual and ends after the designated amount of time has lapsed.³⁹ In interpreting a statute of limitations, accrual is the point at which the plaintiff has been injured, and all events exist which are necessary for the plaintiff to file suit.⁴⁰ While this exact definition can vary by jurisdiction, the Supreme Court has emphasized that “a claim does not ‘accrue’ as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.”⁴¹

Accrual in the Court of Federal Claims has been interpreted to be “on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.”⁴² Correct inter-

³⁴ See Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 OHIO N.U. L. REV. 343, 352 (2015).

³⁵ See *id.*; 28 U.S.C. § 2501.

³⁶ See *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1457–58 (Fed. Cir. 1997).

³⁷ See Peled, *supra* note 34, at 352–53.

³⁸ See *id.*

³⁹ See 28 U.S.C. § 2501 (stating the statute of limitations for the Court of Federal Claims).

⁴⁰ See *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450–52 (2024).

⁴¹ *Id.* at 2451.

⁴² See *Petro. Mex, LLC v. United States*, No. 2023-1848, 2024 U.S. App. LEXIS 23179, at *14 (Fed. Cir. Sep. 12, 2024) (quoting *Bowen v. United States*, 292 F.3d 1383, 1385 (Fed. Cir. 2002)). There have been several similar quotes used throughout the Federal Circuit.

pretation of the statute of limitations in the Court of Federal Claims is important because it is jurisdictional.⁴³ The statute of limitations therefore determines whether a case can be heard at all.⁴⁴ Thus, practically speaking, it is necessary to know when “accrual” occurs so that claimants and attorneys understand the timeframe to bring suit and do not forfeit a claim on statute of limitations grounds.

The statute of limitations for the Court of Federal Claims is in 28 U.S.C. § 2501, which states that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”⁴⁵ Based on this statute, the statute of limitations in the Court of Federal Claims begins at the time of accrual and claims must be filed within six years.⁴⁶

The Supreme Court recently affirmed the importance of measuring accrual from “[the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury.”⁴⁷ The Court also emphasized that a statute of limitations is distinct from a statute of repose.⁴⁸ A statute of repose focuses on the defendant’s actions by starting the clock at “the last culpable act or omission of the defendant.”⁴⁹ Conversely, a statute of limitations focuses on the plaintiff by starting the clock at the time the plaintiff sustains harm.⁵⁰

B. Defining Continuing Claims

The continuing claims doctrine⁵¹ allows a claim to be broken down into separate and distinct wrongful acts, with each wrong having its own time of claim accrual.⁵² Once an initial wrong occurs, and the amount of time in

See, e.g., Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (reasoning that claims accrue “when all the events which fix the government’s alleged liability have occurred *and* the plaintiff was or should have been aware of their existence” (emphasis in original)).

⁴³ *See* Fowler v. United States, 174 Fed. Cl. 423, 428 (2025).

⁴⁴ *See id.*

⁴⁵ 28 U.S.C. § 2501.

⁴⁶ *See id.*

⁴⁷ Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2451 (2024) (alteration in original) (quoting BLACK’S LAW DICTIONARY 37 (4th ed. 1951)).

⁴⁸ *See id.* at 2452.

⁴⁹ *Id.* (quoting CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014)).

⁵⁰ *See id.* (quoting CTS Corp., 573 U.S. at 7–8).

⁵¹ There are several names for the continuing claims doctrine, including “continuing violation doctrine” and “continuing tort doctrine,” both of which are widely used. *See generally* Peled, *supra* note 34 (using the two terms interchangeably).

⁵² *See id.* at 352–53.

the statute of limitations has lapsed, a plaintiff can no longer bring a claim for that initial wrong.⁵³ Without the continuing claims doctrine, each subsequent wrong or violation by a defendant, even though it is the same type of violation as the first, would also be barred because the entire claim accrued at the first wrong, and therefore all following wrongs are barred by the statute of limitations.⁵⁴ With the continuing claims doctrine, each wrong is evaluated on its own to determine when it accrues.⁵⁵ This allows wrongs that occur after the first to still be viable claims.⁵⁶

The continuing claims doctrine can only apply when a violation is “continuing in nature,” meaning the wrongful conduct is repeating.⁵⁷ Case law expounds upon this test for the Court of Federal Claims and the Federal Circuit. The test is largely established by *Brown Park Estates-Fairfield Development Co. v. United States*,⁵⁸ stating “[i]n order for the continuing claim doctrine to apply, the plaintiff’s claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages.”⁵⁹ *Brown Park Estates* is a Court of Federal Claims case, which has been consistently used in the Federal Circuit.⁶⁰

Claims for payments are often found to be continuing, so long as there is a repeating required payment, because each missed payment is considered an additional wrong.⁶¹ For example, in *Wells v. United States*,⁶² a veteran received retirement pay from the government but did not receive the full amount, which was a violation of a statute.⁶³ The claim was continuous because it could be “broken down into a series of independent and distinct wrongs or events—deducting more than 15% of Wells’ retirement pay—each such wrong or event having its own associated damages—the difference between the amount permissible under section 5514(a)(1) and the actual deduction.”⁶⁴ Without the continuing claims doctrine the veteran in *Wells* would be unable to bring a suit for any of the deficit checks, because all of the subsequent

⁵³ See *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455 (Fed. Cir. 1997).

⁵⁴ See *id.*

⁵⁵ See *id.* at 1456.

⁵⁶ See *id.*

⁵⁷ See Peled, *supra* note 34, at 352.

⁵⁸ 127 F.3d 1449 (Fed. Cir. 1997).

⁵⁹ *Id.* at 1456.

⁶⁰ See, e.g., *Wells v. United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005); *Chemehuevi Indian Tribe v. United States*, 104 F.4th 1314, 1325 (Fed. Cir. 2024).

⁶¹ See *Friedman v. United States*, 159 Ct. Cl. 1, 8 (1962).

⁶² 420 F.3d 1343 (Fed. Cir. 2005).

⁶³ See *id.* at 1344–45.

⁶⁴ *Id.* at 1347.

wrongs accrued at the time of the first wrong.⁶⁵ But because the continuing claims doctrine applied, the veteran could bring a suit based on the time of accrual for the more recent paycheck.⁶⁶

Conversely, claims that are based on one wrong cannot be continuing, even if there are “continued ill effects later on.”⁶⁷ This rule evolved from a case that determined there is a single wrong if Congress has “entrusted an administrative officer or tribunal with the *determination* of the claimant’s eligibility for the particular pay he sought.”⁶⁸ For example, in *Davis v. United States*⁶⁹ an Administrative Elimination Board (“board”) decided to discharge a servicemember.⁷⁰ This discharge then resulted in the servicemember not receiving certain payments.⁷¹ This was not continuing because there was one board determination, which was the actionable wrong, and the lack of payments were ill effects of that wrong.⁷² The court did not apply the continuing claims doctrine in *Davis* because the board determination was a single wrong which instigated all the claims.⁷³

In addition to the requirement that a wrong be a repeated violation to be a continuing claim, the wrong must also be based on “an alleged violation of a statute or regulation”⁷⁴ or a breach of contract.⁷⁵ In *Wells*, a statute qualified as the basis for a continuing claim because it limited the amount the

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997).

⁶⁸ *Friedman v. United States*, 159 Ct. Cl. 1, 7 (1962) (emphasis in original). *Friedman* is only inconsistently used in the Court of Federal Claims and the Federal Circuit. Compare *Hatter v. United States*, 203 F.3d 795, 799–800 (Fed. Cir. 2000) (engaging in a *Friedman* analysis for a continuing claim case), with *Jordan v. United States*, 158 Fed. Cl. 440, 455–56 (2022) (not engaging in a *Friedman* analysis for a continuing claim case).

⁶⁹ 550 F. App’x 864 (Fed. Cir. 2013) (per curiam).

⁷⁰ *See id.* at 865. Administrative Elimination Boards are created by military branches to investigate and discharge servicemembers. *See id.* In *Davis*, the servicemember was discharged for “fraudulent entry” into the Army. *See id.*

⁷¹ *See id.*

⁷² *See id.* at 865–66.

⁷³ *See id.* This is different from SBP claims where the government fails to notify a beneficiary of their right to payments, because notification is not required in every circumstance and is therefore not an element for accrual in an SBP case. *See infra* notes 188–98 and accompanying text.

⁷⁴ *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1457 (Fed. Cir. 1997); *Wells v. United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005) (applying *Brown Park Estates*).

⁷⁵ *See Brown Park Ests.*, 127 F.3d at 1458 (citing *Aktiebolaget Bofors v. United States*, 153 F. Supp. 397, 399 (Ct. Cl. 1957)).

government could withhold from a retirement check, thus each check that withheld an amount over that limit was a repeated violation.⁷⁶ The breach of a contract can also be the basis of a continuing claim, so long as it is a breach that can and does occur multiple times.⁷⁷

There are two versions of the continuing claims doctrine for purposes of damages.⁷⁸ Only the second type, the “separate accrual rule,” has been consistently used in the Court of Federal Claims and the Federal Circuit.⁷⁹ The first version is a “unitary violation” approach, where each subsequent “wrong” acts as a part of the claim as a whole.⁸⁰ This allows a plaintiff to bring a suit based on the time of accrual for the most recent wrong but collect damages for all previous wrongs.⁸¹ The second version of the continuing claims doctrine is the “separate accrual rule,” where each subsequent wrong is treated as its own claim.⁸² This version allows a plaintiff to collect the damages that would fall into the related statute of limitations for each distinct “wrong.”⁸³ In the pay claim example above, this would mean that the employee could bring suit for any claims that accrued within the past six years.

II. Specific Claims in the Federal Circuit

The Court of Federal Claims and the Federal Circuit generally apply the continuing claims doctrine to pay claims,⁸⁴ but not to claims under the SBP.⁸⁵ As both claims have the same fundamental structure and statutory basis, the continuing claims doctrine should apply to both.⁸⁶

⁷⁶ See *Wells*, 420 F.3d at 1346–47.

⁷⁷ See *Aktiebolaget Bofors*, 153 F. Supp. at 399. In *Aktiebolaget Bofors*, a contract stated that the United States could use an anti-aircraft gun designed by the plaintiff, so long as the device was not exported to other countries. See *id.* at 398–99. The court held that there was a repeated violation every time that the government exported the device, so even if the statute of limitations had run for the initial exportation, subsequent exportations were not barred by the statute of limitations so long as they themselves were within the past six years. See *id.* at 399–400.

⁷⁸ See Peled, *supra* note 34, at 352–53.

⁷⁹ See, e.g., *Friedman v. United States*, 159 Ct. Cl. 1, 6–8 (1962); *Jordan v. United States*, 158 Fed. Cl. 440, 455 (2022); *Wells*, 420 F.3d at 1347.

⁸⁰ See Peled, *supra* note 34, at 352–53.

⁸¹ See *id.*

⁸² See *id.* at 353.

⁸³ See *id.*

⁸⁴ See *Friedman*, 159 Ct. Cl. at 6–8.

⁸⁵ See *Jordan v. United States*, 158 Fed. Cl. 440, 455 (2022).

⁸⁶ See *infra* notes 177–84 and accompanying text.

A. Pay Claims

For a claim to qualify as a pay claim, the federal government must have a duty to pay a party “where the payments are to be made periodically,” and that duty can be found in statute, regulation, or the Constitution.⁸⁷ Pay claims in the Federal Circuit often involve federal workers, including payments for military employment,⁸⁸ overtime work,⁸⁹ and retirement.⁹⁰ These claims may seek either entire payments that the government did not make, or the difference between what the government did pay and the higher amount it should have paid.⁹¹ For such claims, “each successive failure to make proper payment gives rise to a new claim upon which suit can be brought.”⁹² Therefore, “the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the law (or the contract) requires.”⁹³

Pay claims have been recognized by the Federal Circuit as continuing for many years,⁹⁴ including in recent cases.⁹⁵ The Court of Federal Claims has made a blanket rule for pay claims in regards to employees that “[i]n pay cases . . . claims first accrue when the compensation at issue should have been received by the employee, *i.e.*, the employee’s payday for the relevant period.”⁹⁶ This allows a plaintiff to bring claims later in time, when there are new missed payments that must be brought as claims.⁹⁷

B. Survivor Benefit Plans

The SBP is a federal program which provides monthly payments to the surviving spouses, family members, and other dependents (“beneficiaries”)

⁸⁷ *Friedman*, 159 Ct. Cl. at 8; *see* 28 U.S.C. § 1491(a)(1) (describing the subject-matter jurisdiction of the Court of Federal Claims).

⁸⁸ *See, e.g., Jordan*, 158 Fed. Cl. at 455.

⁸⁹ *See, e.g., Naltner v. United States*, 173 Fed. Cl. 738, 740 (2024).

⁹⁰ *See, e.g., Davis v. United States*, 550 F. App’x 864, 864–65 (Fed. Cir. 2013) (per curiam).

⁹¹ *See, e.g., Yifrach v. United States*, 169 Fed. Cl. 33, 50–51 (2024); *Metzinger v. United States*, 173 Fed. Cl. 636, 647 (2024).

⁹² *Friedman*, 159 Ct. Cl. at 8.

⁹³ *Id.* at 7–8.

⁹⁴ There are, however, other factors that may make the continuing claims doctrine not applicable to other specific pay claims. *See generally, e.g., Friedman*, 159 Ct. Cl. 1 (holding the continuing claims doctrine could not apply to the claim at hand because a decisional board was designated by congress to make a determination, which began accrual).

⁹⁵ *See Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997); *Metzinger v. United States*, 173 Fed. Cl. 636, 647–48 (2024).

⁹⁶ *Naltner v. United States*, 173 Fed. Cl. 738, 758 n.26 (2024).

⁹⁷ *See id.*

of servicemembers.⁹⁸ Because these claims are based on payments, they are also considered pay claims, and if the government does not make these payments then SBP beneficiaries can bring suit seeking restitution.⁹⁹ It is well established that failure to make these payments arises to a claim for “money improperly withheld.”¹⁰⁰

The survivor benefit plan is codified in 10 U.S.C. §§ 1447–1455. This statute has several provisions which create statutory duties for the government to operate the SBP. The payment-requiring provision, § 1450, provides the statutory basis for a claim for survivor benefits payments from the government and requires the actual monthly payment.¹⁰¹ There are also several notification-requiring provisions, mostly found in § 1448, which require the government to provide notice to a potential beneficiary of a servicemember’s election out of the plan.¹⁰²

While it is clear under § 1450 that the government must make monthly payments when a servicemember participates in the SBP, determining if a servicemember is a participant can make this duty to pay more complicated. Specifically, when servicemembers do not want to participate in the SBP, they can choose not to do so.¹⁰³ Servicemembers are automatically enrolled in the

⁹⁸ See 10 U.S.C. §§ 1447–55 (requiring the government to make monthly payments to surviving dependents of deceased servicemembers and describing these monthly payments as “annuities”).

⁹⁹ See *Barber v. United States*, 676 F.2d 651, 654 (Ct. Cl. 1982).

¹⁰⁰ *Id.*

¹⁰¹ 10 U.S.C. § 1450(a) provides in pertinent part: “Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as that person may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to the person’s beneficiaries under the Plan” (referencing 10 U.S.C. § 1451 which details the amount that each annuity payment shall be for).

¹⁰² There are several sub-parts in the survivor benefit plan statute which create this duty, and depending on the claimant’s specific circumstance, a different claim may be used. The statute has been revised several times, so the statutes cited in cases such as *Hart*, i.e. 10 U.S.C.S. § 1448(a)(3)(A), are no longer correct duty-creating citations. See *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990). The current duty-creating statutes under the survivor benefit plan include: 10 U.S.C. § 1448(a)(3)(E) (“Notice to spouse of election to provide former spouse annuity”); 10 U.S.C. § 1448(a)(6)(D) (“Election out of plan by person with spouse coverage who remarries—Notice to spouse”); 10 U.S.C. § 1448(b)(3)(D) (“Former spouse coverage by persons already participating in plan—Notice to spouse”); and 10 U.S.C. § 1448a(f) (“Election to discontinue participation: one-year opportunity after second anniversary of commencement of payment of retired pay—Notice to Affected Beneficiaries”).

¹⁰³ Several factors may influence a servicemember’s decision to opt out, including that SBP benefits are taxable whereas insurance payouts are tax-free, the servicemember may not have beneficiaries in need of benefits, and the SBP premium may feel expensive compared to other insurance options. See Brian O’Neill, *Why Should you Care About the Survivor Benefit*

SBP but can elect out of the program.¹⁰⁴ There are some familial situations where, if a servicemember elects out of these benefits, the government has a statutory obligation to notify the potential beneficiaries of the election.¹⁰⁵ If the government does not notify these beneficiaries of an election to opt out of the SBP, then the servicemember's election out of the SBP automatically becomes void.¹⁰⁶ At that point, the beneficiary has an automatic right to monthly SBP payments.¹⁰⁷

III. Conflicting Case Law Regarding if SBP Claims are Continuing

There is varying case law on if the continuing claims doctrine can apply to SBP claims. The Federal Circuit case *Hart* initially held that SBP claims are not continuing claims.¹⁰⁸ Following the Supreme Court case *Bay Area Laundry*, the Court of Federal Claims case *Nicholas* identified that *Hart* used the incorrect statute in its analysis, and that SBP claims are in fact continuing.¹⁰⁹ *Hart* is currently used for its SBP claim analysis under the continuing claims doctrine despite subsequent supreme Court precedent that invalidates *Hart's* reasoning.

A. *Hart* Held That SBP Claims Are Not Continuing

The Federal Circuit both raises and dismisses the argument of SBP claims being continuous in one short paragraph, while citing no case law to support its decision regarding the continuing claims doctrine.¹¹⁰ In *Hart*, a servicemember elected out of providing SBP payments to their spouse.¹¹¹ The government was required to notify the spouse, Mrs. Hart, of this election, but did not do so.¹¹² Mrs. Hart then did not discover her right to the payments until almost seven years later.¹¹³ Because over six years had passed since the first SBP payment the government missed, the statute of limitations for that payment

Plan Open Season in 2023?, MIL. FIN. ADVISORS ASS'N (Feb. 8, 2023), [<https://perma.cc/Z2UW-VDGK>].

¹⁰⁴ See 10 U.S.C. §§ 1448(a)(2)–(3).

¹⁰⁵ See *supra* note 102 and accompanying text.

¹⁰⁶ See *Pride v. United States*, 40 Fed. Cl. 730, 733 (1998) (quoting *Hart*, 910 F.2d at 817).

¹⁰⁷ See *Hart*, 910 F.2d at 818.

¹⁰⁸ See *id.*

¹⁰⁹ See *Nicholas v. United States*, 42 Fed. Cl. 373, 377–78 (1998); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 201–02 (1997).

¹¹⁰ See *Hart*, 910 F.2d at 818.

¹¹¹ *Hart v. United States*, 17 Cl. Ct. 481, 481 (1989), *rev'd*, 910 F.2d 815 (Fed. Cir. 1990).

¹¹² *Id.* at 481–82.

¹¹³ *Id.*

had lapsed.¹¹⁴ The Federal Circuit had to determine if Mrs. Hart was barred from bringing suit on any of the subsequent missed payments, or if under the continuing claims doctrine Mrs. Hart could bring suit for those claims that arose within the previous six years.¹¹⁵

In *Hart*, the Federal Circuit created a categorical decision that the continuing claims doctrine cannot be used for SBP claims.¹¹⁶ The court's short analysis does not address what the statutory basis of the SBP claim should be, but bases the claim on the notification-requiring statute.¹¹⁷ The court cites one case that the plaintiff presents, which supports the opposite conclusion that the continuing claims doctrine should apply.¹¹⁸

Instead of analyzing the base of the SBP claim and the continuing claims doctrine, the court focused on not keeping the government open to suit.¹¹⁹ The court argued that if they applied the continuing claims doctrine, then "the statute of limitations would never run."¹²⁰ The court claims that the Federal Circuit's statute of limitations is a statute of repose and is therefore designed "both to limit the opportunity to file suits, and to limit the obligation to defend against them."¹²¹

The Federal Circuit arrived at its holding in *Hart* despite the trial court conducting a more thorough analysis and coming to the opposite conclusion.¹²² The Court of Federal Claims determined that SBP claims were continuing because the government's non-payment of SBP payments was similar to other pay claims where the continuing claims doctrine applies.¹²³ The court reasoned that "[s]uch a claim cannot 'first accrue' until money is 'withheld' and money cannot be 'withheld' until due and payable."¹²⁴ This reasoning emphasized that the violation at hand was the government failing to pay the

¹¹⁴ See *id.* at 482, 487–88.

¹¹⁵ See *Hart*, 910 F.2d at 818.

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 817–18.

¹¹⁸ See *id.* at 818 (citing *Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962)).

¹¹⁹ See *id.* at 818–19.

¹²⁰ *Id.* at 818.

¹²¹ *Id.* Despite the court's claims in *Hart*, the statute at play is not a statute of repose and is thus not primarily intended to protect the government. Additionally, the continuing claims doctrine already applies to other pay claims, so this is not a unique concern. See *infra* Section IV.B.

¹²² See *Hart v. United States*, 17 Cl. Ct. 481, 482–87 (1989), *rev'd*, 910 F.2d 815, (Fed. Cir. 1990).

¹²³ See *id.*

¹²⁴ *Id.* at 483.

SBP payments, not the government failing to notify Mrs. Hart of the election out of the SBP.¹²⁵

The Federal Circuit later elaborated on *Hart*. In *Brown Park Estates* the court confirmed that the only “wrong” they believe exists in SBP cases is the government’s failure to notify a beneficiary.¹²⁶ The court claimed that “[t]he plaintiffs’ alleged later ‘wrongs,’ such as nonpayment of annuities or wages, were not independently accruing violations of any statutes or regulations in themselves.”¹²⁷

B. *Nicholas* Recognized That SBP Claims are Continuing

After *Hart*, subsequent case law reasoned that the continuing claims doctrine does apply to SBP claims because interpretation of the statute of limitations must be focused on the correct harm to the plaintiff.¹²⁸ This argument is found in the Court of Federal Claims case *Nicholas*.¹²⁹ This Section discusses the arguments in *Nicholas*, which are based on a binding Supreme Court Case and conclude that SBP claims are continuing.

Before *Nicholas*, the Supreme Court examined the continuing claims doctrine issue in the 1997 case *Bay Area Laundry*.¹³⁰ Here, the Court analyzed continuing claims regarding the Multiemployer Pension Plan Amendments Act of 1980, which established that employers had to make periodic payments.¹³¹ The Supreme Court held that each missed payment was a new claim, with its own time of accrual and damages.¹³² Important to the Court’s reasoning was that the claim could not accrue, and the plaintiff could therefore not recover damages, until the payment was actually missed.¹³³ Because each missed payment had its own time of accrual, the statute of limitations still applied for each missed payment.¹³⁴ This meant that, under the applicable

¹²⁵ See *id.* The Court of Federal Claims case for *Hart* also focused its analysis on other issues analyzed in the test-creating case *Friedman*, which are now mostly obsolete based on the test in *Brown Park Estates*. See *id.* at 484–85; *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1457–58 (Fed. Cir. 1997).

¹²⁶ See *Brown Park Ests.*, 127 F.3d at 1457–58.

¹²⁷ *Id.* at 1457.

¹²⁸ See *Nicholas v. United States*, 42 Fed. Cl. 373, 378–79 (1998).

¹²⁹ See *id.*

¹³⁰ See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 195–202 (1997).

¹³¹ See *id.* at 196–97.

¹³² See *id.* at 208.

¹³³ See *id.* at 202. The importance of an actual violation for accrual purposes has also been supported in the more recent Supreme Court case *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440, 2450–53 (2024).

¹³⁴ See *Bay Area Laundry*, 522 U.S. at 208–09.

statute of limitations, the plaintiff in *Bay Area Laundry* could not bring claims for payments that were missed more than six years prior.¹³⁵

The Court of Federal Claims applied *Bay Area Laundry* in the 1998 case *Nicholas*, and determined that SBP claims are continuing.¹³⁶ In *Nicholas*, the plaintiff expected to receive SBP payments from her former spouse, who was a servicemember, because the servicemember was signed up for SBP.¹³⁷ However, after getting divorced, the servicemember elected out of providing SBP payments to their former spouse.¹³⁸ The government was required to notify the plaintiff that this servicemember made this election, but the government did not notify the plaintiff.¹³⁹ Because the servicemember did elect out, the plaintiff never received SBP payments.¹⁴⁰ After the servicemember passed away, it took several years of the plaintiff contacting Congress members and other government representatives to determine why she was not receiving payments.¹⁴¹ Because SBP claims are based in 10 U.S.C. § 1450(a), the payment-requiring statute, the Court of Federal Claims held that there was a proper statute on which a continuing claim could be based.¹⁴²

The court in *Nicholas* then looked to the continuing nature of the claim and held that the SBP claim was continuing because each time the government did not pay was a violation of § 1450(a).¹⁴³ Like in *Bay Area Laundry* where the “employer owes nothing until its plan demands payment,” the government owes nothing under the SBP until § 1450 demands payment.¹⁴⁴ And, like the plaintiff in *Bay Area Laundry* who could not bring an installment payment claim until it was missed, here a beneficiary cannot bring an SBP claim until the government misses the statutorily required payment.¹⁴⁵ Both claims therefore do not accrue until each time a payment is missed. The court in *Nicholas* rejected the government’s argument that the installment payment in *Bay Area Laundry* differed from SBP claims.¹⁴⁶ The court in *Nicholas* saw “no reason to view the annuity payments in *Hart* differently from installment

¹³⁵ See *id.* at 206.

¹³⁶ See *Nicholas v. United States*, 42 Fed. Cl. 373, 376–79 (1998).

¹³⁷ See *id.* at 374–75.

¹³⁸ See *id.* at 375.

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

¹⁴² See *id.* at 377–78.

¹⁴³ See *id.* at 378.

¹⁴⁴ *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 202 (1997) (quoting *Milwaukee Brewery Workers’ Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 423 (1995)); see *Nicholas*, 42 Fed. Cl. at 377–78.

¹⁴⁵ See *Bay Area Laundry*, 522 U.S. at 202; *Nicholas*, 42 Fed. Cl. at 377–78.

¹⁴⁶ See *Nicholas*, 42 Fed. Cl. at 377.

obligations in *Bay Area Laundry*.¹⁴⁷ Therefore, based on the Supreme Court precedent in *Bay Area Laundry*, SBP claims are continuing.

Nicholas went further than factual comparison by analyzing *Hart* and specifically concluding that “*Bay Area Laundry* abrogates the Federal Circuit’s decision in *Hart*.”¹⁴⁸ Under this reasoning, *Bay Area Laundry*—a Supreme Court decision binding on the Federal Circuit—clarifies that the continuing claims doctrine applies to survivor benefit plan claims.

The analysis in *Nicholas* is similar to the analysis in the Court of Federal Claims decision for *Hart*, which was overruled by the Federal Circuit.¹⁴⁹ Both cases focus on the government failing to pay as the basis of the SBP claims, rather than the government failing to notify a beneficiary that they are not entitled to payments.¹⁵⁰ Both cases also emphasize the fact that these parties could not bring claims for a claim that had not yet accrued, and an SBP claim cannot accrue until money has actually been withheld.¹⁵¹ The importance of there being an actual violation and related harm is further bolstered by the recent Supreme Court case *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,¹⁵² which articulated that “no cause of action accrues until the loss or damage occurs.”¹⁵³ *Nicholas*, unlike *Hart*, was never appealed to the Federal Circuit and is therefore still a standing case in the Court of Federal Claims.¹⁵⁴ Additionally, *Hart* is marked as “questioned” in LexisNexis because *Nicholas* cast doubt on *Hart*’s reasoning.¹⁵⁵

Even if *Hart* had been a valid ruling, *Hart* was abrogated by the Supreme Court case *Bay Area Laundry*.¹⁵⁶ But both the Court of Federal Claims and the Federal Circuit continue to rely on *Hart*, despite its shaky origins and reasoning.¹⁵⁷

¹⁴⁷ *Id.* at 378.

¹⁴⁸ *Id.* at 377.

¹⁴⁹ See *Hart v. United States*, 17 Cl. Ct. 481, 483 (1989), *rev’d*, 910 F.2d 815 (Fed. Cir. 1990); *Nicholas*, 42 Fed. Cl. at 377–78.

¹⁵⁰ See *supra* note 149 and accompanying text.

¹⁵¹ See *supra* note 149 and accompanying text.

¹⁵² 144 S. Ct. 2440 (2024).

¹⁵³ *Id.* at 2451 (quoting *Accrual of Cause of Action*, BALLENTINE’S LAW DICTIONARY (2d ed. 1948)).

¹⁵⁴ See Docket, *Nicholas v. United States*, 42 Fed. Cl. 373 (1998) (No. 96-cv-394).

¹⁵⁵ See *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990) (questioned in *Nicholas*, 42 Fed. Cl. at 377–79).

¹⁵⁶ See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 195–202 (1997).

¹⁵⁷ See discussion *infra* Section III.C.

C. The Court of Federal Claims and Federal Circuit Continue to Use *Hart*

Other cases in the Federal Circuit continue to use *Hart*, and SBP claims in general, as an example of when the continuing claims doctrine does not apply.¹⁵⁸ When the Federal Circuit decided *Brown Park Estates*, which solidified the continuing claims test, it relied on *Hart*'s conclusion that the continuing claims doctrine cannot be used for SBP claims, and did so without doing an analysis of the facts of an SBP claim.¹⁵⁹ This adoption by *Brown Park Estates*, which relies on *Hart*, has been continually cited in the Federal Circuit.¹⁶⁰ *Hart*'s dicta has also been recently cited to state that because the statute of limitations protects the government's sovereign immunity, no exceptions can apply to it.¹⁶¹

Although most cases in the Federal Circuit proceed with *Hart*'s conclusion that the continuing claims doctrine does not apply to SBP claims, there is still a divide in the court of federal claims and other jurisdictions on whether *Hart* or *Nicholas* should be followed.¹⁶² Judges in the Court of Federal Claims have largely ignored *Nicholas*'s ruling that SBP claims are continuing, and have instead continued to rely on *Hart*.¹⁶³ Included in this, the Court of Federal Claims case *Toney v. United States*¹⁶⁴ acknowledges *Nicholas* and seems to excuse it as a one-off case allowing SBP claims to be continuing.¹⁶⁵ But

¹⁵⁸ See, e.g., *Jordan v. United States*, 158 Fed. Cl. 440, 455 (2022); *Wells v. United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005).

¹⁵⁹ See *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456–57 (Fed. Cir. 1997).

¹⁶⁰ See, e.g., *Petro. Mex, LLC v. United States*, No. 2023-1848, 2024 U.S. App. LEXIS 23179, at *15 (Fed. Cir. Sep. 12, 2024); *Chemehuevi Indian Tribe v. United States*, 104 F.4th 1314, 1325 (Fed. Cir. 2024); *May v. United States*, No. 2023-1124, 2023 U.S. App. LEXIS 13964, at *10–11 (Fed. Cir. June 6, 2023); *Emiabata v. United States*, 174 Fed. Cl. 74, 81 (2024).

¹⁶¹ See, e.g., *Bee v. United States*, No. 21-1970, 2024 U.S. Claims LEXIS 2139, at *9 (Fed. Cl. Aug. 23, 2024); *Foxwood, Ltd. v. United States*, 173 Fed. Cl. 109, 117 (2024); *Kelly v. United States*, 171 Fed. Cl. 550, 563 (2024); *Wyo. Tr. Co. v. United States*, No. 23-1341, 2024 U.S. Claims LEXIS 261, at *6 (Fed. Cl. Feb. 26, 2024); *Yifrach v. United States*, 169 Fed. Cl. 33, 43 (2024).

¹⁶² See *infra* notes 163–70 and accompanying text.

¹⁶³ See, e.g., *Jackson v. United States*, 55 Fed. Cl. 157, 163 (2003) (discussing the continuing claims doctrine with reference to *Hart*, but not *Nicholas*); *Angel v. United States*, 165 Fed. Cl. 453, 465–66 (2023) (same discussion).

¹⁶⁴ 43 Fed. Cl. 389 (1999).

¹⁶⁵ See *id.* at 390.

Toney does not address whether SBP claims are continuing or engage with *Nicholas's* analysis of this issue.¹⁶⁶

Other cases have demonstrated belief that *Nicholas* is and should be followed. In the Court of Federal Claims case *Westlands Water District v. United States*,¹⁶⁷ the court expressed that although “[t]he continuing claims doctrine has not been consistently recognized in this court,” it currently is in use based on *Nicholas* and *Bay Area Laundry*.¹⁶⁸ Courts in other jurisdictions have also indicated a belief that the *Nicholas* line of reasoning is still active.¹⁶⁹ In addition to confusion in courts, this inconsistency has also led at least one party in the Federal Circuit to believe they could rely on the continuing claims doctrine.¹⁷⁰

IV. SBP Claims are Continuing, Which Should be Recognized by the Federal Circuit

In *Nicholas*, the Court of Federal Claims correctly applied the Supreme Court case *Bay Area Laundry* to SBP claims, concluding that courts must look at the government’s failure to pay as the actionable wrong. *Nicholas* determined that SBP claims are continuing; the Federal Circuit must now do the same.¹⁷¹

A. SBP Claims are Continuing When Based on the Government’s Failure to Pay

Under Supreme Court reasoning SBP claims are continuing, but this is dependent on the court evaluating the correct “wrong.”¹⁷² While both *Hart* and *Nicholas* involve factual scenarios where the government is required to give a beneficiary notice, this is not a requirement to bring an SBP claim.¹⁷³

¹⁶⁶ *See id.*

¹⁶⁷ 109 Fed. Cl. 177 (2013)

¹⁶⁸ *Id.* at 212 n.17.

¹⁶⁹ The U.S. District Court of D.C. has cited *Nicholas* to say that the continuing claims doctrine does apply to survivor benefit plan claims. *See Lopez v. Sec’y of the Navy*, No. 98-2927, 2000 U.S. Dist. LEXIS 14027, at *3 (D.D.C. Sep. 25, 2000) (referencing the *Nicholas* and *Bay Area Laundry* line of reasoning as the correct interpretation of the continuing claims doctrine).

¹⁷⁰ The plaintiff in *Brophy* cited *Nicholas* as the precedent for the continuing claims doctrine in the Federal Circuit, even though the Federal Circuit now largely uses *Hart*. *See Brophy v. Peake*, 313 F. App’x 303, 305 (Fed. Cir. 2008).

¹⁷¹ *See Nicholas v. United States*, 42 Fed. Cl. 373, 377–78 (1998).

¹⁷² *See discussion supra* Section III.B.

¹⁷³ *See, e.g., Jackson v. United States*, 55 Fed. Cl. 157, 159–60 (2003) (evaluating an SBP claim where there was no notification requirement).

The government's failure to notify a beneficiary is therefore an incorrect basis for measuring accrual, because it is only a preliminary step to the claim and not the basis of the suit. *Hart* based the SBP claim on the government's failure to notify, rather than its failure to pay, which meant that the SBP claims accrued only once when the government failed to notify.¹⁷⁴ The analysis in *Nicholas*, however, measures accrual based on the government's missed payments, allowing accrual every time there is a missed payment.¹⁷⁵ The correct "wrong" is when the government fails to pay a beneficiary, not when the government fails to notify a beneficiary.¹⁷⁶

Under the payment-requiring statute, SBP claims meet all of the requirements of the continuing claims doctrine.¹⁷⁷ Most importantly, there is a proper statutory basis for SBP claims to be continuing because the payment-requiring statute creates a recurring payment obligation that is similar to other pay claims in the Federal Circuit.¹⁷⁸ The Court of Federal Claims and the Federal Circuit have already recognized that the continuing claims doctrine can apply to pay claims, and survivor benefit plan claims are pay claims under this payment-requiring statute.¹⁷⁹ In both courts, if "payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought."¹⁸⁰ Just like the claim in *Wells* was continuing, SBP claims like those in *Hart* and *Nicholas* are continuing.¹⁸¹ The statute at play in *Wells* was 5 U.S.C. § 5514(a), which restricts the government from reducing a servicemember's retirement pay by more than 15%.¹⁸² In *Wells*, the court held that the continuing claims doctrine applied because each time the government withheld over 15% of the veteran's navy retirement pay was an "independent and distinct wrong[]." ¹⁸³ Like *Wells*, where the continuing claims doctrine applied to a veteran's claim for retirement pay because there was a repeated violation of a statute, the continuing claims

¹⁷⁴ See discussion *supra* Section III.A.

¹⁷⁵ See *Nicholas*, 42 Fed. Cl. at 378–79.

¹⁷⁶ See *id.* at 379.

¹⁷⁷ See *id.*

¹⁷⁸ See *Barber v. United States*, 676 F.2d 651, 654 (Ct. Cl. 1982).

¹⁷⁹ See *id.* at 654, 660.

¹⁸⁰ *Metzinger v. United States*, 173 Fed. Cl. 636, 647 (2024) (quoting *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)).

¹⁸¹ Compare *Wells v. United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005) (involving a repeated monthly violation of 5 U.S.C. § 5514(a)), with *Hart v. United States*, 910 F.2d 815, 817–18 (Fed. Cir. 1990) (involving a repeated monthly violation of 10 U.S.C. § 1450).

¹⁸² See *Wells*, 420 F.3d at 1347.

¹⁸³ *Id.*

doctrine applies to SBP claims because they are a repeated violation of the payment-requiring statute, 10 U.S.C. § 1450.¹⁸⁴

The notification-requiring statute should not have any part in the continuing claims analysis because a servicemember's election out of the SBP is void once the government fails to notify the beneficiary of the attempted election.¹⁸⁵ Based on the notification-requiring statute there is only one actionable wrong—not providing notice.¹⁸⁶ Cases which have determined that the continuing claims doctrine does not apply to survivor benefit plan claims were looking at the notification-requiring statute, which should not be used in continuing claims analysis because there is a payment-requiring statute which does establish a continuing claim.¹⁸⁷

The government's failure to notify is only a preliminary step to an SBP claim because a servicemember's election out of the SBP is void, not voidable, once the government fails to notify the beneficiary of the election.¹⁸⁸ Once the election is void, the servicemember is automatically re-enrolled in the SBP, and the government is required to pay the SBP beneficiary every month.¹⁸⁹ A notification-requiring statute is therefore necessary to establish that the SBP beneficiary has a right to payment, but only in situations where a servicemember's attempt to elect out of the SBP is unsuccessful due to the government never giving the beneficiary notice of the election.¹⁹⁰ The actual breach in SBP cases, however, is the missed payment, which is based in the payment-requiring, rather than notification-requiring, statute.¹⁹¹ Therefore, the fact that the plaintiffs in *Hart* and *Nicholas* were entitled to payments because the government failed to notify does not interfere with the payment breach analysis because of the automatic nature of the avoidance. This notification violation can more accurately be framed as a preliminary step that applies to some, but not all, SBP claims.

Violation of the notification-requiring statute is not a requirement for an SBP claim and therefore cannot be the basis of the claim.¹⁹² In *Davis*, a board determination instigated the pay claim and was considered a single

¹⁸⁴ See *id.* at 1345; *Nicholas*, 42 Fed. Cl. at 379.

¹⁸⁵ See *Pride v. United States*, 40 Fed. Cl. 730, 733 (1998) (quoting *Hart*, 910 F.2d at 817–18).

¹⁸⁶ See *Hart*, 910 F.2d at 817–18; *Nicholas*, 42 Fed. Cl. at 377–78.

¹⁸⁷ See *Nicholas*, 42 Fed. Cl. at 377–78 (outlining an SBP claim analysis under 10 U.S.C. § 1450(a)(1), the payment-requiring statute).

¹⁸⁸ See *Pride*, 40 Fed. Cl. at 733 (quoting *Hart*, 910 F.2d at 817–18).

¹⁸⁹ See *Barber v. United States*, 676 F.2d 651, 657 (Ct. Cl. 1982).

¹⁹⁰ See *supra* note 102 and accompanying text.

¹⁹¹ See *Nicholas*, 42 Fed. Cl. at 377–78.

¹⁹² See *id.* at 378.

wrong, making the continuing claims doctrine inapplicable.¹⁹³ Unlike the board determination in *Davis*, which was necessary to instigate the pay claim of retirement pay,¹⁹⁴ the government's violation of a notification requirement is not necessary for an SBP claim.¹⁹⁵ Also, unlike board determinations like those in *Davis* which give claimants notice of a determination, violation of the notification-requiring statute does the opposite, because it means that the potential plaintiff, i.e. the SBP beneficiary, will not have notice of their rights.¹⁹⁶ For example in *Nicholas*, it took the plaintiff several years to determine why she was not receiving SBP payments, and to finally learn that her former spouse elected out of the SBP.¹⁹⁷ In these situations, the government has made it more difficult for a potential plaintiff to identify and understand their right to bring suit by not only not paying, but also not notifying.¹⁹⁸

B. The Continuing Claims Doctrine Can Be Used

Some sources say that the continuing claims doctrine should not apply at all, claiming that in most cases the amount that will be owed is foreseeable, and therefore the claim should accrue all at once the first time there is a breach.¹⁹⁹ The Supreme Court rebuts this argument in *Bay Area Laundry*, where the Court discusses that there has been no actual breach or harm to the plaintiff until the payment has been missed.²⁰⁰ This contention is also rebutted by the Federal Circuit. The Federal Circuit upheld the continuing claims doctrine in *Wells*, even though the amount the government owed was predictable, because there was still a repeated violation of a statute.²⁰¹

One argument against applying the continuing claims doctrine to SBP claims is that the continuing claims doctrine leaves the government open to suit indefinitely.²⁰² This is one of the main contentions with the continuing claims doctrine, and the main reason cited in *Hart*.²⁰³ However, the Federal

¹⁹³ See *Davis v. United States*, 550 F. App'x 864, 865–66 (Fed. Cir. 2013) (per curiam).

¹⁹⁴ See *id.* at 866.

¹⁹⁵ See *Jackson v. United States*, 55 Fed. Cl. 157, 159–60 (2003) (evaluating an SBP claim where there was no notification requirement).

¹⁹⁶ See *Davis*, 550 F. App'x at 865–66.

¹⁹⁷ See *Nicholas*, 42 Fed. Cl. at 375.

¹⁹⁸ See *id.*

¹⁹⁹ See *Wells v. United States*, 420 F.3d 1343, 1349 (Fed. Cir. 2005) (Lourie, J., dissenting).

²⁰⁰ See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 195–202 (1997).

²⁰¹ See *Wells*, 420 F.3d at 1344–46 (deducting \$500 on a monthly basis from a service-member's income payments, when only roughly \$263 was permissible under statute).

²⁰² See *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990).

²⁰³ See *id.*

Circuit already allows the continuing claims doctrine to apply to pay claims.²⁰⁴ It would be unjust to allow SBP claims to be dismissed based on statute of limitations reasoning, when the Federal Circuit allows other pay claims, which have similar violations, to proceed.²⁰⁵ It is even more important that SBP claims can be brought because some of these claims arise due to the government not informing SBP beneficiaries of their rights.²⁰⁶

The recent Supreme Court Case *Corner Post* emphasized that a statute of limitations, which is distinct from a statute of repose, does not protect a defendant's right against staying open to suit.²⁰⁷ The statute at issue in *Corner Post* was 28 U.S.C. § 2401(a),²⁰⁸ which has almost identical language to § 2501, the statute of limitations for the Federal Circuit.²⁰⁹ The Court in *Corner Post* decided that the statute at issue was a statute of limitations rather than a statute of repose.²¹⁰ This meant that the purpose of the statute was to give a certain amount of time for the plaintiff to bring suit based on their injury; the purpose of the statute was not to protect the defendant.²¹¹ The Federal Circuit's statute of limitations is not a statute of repose, because it has almost identical language to § 2401(a) and is similarly plaintiff-centric.²¹² The court in *Hart* claimed that because § 2501 is a statute of repose it is intended "to limit the obligation to defend against" suits.²¹³ Because the Federal Circuit has a statute of limitations rather than a statute of repose, the court's arguments in *Hart* fall flat, and the Federal Circuit's statute of limitations does not protect the government from being kept open to suit.

Applying the continuing claims doctrine to SBP payments would not increase the amount of damages that the government could be held accountable for because the continuing claims doctrine can only apply to the lookback period that applies through the statute of limitations.²¹⁴ Based on this look-

²⁰⁴ See discussion *supra* Section II.A.

²⁰⁵ See discussion *supra* Section II.A.

²⁰⁶ See, e.g., *Hart*, 910 F.2d at 818; *Nicholas v. United States*, 42 Fed. Cl. 373, 379–80 (1998).

²⁰⁷ See *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2452 (2024).

²⁰⁸ See *id.* at 2450.

²⁰⁹ Compare 28 U.S.C. § 2401(a) (claims "shall be barred unless the complaint is filed within six years after the right of action first accrues"), with 28 U.S.C. § 2501 (claims "shall be barred unless the petition thereon is filed within six years after such claim first accrues").

²¹⁰ See *Corner Post*, 144 S. Ct. at 2452.

²¹¹ See *id.*

²¹² See *supra* note 210 and accompanying text.

²¹³ *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990).

²¹⁴ See MATTHEW H. SOLOMONSON, COURT OF FEDERAL CLAIMS: JURISDICTION, PRACTICE, AND PROCEDURE 22-11 (2016).

back period, the government could only be liable for the previous six years.²¹⁵ When *Nicholas* applied the continuing claims doctrine to SBP claims, the court clearly dismissed the beneficiary's claims for payments that were due and missed over six years prior.²¹⁶

C. The Federal Circuit Must Rule That SBP Claims are Continuing

The Federal Circuit must rule that SBP claims are continuing. To do this, first the court should clarify the test for the continuing claims doctrine by adding a rule that if there is a statute or regulation under which the continuing claims doctrine can apply, then the court must use that statute for the continuing claims analysis. Second, the court must overrule *Hart* and determine, based on this new test, that SBP claims are continuing.

The first change that the Federal Circuit must make is the test for the continuing claims doctrine. The Federal Circuit should use *Nicholas* as a template for creating a broader rule that can be applied to other claims. This would not override the current continuing claims test for the Federal Circuit found in *Brown Park Estates*.²¹⁷ Rather, this would clarify the existing test so that the mistake in *Hart* is not repeated. *Brown Park Estates* states that a claim can be continuing if there is a repeated wrong based in statute, regulation, or a breach of contract.²¹⁸ The confusion in *Hart* lied in the court's decision of which statute to base their continuing claims analysis on.²¹⁹ While there is a statute that qualifies SBP claims for application of the continuing claims doctrine, i.e. the payment-requiring statute, the court in *Hart* used the notification-requiring statute, which did not qualify the claim as continuing.²²⁰ Unlike *Hart*, *Nicholas* was decided correctly because that court looked at the government's violation of the payment-requiring statute.²²¹ To ensure future courts do not make the mistake in *Hart* when determining if other claims and statutes are continuing, the Federal Circuit must create a clarifying rule. This rule should state that if a statute or regulation exists that could qualify a claim for the continuing claims doctrine, then that statute must be used. Additionally, the court should not use a separate statute that may contribute to the commission of repeated wrongs for the continuing claims analysis.

²¹⁵ See *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997).

²¹⁶ See *Nicholas v. United States*, 42 Fed. Cl. 373, 380–81 (1998).

²¹⁷ See *Brown Park Ests.*, 127 F.3d at 1456–57.

²¹⁸ See *id.* at 1457.

²¹⁹ See *Hart v. United States*, 910 F.2d 815, 817–18 (Fed. Cir. 1990).

²²⁰ See *id.*

²²¹ See *Nicholas*, 42 Fed. Cl. at 377–78.

This broader rule is derived from the analysis in *Nicholas*, where the court determined that the payment-requiring statute created a claim that could be continuing, and the court used the payment-requiring statute for the continuing claims analysis.²²² Because the payment requiring statute is the correct basis for the claim, the notification-requiring statute should not be used.

Second, the Federal Circuit must overrule *Hart* and determine that SBP claims are continuing because they are a violation of a payment-requiring statute. This would bring the Federal Circuit into compliance with its own rule that the continuing claims doctrine applies to continuous wrongs, so long as those wrongs are founded in a statute, regulation, or breach of contract.²²³ The clarification that SBP claims are continuing will correct the current approach in the Federal Circuit, and align the court with the Supreme Court Case *Bay Area Laundry*. This correction will also resolve the current confusion that does exist in courts as to whether the *Nicholas* or *Hart* line of reasoning should be followed.²²⁴ Then, future adjudications in these courts will need to come into compliance with the *Nicholas* line of reasoning.

This correction must also include clarification of the reasoning in *Brown Park Estates* because *Brown Park Estates* is currently used as a foundational case for the continuing claims doctrine,²²⁵ but relies on *Hart* as an example of the continuing claims doctrine's inapplicability.²²⁶ *Bay Area Laundry* does not abrogate the entire test for continuing claims found in *Brown Park Estates* but it does abrogate that part that relies on *Hart*.²²⁷ *Brown Park Estates* properly stated that, to be continuing, claims must contain "a series of independent and distinct events or wrongs" which are based on the violation of a statute, regulation, or breach of contract.²²⁸ However, *Brown Park Estates* uses *Hart* as an example where the continuing claims doctrine does not apply, without going into analysis on the reasoning.²²⁹ Under *Bay Area Laundry*, SBP claims are continuing.²³⁰ Without clarification from the Federal Circuit that a claim must be based on the statute that would allow for continuing claims, if one is available, this reference to *Hart* in *Brown Park Estates* could lead to more confusion. So, *Brown Park Estate's* reliance on *Hart* must also be undone.

²²² See *id.*

²²³ See *supra* notes 74–75 and accompanying text.

²²⁴ See discussion *supra* Section III.C.

²²⁵ See, e.g., *Wells v. United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005); *Chemehuevi Indian Tribe v. United States*, 104 F.4th 1314, 1325 (Fed. Cir. 2024).

²²⁶ See *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456–57 (Fed. Cir. 1997).

²²⁷ See *Nicholas*, 42 Fed. Cl. at 377.

²²⁸ *Brown Park Ests.*, 127 F.3d at 1456.

²²⁹ See *id.* at 1456–57.

²³⁰ See discussion *supra* Section III.B.

Conclusion

The continuing claims doctrine applies to claims that have repeated “wrongs,” so that every breach of duty has its own time of accrual for statute of limitations purposes. This doctrine currently does not apply SBP claims because the court in *Hart* used the incorrect statute when conducting their analysis. SBP claims are continuing based on the government’s failure to pay, and the related SBP payment-requiring statute. The United States Court of Appeals for the Federal Circuit should clarify the rule for continuing claims and explicitly overrule *Hart*. This is important to recognize for continuity, fairness, and because SBP claims have shaped the law around the continuing claims doctrine in the Federal Circuit.

The Case for Upholding *Wheatland Tube Co. v. United States*: Revisiting the Federal Circuit’s *Chevron* Deference in Antidumping Law After *Loper Bright*

Bryce Phillips*

Introduction

*Wheatland Tube Co. v. United States*¹ is a worthy case to revisit given the state of international trade law. In that case, the issue was whether duties imposed under § 201 of the Trade Act of 1974 are considered “United States import duties” under 19 U.S.C. § 1677a(c)(2)(A) and therefore should be deducted from an antidumping respondent’s export price.² The U.S. Department of Commerce (“Commerce”) determined that § 201 duties were not the typical, “ordinary” customs duties that are mentioned in the legislative history and declined to deduct them from a Thai steelmaker’s export price.³ The U.S. Court of International Trade (“CIT”) reversed Commerce’s decision, holding that its interpretation was an unreasonable interpretation of the statute’s text and purpose.⁴ The United States Court of Appeals for the Federal Circuit (“Federal Circuit”) reversed the CIT’s decision, holding that Commerce’s interpretation was entitled to the level of deference set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*⁵ because the statute was ambiguous on this issue and because Commerce’s interpretation was “reasonable.”⁶

Wheatland’s holding was largely irrelevant until 2018, when the Trump Administration imposed the first § 201 safeguard tariffs in sixteen years—along

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¹ 495 F.3d 1355 (Fed. Cir. 2007).

² *See id.* at 1357.

³ *See id.* at 1361.

⁴ *Id.* at 1359.

⁵ 467 U.S. 837, 842 (1984).

⁶ *Wheatland*, 495 F.3d at 1361.

with §§ 232 and 301 tariffs.⁷ The revival of these tariffs led to new cases about their deductibility under antidumping laws, which implicated *Wheatland*.⁸ Now that courts may no longer afford *Chevron* deference to agency determinations of statutory interpretation (except under severely constrained circumstances), the status of *Wheatland*'s holding is unclear.

Adding to the lack of certainty is the possibility that the new Trump Administration may initiate more § 201 investigations soon.⁹ President Trump favors a protectionist trade policy based on broad, steep tariffs imposed on many of the United States' closest trading partners.¹⁰ He has relied heavily on the International Emergency Economic Powers Act ("IEEPA") to impose these tariffs in his second term.¹¹ The Federal Circuit declared his use of the IEEPA unlawful and on February 20, 2026, The United States Supreme Court ("Supreme Court") upheld its decision.¹² Now that the IEEPA tariffs are struck down, President Trump will most likely utilize other tariff laws, including § 201, to implement his trade policy.¹³ Commerce has already begun investigations for § 301 unilateral tariffs and § 232 national security tariffs, which are closely related to § 201 tariffs.¹⁴ If this Trump Administration imposes new § 201 tariffs (as is likely), overturning *Wheatland* may lead to the negative economic consequences discussed below in Part III. Therefore, given the current uncertainty, it is important to uphold *Wheatland*.

The CIT began its analysis in *Wheatland* by considering the definition of "duty" in the Trade Act of 1974, which was enacted after § 1677a(c)(2)(A), but

⁷ See CONG. RSCH. SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS (SECTIONS 201, 232, AND 301): FREQUENTLY ASKED QUESTIONS 3, 9 (2019).

⁸ See *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 63 F.4th 25, 33 (Fed. Cir. 2023); *Neimenggu Fufeng Biotechs. Co. v. United States*, 741 F. Supp. 3d 1354, 1380–81 (Ct. Int'l Trade 2024).

⁹ See Chase D. Kaniecki et al., *Trump Tariffs: What's Happened, What's Potentially Coming, and How to Prepare*, CLEARY GOTTlieb (Jan. 30, 2025), [<https://perma.cc/B94B-C4MD>].

¹⁰ See Lazaro Gamio, Keith Collins, & Ana Swanson, *Almost Half of U.S. Imports Now Have Steep Tariffs*, N.Y. TIMES (Nov. 5, 2025), [<https://perma.cc/3CLP-UYNJ>].

¹¹ See *Learning Res., Inc. v. Trump*, 2026 WL 477534, at *5 (Feb. 20, 2026), *aff'g*, *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025).

¹² See *id.* at *6, 13–14.

¹³ See *id.* at *78 (Kavanaugh, J., dissenting); *America First Trade Policy*, 90 Fed. Reg. 8471, § 2(c) (Jan. 30, 2025) (directing Commerce to identify "unfair trade practices" and recommend "appropriate actions," including under § 201, to remedy such practices).

¹⁴ See *Section 232 Investigations: The Effect of Imports on National Security*, BUREAU OF INDUS. & SEC., [[HTTPS://PERMA.CC/3ED7-ML2S](https://perma.cc/3ED7-ML2S)] (last visited Nov. 9, 2025); *Section 301 Investigations*, U.S. TRADE REPRESENTATIVE, [<https://perma.cc/6R3T-FLUG>] (last visited Nov. 9, 2025); CONG. RSCH. SERV., *supra* note 7, at 2, 35–36.

is relevant because it authorized the safeguard duties in question.¹⁵ Although the CIT's interpretation was stronger from a textualist perspective, this Note argues that the Federal Circuit's holding in *Wheatland* will likely stand under *Loper Bright Enterprises v. Raimondo*¹⁶ because Commerce has an implied delegation to interpret the antidumping statutes and because the Federal Circuit would likely be persuaded by Commerce's reasoning under *Skidmore v. Swift & Co.*¹⁷ Therefore, a court reviewing Commerce's treatment of current or future § 201 duties should concur with its interpretation.¹⁸

This Note previews how the Federal Circuit may review Commerce's interpretations of antidumping laws under *Loper Bright* by analyzing the Federal Circuit's holding in *Wheatland* and applying it to current § 201 duties on solar cells and modules that were imposed in 2018.¹⁹ Part I of this Note summarizes *Wheatland's* procedural posture, the Federal Circuit's holding, and relevant post-*Wheatland* precedent that will determine how a court would revisit it today. Part II of this Note analyzes the strength of the CIT's textualist approach in *Wheatland* and a recent case decided after *Loper Bright* and contrasts them with other canons of interpretation that would require the Federal Circuit to continue to afford Commerce substantial deference. Part II also discusses the stare decisis principle that compels adherence to *Wheatland*. Finally, Part III recommends an economic policy rationale for affirming *Wheatland*.

¹⁵ See *Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1281 (Ct. Int'l Trade 2006), *rev'd*, 495 F.3d 1355 (Fed. Cir. 2007).

¹⁶ 144 S. Ct. 2244 (2024).

¹⁷ 323 U.S. 134, 140 (1944). The Court in *Loper Bright* did not overturn *Skidmore*, but courts are not mandated to apply it in agency interpretation cases. See *Loper Bright*, 144 S. Ct. at 2267.

¹⁸ Commerce continues to categorically exclude Section 201 duties under the statute. See Memorandum to Christopher Abbott, Deputy Assistant Secretary for Policy and Negotiations, from Elizabeth Eastwood, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, 8–9 (Apr. 18, 2025) (on file with the Federal Circuit Bar Journal) (reversing an inadvertent deduction of § 201 duties in a respondent's export price) (access.trade.gov Case No. A-557-830, Barcode No. 4750525-02). However, it is possible that Commerce may abandon this practice if it concludes that higher antidumping duties would be consistent with the current administration's policy goals. See *America First Trade Policy*, *supra* note 13, at § 2(h) (directing Commerce to review and recommend modifications to its regulations concerning the administration of antidumping and countervailing duties).

¹⁹ See *Section 201 – Imported Solar Cells and Modules*, U.S. TRADE REPRESENTATIVE, [https://perma.cc/4ZUX-ZCEV] (last visited Apr. 3, 2025).

I. Background

A. Antidumping Duties

Dumping is an unfair international trade practice that occurs when foreign goods are imported into the United States at “less than fair value” and those imports cause, or threaten to cause, material injury to the domestic industry that sells a like product.²⁰ An imported good is sold at less than fair value when a foreign manufacturer sells it for a higher price in its home market (the “normal value”) than what it charges in the United States (the “export price”).²¹ Material injury involves a substantial reduction in economic output; such as industry-wide declines in output, prices, cash flows, and the development of competing products.²² Antidumping duties are extra tariffs that are levied on dumped goods to offset their injuriously-low prices.²³

The two main elements of dumping—sales at less than fair value and material injury to the domestic industry—are determined via parallel investigations by separate agencies.²⁴ Commerce determines whether an imported good is being sold at less than fair value by calculating a foreign manufacturer’s “dumping margin,” which is the percentage difference between the normal value and the export price.²⁵ The dumping margin helps calculate the amount of antidumping duties an importer must pay on that good.²⁶ The U.S. International Trade Commission (“ITC”) determines whether the domestic industry is being materially injured by the goods in question.²⁷

An antidumping investigation is usually initiated with the filing of a petition by one or more producers, trade association, or labor unions in the relevant domestic industry.²⁸ Within 140 days of initiation, Commerce must preliminarily determine if there is a “reasonable basis to believe or suspect” that the product is being sold at less than fair value based on the information it received from the mandatory and voluntary respondents and the information in the petition.²⁹ An affirmative determination means that the weighted

²⁰ 19 U.S.C. §§ 1673(1)–(2); see 1 MATTHEW T. McGRATH, U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 20.01, LexisNexis (2d ed. 2022).

²¹ See 19 U.S.C. §§ 1677a–1677b; McGRATH, *supra* note 20, at § 20.01.

²² See McGRATH, *supra* note 20, at § 20.06(c) (quoting 19 U.S.C. § 1677(7)).

²³ See *id.* § 20.01.

²⁴ See *id.*

²⁵ See *id.* §§ 20.01, 20.04(4); 19 U.S.C. § 1673.

²⁶ See McGRATH, *supra* note 20, at § 20.07(1).

²⁷ See *id.* § 20.06. Since this Note primarily concerns Commerce’s policies under the antidumping statutes, the ITC’s responsibilities will not be discussed in much detail.

²⁸ See *id.* § 20.08(1) (citing 19 C.F.R. § 351.202); 19 U.S.C. § 1673a(b).

²⁹ McGRATH, *supra* note 20, at § 20.04(2); see 19 U.S.C. § 1673b(b)(1)(A).

average dumping margin for all producers is above de minimis (two percent).³⁰ Even if Commerce makes a negative preliminary determination, it still moves on to the final determination.³¹

Before the final determination, Commerce will hear arguments from petitioners and respondents on its methodology in the preliminary determination.³² Based on the arguments and information available, Commerce will make its final determination within 75 days of the preliminary determination.³³ Antidumping duties will only be imposed if the ITC's final determination is also affirmative.³⁴

Interested parties have an opportunity to request an administrative review of an antidumping order every 12 months after it is published.³⁵ During an administrative review, Commerce assesses imports of the subject merchandise for the preceding year and decides whether to adjust the antidumping duty rate, leave the rate unchanged, or revoke the antidumping duty order.³⁶

Antidumping duties are remedial in nature because they offset unfair trade practices.³⁷ However, they are not the only remedial trade measure available.

B. § 201 Safeguards

Section 201 of the Trade Act of 1974 allows the President to impose a wide range of remedies when a surge in imports are “a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”³⁸ Section 201 remedies decline regularly until they expire after four years.³⁹ However, upon additional determinations by the ITC, the President may extend § 201 remedies up to eight years if justified.⁴⁰

³⁰ See McGRATH, *supra* note 20, at § 20.04(1); 19 U.S.C. § 1673b(b)(3).

³¹ See McGRATH, *supra* note 20, at § 20.04(3); 19 C.F.R. § 351.205(a).

³² See McGRATH, *supra* note 20, at § 20.04(1).

³³ See *id.* § 20.04(3); 19 U.S.C. § 1673d(a)(1).

³⁴ See McGRATH, *supra* note 20, at § 20.06(1); 19 U.S.C. § 1673d(c)(2).

³⁵ See McGRATH, *supra* note 20, at § 20.07(5); 19 U.S.C. § 1675; 19 C.F.R. § 351.213.

³⁶ See McGRATH, *supra* note 20, at § 20.07(5); 19 U.S.C. § 1675(a)(2)(A).

³⁷ See *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1365 (Fed. Cir. 2007).

³⁸ 19 U.S.C. § 2251(a); see Joshua E. Kurland, *Dusting Off Section 201: Re-examining a Previously Dormant Trade Remedy*, 49 GEO. J. INT'L L. 609, 612 (2018) (citing 19 U.S.C. §§ 2251–2254). Section 201 remedies apply to imported goods from all countries, except those with whom the United States has a free trade agreement. See *id.* at 620.

³⁹ See Kurland, *supra* note 38, at 618 (first citing 19 U.S.C. §§ 2253(e)(1)(A)–(B); and then citing § 2253(e)(5)).

⁴⁰ See *id.* at 622 (citing 19 U.S.C. §§ 2253(e)(1)(A)–(B)).

The § 201 safeguards on imported solar cells and modules recently expired after being in place for eight years.⁴¹ In 2018, after an affirmative determination by the ITC, President Trump issued Proclamation No. 9693, which imposed a tariff increase on imported solar cells and modules.⁴² In 2022, President Biden extended these § 201 duties another four years, with the tariffs due to expire in 2026.⁴³

The last President to impose § 201 safeguards before President Trump was President George W. Bush, who applied safeguard tariffs on certain imported steel products in 2002.⁴⁴ The tariffs were meant to last for four years, but after threats of retaliation from trading partners such as the European Union, and a World Trade Organization (“WTO”) decision declaring them unlawful, President Bush rescinded them in 2003.⁴⁵ These § 201 tariffs were at issue in the antidumping administrative review in *Wheatland*.⁴⁶

C. The 2002–2003 Welded Carbon Steel Pipes and Tubes Administrative Review

On March 5, 2002, President Bush issued Proclamation No. 7529, which used § 201 to impose an increase in duties on certain imported steel products entered from March 20, 2002, to March 21, 2006.⁴⁷ Specifically, the Presidential Proclamation modified Chapter 99 of the Harmonized Tariff

⁴¹ See Proclamation No. 10339, 87 Fed. Reg. 7357, 7361 (Feb. 4, 2022) (extending § 201 duties until February 6, 2026).

⁴² See Proclamation No. 9693, 83 Fed. Reg. 3541, 3542 (Jan. 25, 2018).

⁴³ See Proclamation No. 10339, 87 Fed. Reg. at 7,357.

⁴⁴ See Heather Long, *Remember Bush’s 2002 Steel Tariffs? His Chief of Staff Warns Trump not to do the Same*, WASH. POST (Mar. 6, 2018), [<https://perma.cc/7KD7-QT69>].

⁴⁵ *Id.*; see Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 513(a), WTO Doc. WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R (adopted Dec. 10, 2003) (affirming the dispute settlement panel’s conclusion that the United States failed to demonstrate that “unforeseen developments” had caused injury due to increased imports of certain steel products, as required by Article 3.1 of the WTO Agreement on Safeguards and Article XIX:1(a) of the General Agreement on Tariffs and Trade 1994). President Trump’s solar panel safeguards were also challenged at the WTO, but the dispute settlement panel upheld them because there was sufficient evidence that “unforeseen developments” had led to an injury due to increased imports. See Panel Report, *United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, ¶¶ 7.35–7.45, WTO Doc. WT/DS562/R (circulated Sep. 2, 2021).

⁴⁶ Proclamation No. 7529, 67 Fed. Reg. 10533, 10555 (Mar. 7, 2002); see *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1357 (Fed. Cir. 2007).

⁴⁷ Proclamation No. 7529, 67 Fed. Reg. at 10555–57; see *Wheatland*, 495 F.3d at 1357.

Schedule of the United States to add an additional 15% ad valorem duty on all covered products during the relevant period.⁴⁸

In 2003, Commerce initiated an antidumping duty administrative review for circular welded carbon steel pipes and tubes (“pipe”) from Thailand.⁴⁹ Wheatland Tube was the domestic petitioner.⁵⁰ The review covered one Thai manufacturer: Saha Thai.⁵¹ The period of review was from March 1, 2002, to February 28, 2003, which overlapped with the time period for the § 201 duties imposed by Proclamation 7529.⁵² Therefore, nearly every Saha Thai pipe entered into the United States during the period of review fell squarely within Proclamation 7529’s reach and was subject to the 15% duty.⁵³ Pursuant to its sales contracts, which were “duty-inclusive,” Saha Thai invoiced its customers for the § 201 duties it paid upon importation.⁵⁴

This administrative review presented Commerce with an issue of first impression: whether it should deduct the § 201 duties from the export prices Saha Thai charged to customers in the United States.⁵⁵ Antidumping law necessarily involves an ex-factory comparison between the prices a producer charges for goods in its home market and those exported to the United States.⁵⁶ To make such a comparison, 19 U.S.C. § 1677a(c)(2)(A) requires Commerce to deduct “additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.”⁵⁷ However, it was unclear to Commerce whether § 201 duties qualified as “United States import duties” because the term lacked a statutory definition.⁵⁸ Therefore, before issuing its preliminary

⁴⁸ See Proclamation No. 7529, 67 Fed. Reg. at 10556; *Wheatland*, 495 F.3d at 1357. “Ad valorem” means that the tariff is “a percentage of the value of the imported goods.” *Norsk Hydro Canada v. United States*, 472 F.3d 1347, 1349 (Fed. Cir. 2006).

⁴⁹ See *Wheatland*, 495 F.3d at 1357.

⁵⁰ See *id.* at 1358.

⁵¹ See *id.*

⁵² See *id.* at 1357.

⁵³ See *id.* at 1357–58.

⁵⁴ See *Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1276 (Ct. Int’l Trade 2006), *rev’d*, 495 F.3d 1355 (Fed. Cir. 2007).

⁵⁵ See *Wheatland*, 495 F.3d at 1358.

⁵⁶ See McGRATH, *supra* note 20, at § 20.02(1). “Ex-factory” refers to the point where a good has been purchased and is leaving the exporter’s factory but has not accrued any charges incidental to shipping it to the United States. See *id.* This is the point where its status is most like an identical good destined for the home market and is thus an accurate basis for price comparison. See *id.* § 20.03.

⁵⁷ 19 U.S.C. § 1677a(c)(2)(A) (emphasis added); see *Wheatland*, 414 F. Supp. 2d at 1276.

⁵⁸ See *Wheatland*, 495 F.3d at 1358–60.

results, Commerce initiated a notice-and-comment period to receive feedback on whether § 201 duties should be deductible.⁵⁹

In its preliminary results, Commerce deferred any adjustments to Saha Thai's export price because it had not yet come to a decision following the notice-and-comment period.⁶⁰ Saha Thai's weighted average dumping margin was preliminarily determined to be two percent.⁶¹

In its final results, Commerce determined that § 201 duties were not "normal" duties that qualified as "United States import duties" and declined to deduct them from Saha Thai's export price.⁶² Consequently, Commerce upwardly adjusted Saha Thai's export price to include the § 201 duties it billed to its U.S. customers.⁶³ As a result, Saha Thai's final weighted average dumping margin decreased from 2.00% to 0.17%.⁶⁴ Since the dumping margin was below the two percent de minimis threshold, Saha Thai was assessed a zero cash deposit rate for the period of review.⁶⁵

D. Commerce's Reasons for not Deducting § 201 Duties

Commerce explained its position in the Issues and Decision Memorandum that accompanied the final results, which incorporated its reasoning from *Stainless Steel Wire Rod from the Republic of Korea* ("SWR Korea").⁶⁶ Commerce's main conclusion was that § 201 duties are like antidumping and countervailing duties—and unlike the ordinary customs duties that qualify as "United States import duties"—because § 201 duties are similar in their purpose and application and because deducting § 201 duties would lead to an impermissible double remedy.⁶⁷

⁵⁹ See *id.* at 1358; Certain Welded Carbon Steel Pipes and Tubes from Thailand: Notice of Preliminary Results of Antidumping Duty Administrative Review, 69 Fed. Reg. 18539, 18541 (Dept. Com. Apr. 8, 2004) [hereinafter Preliminary Results].

⁶⁰ See *Wheatland*, 495 F.3d at 1358.

⁶¹ See Preliminary Results, 69 Fed. Reg. at 18542.

⁶² See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 69 Fed. Reg. 61649 (Dept. Com. Oct. 20, 2004) [hereinafter Final Results], and accompanying Issues and Decision Memorandum [hereinafter IDM], [<https://perma.cc/P3FT-48XC>]; *Wheatland*, 495 F.3d at 1358; see also *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19153, 19159 (Dept. Com. Apr. 12, 2004) [hereinafter SWR Korea] (describing Commerce's reasoning behind its interpretation of "United States import duties").

⁶³ See *Wheatland*, 495 F.3d at 1358.

⁶⁴ See *id.*; IDM, *supra* note 62, at 15.

⁶⁵ See *Wheatland*, 495 F.3d at 1358.

⁶⁶ See *id.*; IDM, *supra* note 62, at 3 (quoting SWR Korea, 69 Fed. Reg. at 19159–60).

⁶⁷ See *Wheatland*, 495 F.3d at 1361; SWR Korea, 69 Fed. Reg. at 19159.

1. The Legislative History Distinguished Between “Special” and “Ordinary” Import Duties

Commerce began its analysis by reviewing the text and legislative history of the Antidumping Act of 1921, 42 Stat. 9, and found that Congress did not intend for all duties to count as “United States import duties.”⁶⁸ It referred to the U.S. Senate Committee on Finance (“Senate Finance Committee”) Report that accompanied the Antidumping Act of 1921, which “contrasts antidumping duties (which it refers to as ‘special dumping duties’) with normal customs duties (which it refers to as ‘United States import duties’).”⁶⁹ Commerce also noted that § 211 and § 202(a) of the 1921 Act consistently used “special dumping duties” in contrast with “regular Customs duties” and “‘duty-free’ merchandise,” respectively.⁷⁰ Therefore, according to Commerce, Congress’s use of “special dumping duties” in other contexts meant that special remedial measures were not “United States import duties” to be deducted from a respondent’s export price.⁷¹

2. Similarities Between Antidumping and § 201 Duties

Having established the difference between special and ordinary duties, Commerce compared § 201 and antidumping duties and determined that they were similar enough such that § 201 duties also qualify as special duties.⁷² Commerce’s decision rested on three factors: (1) both duties remedy similar injuries to domestic industry; (2) both duties are temporary; and (3) the duties are meant to complement each other.⁷³

Section 201 duties act as a safeguard when increased imports are a “substantial cause of serious injury, or the threat thereof, to the domestic industry.”⁷⁴ Likewise, antidumping duties are meant to remedy injuries from when imported merchandise is sold at less than fair value.⁷⁵ Finally, both duties

⁶⁸ See *SWR Korea*, 69 Fed. Reg. at 19159; see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (“While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress.”).

⁶⁹ *SWR Korea*, 69 Fed. Reg. at 19159; see *Wheatland*, 495 F.3d at 1361.

⁷⁰ See *SWR Korea*, 69 Fed. Reg. at 19159; see also *Pulsifer v. United States*, 144 S. Ct. 718, 735 (2024) (“In a given statute, the same term usually has the same meaning and different terms usually have different meanings.”). Commerce also held that “‘duty-free’ was understood to mean ‘free from normal Customs duties.’” *SWR Korea*, 69 Fed. Reg. at 19159.

⁷¹ See *SWR Korea*, 69 Fed. Reg. at 19159; *Wheatland*, 495 F.3d at 1361.

⁷² See *SWR Korea*, 69 Fed. Reg. at 19159; *Wheatland*, 495 F.3d at 1362.

⁷³ See *SWR Korea*, 69 Fed. Reg. at 19159–60; *Wheatland*, 495 F.3d at 1362.

⁷⁴ 19 U.S.C. § 2251(a); see *SWR Korea*, 69 Fed. Reg. at 19159–60; *Wheatland*, 495 F.3d at 1362.

⁷⁵ See 19 U.S.C. § 1673; *Wheatland*, 495 F.3d at 1362.

require similar findings from the ITC: imports must cause either “serious” injury for the President to implement § 201 safeguards,⁷⁶ or “material” injury for Commerce to impose antidumping duties.⁷⁷ According to Commerce, this distinguished § 201 duties from ordinary duties, which are not imposed based on any finding of injury from imports.⁷⁸

Section 201 safeguards initially last four years, but the President can extend them for another four years if they are necessary to prevent further injury or if the domestic industry is making a positive adjustment because of the safeguards.⁷⁹ Similarly, antidumping duty orders last for five years unless Commerce and the ITC determine that lifting the antidumping order would allow continued or renewed dumping.⁸⁰ Conversely, “[n]ormal customs duties . . . have no termination provision and are permanent unless modified by Congress.”⁸¹

According to Commerce, Congress understood that the ITC and the President would need to strike a balance between § 201 and antidumping duties in situations where they provide overlapping remedies.⁸² Commerce found support for its position in the following excerpt from the Senate Finance Committee Report accompanying the Trade Act of 1974:

Furthermore, the Commission would be required, whenever . . . it has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of the Antidumping Act . . . or other remedial provisions of law, to notify promptly the appropriate agency so that such action may be taken as is otherwise authorized by such provisions of law. Action under one of those provisions when appropriate is to be preferred over action under this chapter.⁸³

Commerce held that this meant that antidumping and § 201 duties were somewhat interchangeable and thus required § 201 duties to be treated the same as antidumping duties under § 1677a(c)(2)(A).⁸⁴

To further demonstrate how the two duties are complementary, Commerce referred to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which suggested that the President may consider relief from antidumping duties when deciding the type and amount of § 201 safeguards to implement following an injury determination by the ITC.⁸⁵

⁷⁶ See 19 U.S.C. § 2251(a).

⁷⁷ See 19 U.S.C. § 1671(a)(2); *Wheatland*, 495 F.3d at 1362.

⁷⁸ See *SWR Korea*, 69 Fed. Reg. at 19160; *Wheatland*, 495 F.3d at 1362.

⁷⁹ See 19 U.S.C. §§ 2253(e)(1)(A)–(B); *Wheatland*, 495 F.3d at 1362.

⁸⁰ See 19 U.S.C. § 1675(c)(1); *Wheatland*, 495 F.3d at 1362.

⁸¹ *Wheatland*, 495 F.3d at 1362.

⁸² See *SWR Korea*, 69 Fed. Reg. at 19160.

⁸³ *Id.* (quoting S. REP. NO. 93-1298, at 122–23 (1974)).

⁸⁴ See *id.*

⁸⁵ See *id.* (quoting H.R. DOC. NO. 103-316, vol. 1, at 964 (1994)).

According to Commerce, this meant that the President can decide how much overlap there should be between § 201 duties and any correlating antidumping duties.⁸⁶ Because these duties are considered together, Commerce held that it followed that § 201 duties are a special type of duty.⁸⁷

Commerce rejected the idea that § 201 duties must be deducted so that the dumping margin would reflect what it would have been if § 201 duties were never imposed.⁸⁸ Even though § 201 duties may reduce dumping margins, as they did in this case, Commerce found that this was a “legitimate remedy for dumping” because § 201 duties complement antidumping duties.⁸⁹

Commerce’s final reason for not deducting § 201 duties rested on the idea that deducting § 201 duties would effectively “collect the 201 duties twice—first as 201 duties, and a second time as an increase in that dumping margin.”⁹⁰ Commerce also noted that deducting § 201 duties could create a dumping margin where one did not exist before.⁹¹

Given Congress’ silence on the issue, Commerce held that any balance between § 201 and antidumping duties must be made by the President through the implementing Proclamation and that Commerce could not upset this balance by “providing relief beyond what the President approved.”⁹² Commerce then noted that nothing in Proclamation No. 7529 indicated that the President wanted Commerce to increase dumping margins by deducting the duties it imposed from export prices.⁹³

Therefore, based on the text, legislative history, and purposes of the Trade Act of 1974 and the Antidumping Act of 1921, Commerce determined that § 201 duties are special duties and should not be deducted from a foreign producer’s export prices.⁹⁴

E. The CIT’s Decision That Commerce’s Interpretation was Unreasonable

Wheatland Tube challenged Commerce’s decision at the CIT.⁹⁵ The CIT began its analysis by holding that the *Chevron* doctrine applied in this case

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.*; *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362–63 (Fed. Cir. 2007).

⁹² *SWR Korea*, 69 Fed. Reg. at 19160; *see Wheatland*, 495 F.3d at 1365.

⁹³ *See SWR Korea*, 69 Fed. Reg. at 19160; *Wheatland*, 495 F.3d at 1365.

⁹⁴ *See SWR Korea*, 69 Fed. Reg. at 19161; *Wheatland*, 495 F.3d at 1363.

⁹⁵ *See Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1274–75 (Ct. Int’l Trade 2006), *rev’d*, 495 F.3d 1355 (Fed. Cir. 2007).

because it centered on whether Commerce's interpretation of the governing statutes was entitled to judicial deference.⁹⁶ The CIT summarized *Chevron's* two-step test as follows:

First, the Court must consider "whether Congress has directly spoken to the precise question at issue." If so, the matter is at an end. If the statute is silent or ambiguous concerning the issue before it, the Court must assess whether the agency's interpretation of the statute is reasonable.⁹⁷

The CIT quickly determined that § 1677a(c)(2)(A) was ambiguous because Congress did not define the term "United States import duties."⁹⁸ However, the CIT held that Commerce's interpretation was unreasonable because it went against the text and purposes of § 201 and the Antidumping Act and accordingly did not afford it *Chevron* deference.⁹⁹

The CIT first considered the meaning of the term "duties" in the context of the Trade Act of 1974 to discern Congress' intent.¹⁰⁰ It found that Commerce's interpretation was unsupported by the use of "duties" in Proclamation No. 7529, as defined by the Trade Act.¹⁰¹ Therefore, the CIT held, Congress likely intended for § 201 duties to count as import duties under § 1677a(c)(2)(A) by defining the term in the Trade Act.¹⁰²

The CIT then looked to the purpose and policy behind the two tariffs. First, it held that even if § 201 duties were different from other duties, they are not akin to antidumping duties because they serve a sufficiently distinct purpose.¹⁰³ Next, the CIT looked to precedent where it upheld Commerce's policy of not deducting antidumping duties from export price and determined that the reasoning in those cases did not apply to § 201 duties.¹⁰⁴ Finally, the CIT

⁹⁶ See *Wheatland*, 414 F. Supp. 2d at 1279; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984).

⁹⁷ See *Wheatland*, 414 F. Supp. 2d at 1279 (citations omitted) (quoting *Chevron*, 467 U.S. at 842).

⁹⁸ See *id.* at 1280–81.

⁹⁹ See *id.* at 1280–85.

¹⁰⁰ See *id.* at 1281; 19 U.S.C. §§ 2252(e)(1), (e)(2)(A).

¹⁰¹ See *Wheatland*, 414 F. Supp. 2d at 1281.

¹⁰² See *id.*

¹⁰³ See *id.* at 1282. Antidumping duties, according to the CIT, are meant to remedy situations where domestic producers are injured by price discrimination from foreign exporters. See *id.* (quoting *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997), *aff'd*, 215 F.3d 1342 (Fed. Cir. 1999)). Section 201 duties, meanwhile, are set by the President to temporarily counter a global surge in imports, not price discrimination. See *id.*

¹⁰⁴ See *id.* at 1283. For instance, deducting § 201 duties would not result in double counting because antidumping duties are a product of the dumping margin calculation while § 201 duties are unaffected by it. See *id.* at 1284 (citing *Hoogovens Staal BV v. United States*, 144 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998)).

held that Commerce's decision violated the principle of comparing domestic prices and export prices on an ex-factory basis.¹⁰⁵ Instead, the CIT held that they are incidental to transporting the merchandise to the United States.¹⁰⁶ Therefore, the CIT held that Commerce's interpretation was not entitled to *Chevron* deference because its interpretation was not in accordance with the text and purpose of the Trade Act of 1974 and antidumping laws in general.¹⁰⁷ The United States appealed the decision to the Federal Circuit.¹⁰⁸

F. The Federal Circuit's Application of the *Chevron* Doctrine

The Federal Circuit reversed the CIT's decision on the grounds that the court did not give Commerce proper deference under step two of *Chevron*.¹⁰⁹ The Federal Circuit quickly agreed that the statute was ambiguous at *Chevron* step one because the text and legislative histories of the Tariff Act and the Trade Act of 1974 were silent on this issue.¹¹⁰ The Federal Circuit then held that Commerce was entitled to the fullest extent of *Chevron* deference because it was acting pursuant to its statutorily delegated interpretive authority and because its interpretation was the result of notice-and-comment rulemaking.¹¹¹ Likewise, the Federal Circuit "g[ave] Commerce's interpretation of antidumping laws significant deference because of its special expertise in administering antidumping duty law."¹¹²

The Federal Circuit overruled the CIT at *Chevron* step two.¹¹³ It held that even if the CIT may prefer another interpretation, it was obligated to defer to Commerce when its interpretation is reasonable.¹¹⁴ The Federal Circuit then concluded that Commerce's interpretation was reasonable—and therefore should be entitled to *Chevron* deference—for the same reasons Commerce described in *SWR Korea*.¹¹⁵

¹⁰⁵ See *id.* at 1285 (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983)).

¹⁰⁶ See *id.* (quoting Saha Thai's administrative review questionnaire response, which described the Section 201 duties it paid as "additional expenses incurred for shipping merchandise to the United States").

¹⁰⁷ See *id.* at 1285–86.

¹⁰⁸ *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007).

¹⁰⁹ See *id.* at 1361.

¹¹⁰ See *id.* at 1359–60.

¹¹¹ See *id.* at 1360.

¹¹² *Id.* at 1361.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 1361–63.

The Federal Circuit then concluded that the CIT's reasoning for why it held Commerce's interpretation unreasonable was flawed.¹¹⁶ First, it found the CIT's distinction between § 201 duties and antidumping duties "without merit" because remedial duties naturally target different harms, but are overall targeted towards unfair trade practices.¹¹⁷ Next, it held that the CIT made an "erroneous and unsupported presumption . . . that the President had an intent regarding" Commerce's treatment of § 201 duties.¹¹⁸ Finally, the Federal Circuit held that the CIT's conclusion that antidumping margins would be negated by § 201 duties was "flawed" because there is significant overlap between safeguards and antidumping duties and because the President is responsible for deciding how the two duties should interact.¹¹⁹ The Federal Circuit ultimately held that the CIT's "reasoning [was] insufficient to overcome the deference" given to Commerce under *Chevron*.¹²⁰

The holding in *Wheatland* once again came into significance after the Trump Administration used § 301 of the Trade Act of 1974 and § 232 of the Trade Expansion Act of 1962 to impose additional tariffs on certain imported goods.¹²¹ Commerce was once again tasked with deciding whether to deduct these tariffs from a foreign respondent's export price.¹²² The next Section discusses one such case that distinguished *Wheatland* and anticipated the end of *Chevron* deference.

G. Borusan and the Importance of the Implementing Proclamation

In *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*,¹²³ the Federal Circuit recontextualized *Wheatland* by holding that Commerce's decision whether to deduct a Presidentially imposed duty is specific to the

¹¹⁶ See *id.* at 1363–66.

¹¹⁷ See *id.* at 1363–64.

¹¹⁸ *Id.* at 1364; cf. *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 63 F.4th 25, 36 (Fed. Cir. 2023) (discussing *Wheatland*'s holding that there was no express Presidential intent regarding the treatment of Section 201 duties while noting that the President may set the balance between Section 201 duties and antidumping duties in the language of the implementing proclamation).

¹¹⁹ See *Wheatland*, 495 F.3d at 1364–65.

¹²⁰ *Id.* at 1365–66.

¹²¹ See *Borusan*, 63 F.4th at 31–33; *Neimenggu Fufeng Biotechs. Co. v. United States*, 741 F. Supp. 3d 1354, 1380–81 (Ct. Int'l Trade 2024) (declining to create a categorical rule for § 301 tariffs but holding that § 301 tariffs should not be deducted from the respondent's export price under *Borusan*).

¹²² See *Borusan*, 63 F.4th at 31–33; *Neimenggu*, 741 F. Supp. 3d at 1380–81.

¹²³ 63 F.4th 25 (Fed. Cir. 2023).

language of the implementing proclamation.¹²⁴ In that case, the Federal Circuit upheld Commerce's decision to deduct § 232 duties from a respondent's export price because the implementing proclamation expressly stated that they were to be imposed "in addition to any other duties," including anti-dumping duties.¹²⁵ The Federal Circuit distinguished the Proclamation in *Wheatland*, which contained no such language.¹²⁶

The Federal Circuit ended its opinion noting that it did not apply a Chevron analysis, because of some uncertainty about the doctrine's future.¹²⁷ The court noted that it would be willing to revisit *Wheatland* if Commerce chose not to deduct § 201 duties in violation of a Presidential proclamation ordering it to do otherwise.¹²⁸ However, the court may also need to revisit *Wheatland's* use of deference following the Supreme Court's decision in *Loper Bright*.

H. *Loper Bright* and the End of *Chevron* Deference

In *Loper Bright* the Supreme Court overturned the *Chevron* doctrine and held that courts must use their own independent judgment to find the best meaning of a statute.¹²⁹ While the Supreme Court expressly held that past *Chevron* cases were not overruled by *Loper Bright*, courts no longer are required to afford the same kind of deference seen in cases like *Wheatland*.¹³⁰ In the short time since *Loper Bright*, many questions abound regarding the standing of pre-*Chevron* decisions and the weight courts should now give to agency interpretations.¹³¹

Despite the uncertainty, Professor Thomas W. Merrill has identified six key circumstances where *Loper Bright* is clear.¹³² First, ambiguity is no longer a factor that courts should consider when reviewing an agency's interpretation

¹²⁴ See *id.* at 31–33.

¹²⁵ *Id.* at 34 (quoting Proclamation No. 9705, 83 Fed. Reg. 11625, 11627 (Mar. 15, 2018)).

¹²⁶ See *id.* at 36.

¹²⁷ See *id.* at 36–37.

¹²⁸ See *id.* at 37.

¹²⁹ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2265–66 (2024).

¹³⁰ See *Loper Bright*, 144 S. Ct. at 2273 ("Mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.'") (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)); Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 263 (2024).

¹³¹ See Merrill, *supra* note 130, at 264–69 (discussing questions that *Loper Bright* leaves unclear).

¹³² See *id.* at 259–64.

of a statute.¹³³ Second, courts may continue to give weight to agency interpretations—via the traditional canons of statutory interpretation or *Skidmore* deference—and may find that Congress meant to delegate interpretive authority to the agency either implicitly or explicitly.¹³⁴ Third, “courts must independently determine the scope of an agency’s authority when it is challenged on judicial review.”¹³⁵ Fourth, courts must exercise their “independent judgment” when evaluating agency interpretations, but may consider the persuasiveness of the agency’s interpretation using the traditional tools of statutory interpretation and *Skidmore*.¹³⁶ Fifth, courts must adopt what they believe is the best interpretation of the statute, but may concur with an agency’s interpretation if they think it is the best one or if the statute delegates interpretive authority to the agency.¹³⁷ Finally, courts should always carefully analyze the entire statute as issue and cannot abandon their interpretive authority by broadly declaring the statute is “ambiguous” based on a few words taken out of context.¹³⁸

Overall, these six propositions show that *Loper Bright* gives courts much more leeway to come to their own conclusions on how to best read a statute than under *Chevron*.¹³⁹ However, it is important to reiterate that this change in doctrine does not remove agencies from the equation, as courts may still look to their interpretations for guidance when appropriate.¹⁴⁰

II. Analysis

While the CIT’s interpretation was more closely aligned with recent Supreme Court statutory construction methods, the Federal Circuit is unlikely to overturn *Wheatland* because it has acknowledged that Commerce has both an implicit and explicit delegation of interpretive authority from Congress

¹³³ See *id.* at 259–60 (“[T]here is only one step, as it were: Courts will review agency interpretations of statutes using the traditional tools of statutory interpretation.”).

¹³⁴ See *id.* at 260–61. In *Skidmore v. Swift & Co.*, the Supreme Court outlined several factors that may give weight to an agency’s interpretation: “[T]he thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. 134, 140 (1944). In *Loper Bright*, the Supreme Court appeared to reposition *Skidmore* as an important tool for courts to use when reviewing agency interpretations. See Merrill, *supra* note 130, at 260–61; *Loper Bright*, 144 S. Ct. at 2259.

¹³⁵ Merrill, *supra* note 130, at 261.

¹³⁶ See *id.* at 262–63.

¹³⁷ See *id.* at 263–64.

¹³⁸ See *id.* at 264.

¹³⁹ See *id.* at 271.

¹⁴⁰ See *id.*; *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024).

and it is likely to find Commerce's reasoning persuasive under the *Skidmore* factors. Therefore, the Federal Circuit should affirm Commerce's treatment of the § 201 duties imposed by Proclamation No. 9693, and future § 201 duties, despite its holding in *Borusan* and the Supreme Court's ruling in *Loper Bright*.

A. The CIT's Interpretation was More Closely Aligned with the Statute's Text Because It Read the Plain Text of the Proclamation and Statutes in Pari Materia

The Supreme Court in *Loper Bright* recommended that courts use the traditional means of statutory construction when reviewing an agency's interpretation of a statute.¹⁴¹ Although there are a plethora of statutory construction methods, the Supreme Court generally considers the plain meaning of the text to be the best starting point.¹⁴² Discerning the plain meaning of a term usually involves reading the term as it was understood when the statute was written.¹⁴³ It also involves reading a term in its surrounding statutory context and in *pari materia* with other statutes that serve the same or similar purposes.¹⁴⁴ This process was key to step one of *Chevron*, and courts may now take a fully textualist approach to find a statute's best meaning instead of deferring to the agency's interpretation under step two.¹⁴⁵ Thus, a court reviewing Commerce's treatment of § 201 duties would begin by analyzing Proclamation No. 9693 and its relevant statutes with a textualist method of interpretation.¹⁴⁶

The CIT's interpretation is instructive because Proclamation No. 9693 contains nearly identical language as Proclamation No. 7529.¹⁴⁷ Proclamation

¹⁴¹ See *Loper Bright*, 144 S. Ct. at 2266 (“The very point of the traditional tools of statutory construction . . . is to resolve statutory ambiguities.”).

¹⁴² See *Kisor v. McDonough*, 995 F.3d 1347, 1348–49 (Fed. Cir. 2021) (Prost, J., concurring) (memorandum opinion); Kevin O. Leske, *Major Questions Hypocrisy*, 76 ADMIN. L. REV. 771, 798 (2024). This statutory construction method is known as textualism. See *id.*

¹⁴³ See *Bostock v. Clayton County*, 140 S. Ct. 1371, 1738 (2020) (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President.”); *Loper Bright*, 144 S. Ct. at 2266 (“[E]very statute’s meaning is fixed at the time of enactment.” (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018))).

¹⁴⁴ See *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *Wachovia Bank, N.A. v. Schmidt*, 564 U.S. 303, 315–16 (2006).

¹⁴⁵ See *Loper Bright*, 144 S. Ct. at 2266.

¹⁴⁶ See *id.*; *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 63 F.4th 25, 34 (Fed. Cir. 2023).

¹⁴⁷ Compare Proclamation No. 7529, 67 Fed. Reg. 10533, 10555 (Mar. 7, 2002), with Proclamation No. 9693, 83 Fed. Reg. 3541, 3542 (Jan. 23, 2018).

No. 7529, reads, in relevant part: “Pursuant to section 203 of the Trade Act (19 U.S.C. 2253), the actions I have determined to take shall be safeguard measures in the form of: . . . (b) an increase in duties on imports of certain flat steel.”¹⁴⁸ The corresponding Section of Proclamation No. 9693 reads: “Pursuant to section 203 of the Trade Act, the action I have determined to take shall be a safeguard measure in the form of: . . . (b) an increase in duties on imports of modules.”¹⁴⁹ A court reviewing Commerce’s treatment of § 201 duties as imposed by Proclamation No. 9693 would be starting with essentially the same language and relevant statutes. Therefore, the CIT’s textual reading of Proclamation No. 7529 may provide helpful guidance on how a court would likely interpret Proclamation No. 9693.

The CIT’s interpretation in *Wheatland* is a persuasive textualist framework for a review of Proclamation No. 9693 and § 1677a(c)(2)(A). Noting that the term “United States import duties” was ambiguous because it lacked a statutory definition, the CIT looked at how “duty” was used in the Trade Act of 1974, which authorized the Proclamation at issue.¹⁵⁰ Even though the Trade Act of 1974 was written several decades after § 1677a(c)(2)(A) was first enacted, the CIT looked to its text for guidance on how Congress may have intended to classify § 201 duties, which would determine how they fall under § 1677a(c)(2)(A).¹⁵¹ Specifically, the CIT pointed to § 202(d)(1)(A) of the Trade Act, which allows the ITC to recommend “an increase in, or the imposition of, any *duty* on the imported article.”¹⁵² The CIT then focused on how “duty” was used in Proclamation No. 7529 and read it in *pari materia* with the Trade Act’s definition of “duty” (“the rate and form of any *import duty*, including but not limited to tariff-rate quotas”).¹⁵³ As mentioned above, the CIT next discussed the Trade Act’s legislative history and the respective purposes of § 201 and antidumping duties, but the CIT’s textual interpretation is most in line with the traditional methods of statutory interpretation and the Federal Circuit’s holding in *Borusan*.¹⁵⁴

¹⁴⁸ Proclamation No. 7529, 67 Fed. Reg. at 10555.

¹⁴⁹ Proclamation No. 9693, 83 Fed. Reg. at 3542.

¹⁵⁰ See *Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1281 (Ct. Int’l Trade 2006).

¹⁵¹ See *id.*

¹⁵² *Id.* (emphasis in original) (quoting 19 U.S.C. § 2252(e)(2)(A)).

¹⁵³ *Id.* (emphasis in original) (quoting 19 U.S.C. § 2481(1)); see *Yanko v. United States*, 869 F.3d 1328, 1332 n.4 (Fed. Cir. 2017) (reading an undefined term in an executive order in *pari materia* with relevant statutory provisions).

¹⁵⁴ See *supra* discussion Section I.E; *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 63 F.4th 25, 34 (Fed. Cir. 2023).

B. Commerce's Interpretation is Still Entitled to Deference Under its Implied Delegation of Authority, *Skidmore*, and *Stare Decisis*

1. Pre-Chevron Precedent Indicates that Commerce has an Implicit Delegation of Interpretive Authority for This Statute.

As mentioned above, *Loper Bright* allows courts to defer to an agency's interpretation when it finds that the statute implicitly or explicitly delegates authority to the agency.¹⁵⁵ This is a practice that the Supreme Court has held as consistent with judicial review under the Administrative Procedure Act.¹⁵⁶ If a court finds that the best reading of a statute delegates authority to an agency, it may use the tools of statutory construction to determine the level of discretion the agency is granted.¹⁵⁷ Professor Merrill notes that the Supreme Court may take steps to further define implied delegations and limit their flexibility.¹⁵⁸ For the time being, if a court finds that a statute does delegate authority to an agency, then the court may uphold an agency interpretation as long as it is within the scope of the statutory language.¹⁵⁹

In the years leading up to *Chevron*, and in the decades since then, the Federal Circuit has consistently afforded very broad discretion to the agencies administering the antidumping laws.¹⁶⁰ This is most evident in *Smith-Corona Group v. United States*,¹⁶¹ where the Federal Circuit reviewed several challenged regulations that allowed Commerce to make certain adjustments when calculating foreign market value under 19 U.S.C. § 1677b.¹⁶² Consistent with the methods of interpretation found in *Loper Bright*, the Federal Circuit did not end its analysis by automatically deferring to Commerce, even though it had broad discretion under the statute.¹⁶³

The court looked to the text, purpose, and legislative history of each statute and determined that each of Commerce's actions were consistent with

¹⁵⁵ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*; Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 764 (2025).

¹⁵⁸ See Merrill, *supra* note 130, at 265.

¹⁵⁹ See *id.*; Breyer, *supra* note 157, at 764.

¹⁶⁰ See *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Daewoo Elecs. Co., Ltd. v. Int'l Union of Elec., Elec., Tech., Salaried and Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1516 (Fed. Cir. 1993); *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985); *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007).

¹⁶¹ 713 F.2d 1568 (Fed. Cir. 1983).

¹⁶² See *id.* at 1574–75.

¹⁶³ See *id.* at 1575.

its delegated authority.¹⁶⁴ For instance, the court upheld Commerce’s regulation allowing it to primarily consider cost when making adjustments for differences in circumstances of sale as part of the home market calculation under 19 U.S.C. § 1677b(a)(4)—even though the statute focuses on value and price—because the statute expressly gives Commerce broad discretion to make adjustments in how it administers the antidumping laws.¹⁶⁵ Likewise, the court did not find any language expressly limiting Commerce’s authority to make adjustments or setting any standards it must follow.¹⁶⁶ Therefore, according to the Federal Circuit’s interpretation of the statute, “Congress has deferred to the Secretary’s expertise in this manner.”¹⁶⁷

It is possible that the Federal Circuit, after independently examining the statute, could determine that Commerce’s interpretation of “import duties” is contrary to the text.¹⁶⁸ However, that outcome is unlikely in this case because, as discussed above, the Federal Circuit has already held that Commerce has broad implicit authority to promulgate regulations under 19 U.S.C. §§ 1677a and 1677b that allow it to fairly make an “apples to apples” comparison of home market price and export price.¹⁶⁹ The Federal Circuit also held that Commerce’s interpretation was reasonable and consistent with the purposes of antidumping law.¹⁷⁰ Likewise, there is nothing in the statutory language or legislative history that expressly limits Commerce’s ability to define “United States import duties” to exclude § 201 duties.¹⁷¹ This also suggests that Commerce’s interpretation is a fair comparison of the home market price and export price because it avoids imposing a double remedy.¹⁷²

¹⁶⁴ See *id.* at 1575–77.

¹⁶⁵ See *id.* at 1575.

¹⁶⁶ See *id.* at 1575–76.

¹⁶⁷ *Id.* at 1575.

¹⁶⁸ The Federal Circuit has done so for an ITC interpretation that did not involve *Chevron*-based precedent. See *Lashify, Inc. v. Int’l Trade Comm’n*, 130 F.4th 948, 957 (Fed. Cir. 2025).

¹⁶⁹ See *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994); *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1037 (Fed. Cir. 1985) (“This court [in *Smith-Corona Group*] held that the deduction, although not specifically authorized by the statute, was valid since it was an attempt to achieve one of the goals of the statute, a *fair* comparison between foreign and domestic market prices or values.”) (emphasis in original).

¹⁷⁰ See *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007).

¹⁷¹ See 19 U.S.C. § 1677a(c)(2)(A); *Wheatland*, 495 F.3d at 1359, 1361; see also *Smith-Corona Grp.*, 713 F.2d at 1582 (“We find no specific limitation in the statute, nor do we find any evidence of record, that would compel reversal of the ITA’s determinations in this proceeding.”).

¹⁷² See *Wheatland*, 495 F.3d at 1362–63.

These factors all indicate that the Federal Circuit may uphold Commerce's interpretation as a reasonable exercise of its delegated authority.

2. The Federal Circuit May Give Commerce Considerable Weight Under the Skidmore Factors

In *Skidmore*, the Supreme Court held that agencies typically possess specialized knowledge and expertise such that courts may look to their interpretations for non-binding guidance.¹⁷³ The factors that may inform a court's judgment are: "[T]he thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹⁷⁴

It is difficult to reliably predict how the Federal Circuit would review Commerce's interpretation of § 1677a(c)(2)(A) and Proclamation No. 9693 under the *Skidmore* factors. However, the Federal Circuit gave some indication of how persuasive it found Commerce's interpretation in *Wheatland* when it refuted the CIT's reasoning after it found that Commerce was entitled to *Chevron* deference.¹⁷⁵ While the Federal Circuit may not have been expressly applying the *Skidmore* factors, the court's language indicates that it finds Commerce's reasoning persuasive.¹⁷⁶ The fact that the Federal Circuit repeatedly found the CIT's conclusions unreasonable likely means that it is not persuasive enough for the court to conclude that it is the best reading of the statute.¹⁷⁷ The court contrasted the CIT's reasoning with Commerce's to show that the former's reasoning was flawed, which would further indicate that the court found Commerce's interpretation thorough and persuasive enough to afford it *Skidmore* deference.¹⁷⁸ Therefore, this comparison is a helpful predictor for how the Federal Circuit may determine whether Commerce's interpretation is subject to *Skidmore* deference.

3. Commerce's Interpretation may be Upheld Through Stare Decisis

Loper Bright rejected *Chevron* as a method of statutory interpretation without directly overturning the multitude of cases that relied on it.¹⁷⁹ Specifically,

¹⁷³ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁷⁴ *Id.*

¹⁷⁵ See *Wheatland*, 495 F.3d at 1363–66.

¹⁷⁶ See *id.* at 1365.

¹⁷⁷ See *id.* at 1364–66; *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

¹⁷⁸ See *Wheatland*, 495 F.3d at 1365 (“Commerce’s interpretation gives effect to the very purposes of § 201 safeguard duties and preserves the balance between § 201 safeguard duties and antidumping duties.”).

¹⁷⁹ See *Loper Bright*, 144 S. Ct. at 2273; see also *Bartolo v. Garland*, No. 23-1578, 2025 WL 32825, at *2 (9th Cir. Jan. 6, 2025) (upholding *Chevron*-based holding on the grounds that it was not “clearly irreconcilable” with *Loper Bright*).

the Supreme Court held that “[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology.”¹⁸⁰ Thus, there must be a “special justification” for a court to overturn a decision beyond the fact that the decision relied on *Chevron*.¹⁸¹

What exactly the Federal Circuit considers a “special justification” for overruling a *Chevron* precedent remains to be seen. The Federal Circuit has cited or applied *Loper Bright* in several cases that did not involve *Chevron*-based precedents.¹⁸² It has also declined to overrule some *Chevron*-based precedents under *Loper Bright*.¹⁸³ The closest the Federal Circuit came to addressing this question was in *Solar Energy Industries Ass’n v. United States*,¹⁸⁴ where it was asked to rehear a 2023 decision that relied on a non-*Chevron* precedent for presidential statutory interpretations.¹⁸⁵ In a supplemental opinion, the court affirmed its prior decision without reconsidering its precedent because the outcome would be the same under a textualist *de novo* reading of the statute.¹⁸⁶ Thus, at least in that case, the court indirectly upheld its deferential standard of review because it aligned with the best reading of the statute.¹⁸⁷ That case does not say much about how the Federal Circuit will treat *Chevron*

¹⁸⁰ *Loper Bright*, 144 S. Ct. at 2273.

¹⁸¹ *See id.*

¹⁸² *See Lashify, Inc. v. Int’l Trade Comm’n*, 130 F.4th 948, 957 (Fed. Cir. 2025); *Acuna v. EEOC*, 2024-21114, 2025 WL 685915, at *2 (Fed. Cir. Mar. 4, 2025); *Metro. Area EMS Auth. v. Sec’y of Veterans Affs.*, 122 F.4th 1339, 1344 (Fed. Cir. 2024); *Allen v. United States*, 2024-1117, 2024 WL 4002305, at *1 (Fed. Cir. Aug. 30, 2024); *Darby Dev. Co., Inc. v. United States*, 112 F.4th 1017, 1048 n.10 (Fed. Cir. 2024); *SoftView LLC v. Apple, Inc.*, 108 F.4th 1366, 1372 n.2 (Fed. Cir. 2024); *Adee Honey Farms v. United States*, 107 F.4th 1322, 1331 (Fed. Cir. 2024); *Solar Energy Indus. Ass’n v. United States*, 111 F.4th 1349, 1351 n.2 (Fed. Cir. 2024); *Shamrock Bldg. Materials, Inc. v. United States*, 119 F.4th 1346, 1355 (Fed. Cir. 2024).

¹⁸³ *See Doe No. 1 v. United States*, 129 F.4th 1362, 1367 & n.1 (Fed. Cir. 2025) (citing *Billings v. United States*, 322 F.3d 1328, 1333 (Fed. Cir. 2003)) (altering a *Chevron*-based standard to comply with *Loper Bright*); *Biestek v. United States*, 2023-1467, 2025 WL 2985073, at *4 n.5 (Fed. Cir. Oct. 23, 2025); *Arellanes v. Dep’t of Def.*, 2023-1806, 2025 WL 2088374, at *4 n.2 (Fed. Cir. July 25, 2025).

¹⁸⁴ 111 F.4th 1349 (Fed. Cir. 2024).

¹⁸⁵ *See id.* at 1351 (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (upholding presidential interpretations in the international trade context when the statute affords discretion, and the President did not clearly misconstrue the statute)).

¹⁸⁶ *See id.* at 1351–52.

¹⁸⁷ *See id.* at 1354 (“We reach this determination without according any deference to the President’s interpretation.”).

cases generally, but it does indicate the court's willingness to re-examine precedent when necessary to the outcome of a case.¹⁸⁸

Based on the incredibly limited case law, one possible "special justification" for overruling a case like *Wheatland* would be if Commerce's interpretation differed from the best reading of the statute and that difference affected the outcome of the case.¹⁸⁹ However, this is unlikely to happen because, as this Note argues, Commerce's interpretation is the best reading of the statute. Commerce's interpretation is supported by the Federal Circuit's prior cases where it determined the scope of Commerce's statutory authority.¹⁹⁰ Therefore, *Wheatland* will likely retain stare decisis despite the holding in *Loper Bright*.

Given the statutory interpretation considerations, the Federal Circuit likely will not overturn *Wheatland* even though the *Chevron* doctrine has been overruled. However, as discussed in Part III, economic policy further supports upholding *Wheatland*.

III. Recommendation

Each of the interpretive rationales discussed in Section II.B are sufficient grounds to uphold *Wheatland*. However, the Federal Circuit should consider them collectively in its analysis. First, the Federal Circuit is expected to acknowledge Commerce's implied delegation of interpretive authority for the antidumping laws and afford its reading of the statute greater weight as a function of its expertise.¹⁹¹ Second, the Federal Circuit should give considerable weight to Commerce's interpretation under the *Skidmore* factors because Commerce has specialized knowledge in antidumping law.¹⁹² Finally, the Federal Circuit should uphold *Wheatland* through stare decisis because there is currently no "special justification" for departing from its past decision.¹⁹³

Aside from the interpretive rationales discussed in Section II.B, *Wheatland* should be upheld as a matter of policy because it prevents the oft-mentioned double remedy problem.¹⁹⁴ Antidumping duties and § 201 duties are

¹⁸⁸ See *id.* at 1357–58.

¹⁸⁹ In her dissenting opinion in *Loper Bright*, Justice Kagan noted that this may become a common justification for overruling statutory precedent. See 144 S. Ct. at 2310 (Kagan, J., dissenting) ("Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.' Maybe a court will say 'the quality of [the precedent's] reasoning' was poor." (alteration in original) (quoting *id.* at 2270)).

¹⁹⁰ See *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983).

¹⁹¹ See *supra* discussion Section II.B.1.

¹⁹² See *supra* discussion Section II.B.2.

¹⁹³ See *supra* discussion Section II.B.3.

¹⁹⁴ See *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1365 (Fed. Cir. 2007).

“remedial, not punitive or retaliatory.”¹⁹⁵ They are only necessary to the extent that they benefit the domestic industry and create a more competitive market.¹⁹⁶ The same policy rationale was key to Commerce’s decision in *SWR Korea* and the Federal Circuit’s in *Wheatland*.¹⁹⁷ However, it was unnecessary for Commerce, the CIT, or the Federal Circuit to consider the broader economic effects of double remedies to come to their conclusions.¹⁹⁸ Section 201 tariffs have a massive effect on the price and quantities of imported goods.¹⁹⁹ They apply to nearly every foreign source of the product and they are imposed on U.S. importers who pass on the higher prices to consumers downstream, which leads to decreased demand.²⁰⁰ This is especially true for domestic producers who use the imported good (such as steel or aluminum) as an input and are faced with declining demand for their product due to raised tariffs, even though they produce their finished goods in the United States.²⁰¹

These factors combine to lower profitability for domestic producers (who use the good as an input), domestic exporters, and domestic consumers.²⁰² By imposing antidumping duties on top of § 201 duties, prices for those imported goods would increase even more, which would in turn exacerbate the negative economic effects.²⁰³ Therefore, upholding *Wheatland* is necessary to prevent double-counting and the negative consequences that stem from it.

Conclusion

While the CIT’s interpretation started with a more textualist reading of the statutes in question, a court reviewing the duties imposed by Proclamation No. 9693 should concur with Commerce’s reasoning as a valid exercise of its delegated authority and as a persuasive reading of the statute. Therefore, while *Loper Bright* may have changed the way courts review agency interpretations,

¹⁹⁵ *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005); *see Wheatland*, 495 F.3d at 1365.

¹⁹⁶ *See Nucor*, 414 F.3d at 1337 (upholding the ITC’s decision that § 201 duties had remedied a domestic injury to the extent that antidumping duties were unnecessary).

¹⁹⁷ *See Wheatland*, 495 F.3d at 1365; *SWR Korea*, 69 Fed. Reg. 19153, 19160 (Dept. Com. Apr. 12, 2004).

¹⁹⁸ *See Wheatland*, 495 F.3d at 1365; *SWR Korea*, 69 Fed. Reg. at 19160; *Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1285 (Ct. Int’l Trade 2006), *rev’d*, 495 F.3d 1355 (Fed. Cir. 2007).

¹⁹⁹ *See* CONG. RSCH. SERV., *supra* note 7, at 23–27.

²⁰⁰ *See Wheatland*, 495 F.3d at 1364–65.

²⁰¹ *See* Helena Kreuter & Massimo Riccaboni, *The Impact of Import Tariffs on GDP and Consumer Welfare: A Production Network Approach*, 126 ECON. MODELING, Sep. 2023, at 5; CONG. RSCH. SERV., *supra* note 7, at 24.

²⁰² *See* Kreuter & Riccaboni, *supra* note 201, at 5; CONG. RSCH. SERV., *supra* note 7, at 26.

²⁰³ *See Wheatland*, 495 F.3d at 1364–65; Kreuter & Riccaboni, *supra* note 201, at 2.

Commerce's treatment of § 201 duties under § 1677a(c)(2)(A) should not be reversed.²⁰⁴

²⁰⁴ See Merrill, *supra* note 130, at 271.

The Burden of Policing Counterfeits in Online Marketplace E-Commerce

Kiera Yu*

Introduction

As of October 26, 2025, there are 428,571 active trademark registrations under the U.S. Patent and Trademark Office (“USPTO”) and 604,166 pending applications.¹ Trademarks act to distinguish products within the same industry and, more importantly, amongst consumers.² Under the Lanham Act, a trademark can be “any word, name, symbol, or device, or any combination thereof” that is used “to identify and distinguish [one’s] goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”³

It is crucial that business owners trademark their brands and products. A trademark protects its owner from “being sued by others with similar assets” and adds credibility to the owner.⁴ Trademark owners can protect their rights and their goods by holding those who misappropriated their trademark liable for infringement.⁵ Though not explicit in the Lanham Act, trademark owners are protected from both direct infringers of their protected trademark and from indirect third-parties that participated in the misappropriation process.⁶ Such indirect parties most prominently include product distributors “who sell[] an infringing product to a downstream party.”⁷

Currently, The United States Supreme Court’s (“Supreme Court”) case law finds a distributor of goods culpable for trademark infringement under a theory of secondary liability if it “intentionally induces another to infringe a

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¹ *Trademarks Data Q4 2025 at a Glance*, USPTO, [https://perma.cc/A46A-EVAQ].

² *See Trademark, Patent, or Copyright*, USPTO, [https://perma.cc/2ASF-42CQ].

³ 15 U.S.C. § 1127.

⁴ Paula Celestino, *The Importance of Trademarking Your Business*, FORBES (Jan. 18, 2023), [https://perma.cc/Q3YW-QQ7M].

⁵ *See* USPTO, *supra* note 2.

⁶ *See* Paul Abelkop, *Secondary Liability for Trademark Infringement*, WILSON LEGAL GRP. BLOG (Mar. 31, 2021), [https://perma.cc/KR3W-P4RJ].

⁷ *Id.*

trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”⁸ One way to satisfy the knowledge requirement in the second prong is when distributors are found to have acted with “willful blindness,” meaning that they purposefully turned a blind eye to counterfeits on their platforms or failed to investigate when they suspected the existence of counterfeits.⁹

Distributors that provide services are found to have secondary liability only when they have specific knowledge of particular acts of infringement or sales of counterfeits.¹⁰ A mere general knowledge of the existence of counterfeits is insufficient.¹¹ In the absence of knowing or having reason to know such facts, courts look for willful blindness of the distributor which is when the distributor suspects the buyer of wrongful infringement and deliberately fails to investigate to satisfy the knowledge requirement.¹² Distributors are required to take reasonably prompt remedial steps in response to such knowledge.¹³

There is no affirmative duty for distributors to take precautions against the sale of counterfeits.¹⁴ This is rooted in the fundamental concept in trademark law that the trademark owner has the burden to police its mark.¹⁵ The trademark owner best polices its trademark because it knows its product best, has a strong incentive to protect them, and can most effectively identify and address infringements.¹⁶

Distributors who face scrutiny for secondary liability vary in the way that they conduct business but can generally be categorized largely as either in-person or online distributors. Over the last decade, there has been an increase in the scale of electronic commerce (“e-commerce”).¹⁷ This includes substantial growth in the presence of third-party online platforms where individuals may easily register to conduct their business relatively unsupervised.¹⁸ Along

⁸ *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982).

⁹ *See Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992).

¹⁰ *See id.*; *Inwood Labs.*, 456 U.S. at 854.

¹¹ *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 106–07 (2d Cir. 2010).

¹² *See id.* at 109; *Hard Rock Cafe Licensing Corp.*, 955 F.2d at 1149.

¹³ *See R. Bruce Rich & David Ho, Sound Policy and Practice in Applying Doctrines of Secondary Liability Under U.S. Copyright and Trademark Law to Online Trading Platforms: A Case Study*, 32 *Intell. Prop. & Tech L.J.*, no. 1, 2020, at 6, 6–7.

¹⁴ *See Hard Rock Cafe Licensing Corp.*, 955 F.2d at 1149.

¹⁵ *See Rich & Ho*, *supra* note 13, at 5.

¹⁶ *Id.*

¹⁷ Liz Masoner, *What Is E-Commerce?: A Comprehensive Introduction*, *FORBES* (July 10, 2023), [<https://perma.cc/8NCF-AFUE>].

¹⁸ *See Thomas Ponce de Leon, The Rise of the Marketplace: Winning in an Evolving Retail Landscape*, *FORBES* (Aug. 24, 2023), [<https://perma.cc/9QZ9-ALCZ>].

with the expansion of e-commerce, a sizable market for the production and sale of counterfeit products was born.¹⁹ In 2022, the United States' annual e-commerce sales reached one trillion dollars for the first time, and Forbes stated that the "growth [of e-commerce] is having an outsized impact on marketplaces, which are projected to account for 45–50% of [United States] e-commerce spend by 2025."²⁰ As a result of the growth of e-commerce and the increase in the ease of using online platforms, the premise that the burden of trademark policing lay solely with the trademark owner and not the distributor should be reconsidered.

This Note argues that when the online distributor provides services or platform for third-party sale of goods between individuals, the distributor's failure to investigate and monitor for trademark infringement constitutes willful blindness. There ought to be a presumption of the existence of counterfeit goods. This presumption regarding the willful blindness doctrine shifts a portion of the burden of trademark protection to the distributor and would more accurately reflect the current environment of trademark infringement and prevalent counterfeiting.

Part I of this Note provides an overview of the proliferation of counterfeit goods on online e-commerce platforms, explaining also the intermediary role of these online distributors which makes them central to such counterfeit trafficking. Part II outlines the legal history of secondary trademark infringement, summarizing existing case law and discussing public dissatisfaction with the current framework.

Part III then advances this Note's argument that e-commerce platforms' failure to police trademark infringement constitutes willful blindness because the proliferation of counterfeits creates a presumption of their existence on such platforms. Additionally, e-commerce distributors are well-positioned to police the sales of counterfeit goods on their platforms and have both the incentive and the obligation to do so. Finally, Part IV discusses policy and legislative responses, and Part V proposes specific measures to strengthen the accountability for online distributors to protect against the sale of counterfeit goods.

¹⁹ *See id.*

²⁰ *Id.*

I. Background

A. The Growth of Online Marketplace E-Commerce Has Come with a Drastic Increase in the Production and Distribution of Counterfeit Goods

“Counterfeiting is the manufacture, import, export, distribution, and sale of consumer goods that are not genuine but are designed and branded to look identical to the authentic products in order to deceive consumers into believing that they are authentic.”²¹ It also includes the act of putting someone else’s trademark on products not made by the trademark owner and without authorization.²² Counterfeits tend to be of lesser quality and are less safe for consumers.²³ They also force trademark owners to “divert resources away from critical business operations and focus on policing platforms and protecting their brands.”²⁴ Authorities have also found that money made from the purchase of counterfeit goods are often used to fund criminal organizations and that counterfeits tend to be produced by workers in unsafe conditions without regulatory oversight.²⁵ As such, the production and distribution of counterfeit goods pose a danger that goes beyond the simple loss of profit and good name by the trademark owner.²⁶ Counterfeits harm the owner of the trademark being used, the individuals who purchase such goods, as well as community at large.²⁷

Today, as the world continues towards digitalization, third-party online marketplace e-commerce is increasing in popularity due to shoppers’ preference for convenience and variety.²⁸ This has made for a rich environment for the distribution of counterfeit goods.²⁹ The U.S. Department of Homeland Security (“DHS”) discovered \$509 billion in the value of trade in counterfeit and pirated goods in 2016, and \$1.5 billion in the value of seized merchandise

²¹ *Counterfeiting (Intended for a Non-Legal Audience)*, INT’L TRADEMARK ASS’N (Nov. 5, 2025), [<https://perma.cc/5KFA-BDVR>].

²² *See id.*

²³ *See id.*

²⁴ NAT’L ASS’N OF MFRS., COUNTERING COUNTERFEITS: THE REAL THREAT OF FAKE PRODUCTS HOW FAKE PRODUCTS HARM MANUFACTURERS, CONSUMERS AND PUBLIC HEALTH—AND HOW TO SOLVE THIS PROBLEM 4 (2021), [<https://perma.cc/U2GB-DTS4>].

²⁵ *Consumers Combat Counterfeits, USPTO Video Contest*, USPTO (July 26, 2018), [<https://perma.cc/Z9X9-MQMF>].

²⁶ *See id.*

²⁷ *See id.*

²⁸ Farnia Ghavami, *Top Global Online Marketplaces: Key Data and Statistics*, DIGIT. COM. 360 (Apr. 2024), [<https://perma.cc/A3A6-BTUQ>].

²⁹ DEP’T OF HOMELAND SEC., COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 7 (2020), [<https://perma.cc/9ATH-Y4RE>].

as well as 6 billion counterfeit listings reportedly removed from one unnamed e-commerce platform in 2019.³⁰ The U.S. Customs and Border Protection Agency seized \$3.33 billion worth of counterfeit goods in 2021 and \$2.76 billion in 2023, marking a 111% increase from 2020.³¹ A study by Michigan State University in 2023 found that around 74% of 13,054 sampled consumers purchased a counterfeit product.³² It is a common sentiment that because counterfeiting has a long history in human society, and because of advances in technology, people will never cease making counterfeit goods.³³

Amazon is one of the world's largest online marketplace and retail platform selling its own branded goods, but it exercises little control over the millions of third-party retailers on its platform, many of whom are anonymous.³⁴ Counterfeits have long been a prevalent problem for Amazon, exacerbated by the surge in online shopping during the COVID-19 pandemic.³⁵ Certain retailers have also found a way to use Amazon's own brand listings to its advantage.³⁶ Amazon's listings tend to be heavily promoted, thus collecting thousands of reviews.³⁷ They are then abandoned when Amazon creates a new or more updated product, which is sold under a different listing.³⁸ These abandoned listings often get hijacked by retailers to sell their own, unrelated, products – and the preexisting comments build trust in prospective consumers of the product.³⁹

³⁰ *Stopping Counterfeit Trafficking on E-Commerce Platforms Through Fines and Civil Penalties*, DEP'T OF HOMELAND SEC. (Dec. 31, 2020), [https://perma.cc/7FRF-3BGX].

³¹ Keerthi Vedantam, *Inside the Fight Against the Counterfeit Goods Market, and How You Can Purchase Wisely*, THE REALREAL (Nov. 19, 2024), [https://perma.cc/MS48-PNC9].

³² SALEEM ALHABASH, ET AL, CTR. FOR ANTI-COUNTERFEITING AND PRODUCT PROT., *GLOBAL ANTI-COUNTERFEITING CONSUMER SURVEY 2023 2* (2023), [https://perma.cc/85TC-P9V2].

³³ See Gopal Ratnam, *Pressure Rises on Online Retailers to Fight Fakes*, ROLL CALL (Oct. 17, 2023), [https://perma.cc/DX3V-GBAT]; Alice Sherwood, *Spot the difference: The Invincible Business of Counterfeit Goods*, THE GUARDIAN (May 10, 2022), [https://perma.cc/ZF9K-XF5F].

³⁴ See Alexandra Berzon, Shane Shifflet, & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL STREET J. (Aug. 23, 2019), [https://perma.cc/YH5D-NLEX].

³⁵ See Annie Palmer & Kate Tarasov, *Amazon Turns to Team of Ex-prosecutors to Try to Fight Counterfeit Problem*, CNBC (Oct. 25, 2024), [https://perma.cc/WLJ6-RVJR].

³⁶ See Josh Dzieza, *Even Amazon's Own Products are Getting Hijacked by Imposter Sellers*, THE VERGE (Aug. 29, 2019), https://www.theverge.com/2019/8/29/20837359/amazon-basics-fake-sellers-imposters-third-party-marketplace.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

B. Online E-Commerce Platforms Have Become Key Contributors to Counterfeit Trafficking Through Their Role as Intermediaries and by Providing Marketplaces Where Bad Actors Sell to Unsuspecting Buyers

DHS attributes this phenomenon to the profitability of selling counterfeits as a result of low production costs, large availability of prospective online shoppers, convenient transactions, as well as how “listing on well-branded e-commerce platforms provides an air of legitimacy.”⁴⁰ The nature of e-commerce platforms provides a marketplace where online vendors become ready for business by easily setting up one or more accounts quickly, without sophistication or specialized skills, and without needing to find a physical retail space or to hire staff.⁴¹ On some platforms, little identifying information is required for vendors to set up shop.⁴² Because of such easy proliferation by vendors of online marketplaces, DHS recognizes that efforts to enforce against counterfeit goods have become extremely complicated, especially for the owners of such intellectual property or trademark rights.⁴³

The Office of the U.S. Trade Representative’s (“USTR”) 2023 review of notorious markets for counterfeiting and piracy provided a non-exhaustive list of approximately forty online marketplaces that are reported to be engaging in, facilitating, turning a blind eye to, or benefiting from significant acts of counterfeiting.⁴⁴ The USTR further encouraged not just trademark holders and service providers but also governments and owners or operators of online marketplaces to take substantive and meaningful steps to counterfeiting.⁴⁵ Market owners may require licensing for the distribution of legitimate products and negotiate the appropriate licenses with the trademark holders; they may also collaborate with the trademark owners and law enforcement to discourage and curtail counterfeiting.⁴⁶

For example, Amazon implements several mechanisms to address the counterfeit problem.⁴⁷ Amazon’s Project Zero and Brand Registry initiatives allow trademark owners to report and remove counterfeits themselves.⁴⁸ It has also created the Counterfeit Crimes Unit (“CCU”), which is an internal team

⁴⁰ DEP’T OF HOMELAND SEC., *supra* note 29, at 10.

⁴¹ *Id.* at 22.

⁴² *Id.* at 11.

⁴³ *Id.*

⁴⁴ See OFF. OF THE U.S. TRADE REPRESENTATIVE, 2023 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 1–2 (2024), [<https://perma.cc/CKW7-5U75>].

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 16.

⁴⁷ Palmer & Tarasov, *supra* note 35.

⁴⁸ *Id.*

made up of data analysts, investigators, and former federal prosecutors.⁴⁹ The CCU partners with trademark owners and law enforcement to proactively block bad actors and further enables Amazon to take the offensive legal actions that will hold them accountable.⁵⁰

eBay, another retail platform that allows for easy sign-up and transactions, has also taken initiative when it comes to combating counterfeit goods.⁵¹ The platform applies a three-step approach: prevention, detection, and enforcement.⁵² It monitors the online activities of retailers on the site and uses an anti-fraud engine to search for and remove listings for counterfeit goods.⁵³ Although eBay states it is impossible to actually inspect, examine, or authenticate any of the hundreds of millions of items listed for sale on its platform by third parties, its proactive detection system manages to remove thousands of counterfeit listings each day.⁵⁴

II. Legal History

A. Existing Case Law Sets a High Bar for Finding Online Distributors Liable for Counterfeit Sales

Cases involving the spread and distribution of counterfeit goods through online marketplaces have come before the courts on several occasions. Trademark owners recognize the implicit role such online marketplaces play in this process and have sought to receive damages from them for injuries sustained due to the sale of counterfeits on their platform under a theory of secondary infringement within trademark infringement.

In the early case of *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*,⁵⁵ the Supreme Court addressed the issue of secondary liability of third parties.⁵⁶ The issue was whether the manufacturer of a generic version of a drug could be found liable for infringement when an independent pharmacist was responsible for labeling that drug with a brand-name label.⁵⁷ The Court held that a third-party distributor can be found liable under the secondary liability doctrine if it “intentionally induces another to infringe a trademark,

⁴⁹ Amazon, *Amazon Establishes New Counterfeit Crimes Unit*, AMAZON NEWS (June 24, 2020), [<https://perma.cc/JQ4H-9BUF>].

⁵⁰ *See id.*

⁵¹ *See* eBay, *FIGHTING AGAINST ONLINE SOLICITATIONS OF COUNTERFEITS: A REFLECTION PAPER 18* (2009), [<https://perma.cc/HR46-W66W>].

⁵² *Id.*

⁵³ *See id.* at 24.

⁵⁴ *Id.*

⁵⁵ 456 U.S. 844 (1982).

⁵⁶ *See id.* at 846.

⁵⁷ *See id.* at 846–849.

or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”⁵⁸ The Court found the manufacturer in this case not liable because there was no evidence that the manufacturer had intentionally induced the pharmacist into mislabeling the drug.⁵⁹ Though *Inwood* was decided before the era of digital online marketplaces, it remains a leading case in this area.

Following *Inwood*, the theory of secondary liability was expanded to the context of commercial landowners. In *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.*,⁶⁰ Concession Services operated a flea market where it rented space out to vendors who then sold t-shirts with Hard Rock’s logo printed on them, without authorization by Hard Rock.⁶¹ The lower court utilized a theory of willful blindness, which would be the equivalent of actual knowledge under the secondary liability doctrine.⁶² The United States Court of Appeals for the Seventh Circuit stated that “[t]o be willfully blind, a person must suspect wrongdoing and deliberately fail to investigate.”⁶³ The court explicitly stated that there is no affirmative duty to take precautions against such wrongdoing.⁶⁴

Similarly, in the case of *Fonovisa, Inc. v. Cherry Auction, Inc.*,⁶⁵ Cherry Auction operated a swap meet for music recordings and was aware of the sale of counterfeit recordings.⁶⁶ The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) found that Cherry Auction was liable because it knew of the infringing activities, provided the site and facilities where sales took place, was profiting from those sales, and had the power to prevent the sales by removing the vendors.⁶⁷

Most recently in 2019, the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) reaffirmed the willful blindness doctrine in *Luxottica Group, S.p.A. v. Airport Mini Mall, LLC*.⁶⁸ Here, defendant was aware of law enforcement raids that had been conducted in defendant’s Airport Mini Mall, during which counterfeit Luxottica eye wear and other products were confiscated.⁶⁹ Plaintiff and trademark owner Luxottica had also written

⁵⁸ *Id.* at 854.

⁵⁹ *See id.* at 855, 858.

⁶⁰ 955 F.2d 1143 (7th Cir. 1992).

⁶¹ *See id.* at 1145.

⁶² *See id.* at 1149.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 76 F.3d 259 (9th Cir. 1996).

⁶⁶ *Id.* at 261.

⁶⁷ *See id.* at 261–63.

⁶⁸ 932 F.3d 1303, 1312–13 (11th Cir. 2019).

⁶⁹ *Id.* at 1315.

letters to the defendant, notifying them of the existence of such counterfeit goods in their Mall.⁷⁰ However, because the defendant took no action despite having knowledge about the Luxottica counterfeits being sold in the Mall, it was found to have been willfully blind by the Eleventh Circuit.⁷¹

The courts have also addressed application of the secondary liability doctrine to online marketplaces, which are entities that provide third-parties with certain services as opposed to physical or concrete products. The leading case in this regard is *Tiffany (NJ) Inc. v. eBay, Inc.*,⁷² where the well-known jewelry brand Tiffany sued eBay for having counterfeit Tiffany goods listed on its platform for sale, even though they were put up by third-party vendors.⁷³ The United States Court of Appeals for the Second Circuit (“Second Circuit”) held that a service provider like eBay may be liable under the secondary liability doctrine only if it had knowledge of specific acts of infringement and not merely a general knowledge or reason to believe that its service is being used in ways to cause trademark infringement.⁷⁴ It also applied the willful blindness doctrine and stated that “[w]hen [a service provider] has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of the particular infringing transactions by looking the other way.”⁷⁵ Applying this doctrine to the facts of the case, the court found that eBay had not been willfully blind because it “did not ignore the information it was given about counterfeit sales on its website.”⁷⁶ The Second Circuit was explicit that eBay did not have any duty to investigate the authenticity of products being sold on its platform, nor did it have any duty to prevent the sale of such counterfeits.⁷⁷

*Lockheed Martin Corp. v. Network Solutions, Inc.*⁷⁸ is another notable case on secondary trademark infringement liability for service providers. Network Solutions was an entity responsible for registering domain names, and it registered a domain name that allegedly infringed up a trademark owned by Lockheed Martin.⁷⁹ The Ninth Circuit held that Network Solutions was not liable because the service that it provided was akin to a routing function; it neither exercised direct control over the domain names registered nor monitored

⁷⁰ *Id.* at 1316.

⁷¹ *See id.* at 1313–15.

⁷² 600 F.3d 93 (2d. Cir. 2010).

⁷³ *See id.* at 96–98.

⁷⁴ *Id.* at 107.

⁷⁵ *Id.* at 109.

⁷⁶ *Id.* at 110.

⁷⁷ *See id.* at 107.

⁷⁸ 194 F.3d 980 (9th Cir. 1999).

⁷⁹ *Id.* at 982–83.

the use of the names for potential trademark infringements.⁸⁰ The court distinguished this case from those involving the sale of goods or real estate, as here the provider could not control the infringing activity.⁸¹ Through this case, the court depicted a narrower scenario for finding providers of services liable for secondary infringement when compared with providers of goods.⁸² It stated that the secondary infringement doctrine applies to providers of services if and only if the service it provides “entail[s] the kind of direct control and monitoring required to justify an extension of the ‘supplies a product’ requirement.”⁸³

Tiffany is a notably influential case regarding the secondary liability of online marketplaces for trademark infringement claims.⁸⁴ The case set a high standard of requiring actual knowledge of specific, individual cases of infringement before liability of the distributor may be found.⁸⁵ This placed the heavy duty of policing counterfeits and trademark infringement in the numerous, prolific online marketplaces falls predominantly on trademark owners.⁸⁶ A huge burden was eliminated from the shoulders of such online marketplaces.

B. Public Sentiment Leans Toward Change Because the Status Quo Can be Ineffective and Unreasonable

According to comments received from the public by the USPTO, most respondents expressed dissatisfaction with the current doctrine governing trademark infringement in online marketplace.⁸⁷

Out of 24 published comments, 5 were proponents of the status quo.⁸⁸ In other words, only a small minority was in favor of retaining the current legal approach to secondary trademark infringement liability which

⁸⁰ *Id.* at 984–85.

⁸¹ *Id.* at 985.

⁸² *See id.* at 984–85.

⁸³ *Id.* at 985.

⁸⁴ *See* Mark Sommers & Naresh Kilaru, *The Second Circuit’s Decision in Tiffany v. eBay*, FINNEGAN (May/June 2010), <https://web.archive.org/web/20240909120508/https://www.finnegan.com/en/insights/articles/the-second-circuit-s-decision-in-tiffany-v-ebay.html>.

⁸⁵ *See* U.S. PAT. & TRADEMARK OFF., SECONDARY TRADEMARK INFRINGEMENT LIABILITY IN THE E-COMMERCE SETTING: SUMMARY OF RESPONSES TO FEDERAL REGISTER NOTICE PTO-T-2020-0035 3 (2021), [<https://perma.cc/DE2M-9ERH>]; *See generally* Secondary Trademark Infringement Liability in the E-Commerce Setting, 85 Fed. Reg. 72365 (USPTO, Nov. 13, 2020) (request for comments on the application of the traditional doctrines of trademark infringement to the e-commerce setting).

⁸⁶ *See* U.S. PAT. & TRADEMARK OFF., *supra* note 85, at 4.

⁸⁷ *See id.* at 5 tbl. 1 (listing the respondents who supported the status quo and those supported changing the doctrine).

⁸⁸ *Id.*

places the burden primarily on trademark owners and not online marketplaces or platforms.⁸⁹ Representing this minority, Amazon, the Computer & Communications Industry Association, and the Electronic Frontier Foundation argued that changes to the current approach will harm legitimate competition by making it so that e-commerce platforms “only allow goods to be sold by sellers authorized by brand owners.”⁹⁰ Sellers, regardless of whether they are bad actors or honest ones, may be deterred from setting up shop in the marketplaces, which would be disruptive to the competitive environment.⁹¹ Commenters also argued that shifting the burden to online marketplaces would intensify trademark bullying and would require significant costs while achieving limited effects.⁹²

The other position on this issue, which makes up 19 out of the 24 comments, is that there ought to be changes to the current approach.⁹³ First and foremost is the expressed concern that “[t]he knowledge test for contributory infringement liability is vague and applied inconsistently.”⁹⁴ This sentiment is shared by many, including the American Apparel and Footwear Association (“AAFA”), the American Bar Association-IP Law Section (“ABA-IPL”), the Alliance for Automotive Innovation, the National Association of Manufacturers, the Recording Industry Association of America, and the Toy Association.⁹⁵ There is a lot of confusion, according to these commenters, about “the degree to which online service providers and intellectual property owners must monitor the e-commerce platforms for marks,” as well as “what constitutes sufficient knowledge or control to hold an e-commerce platform provider liable.”⁹⁶ Several commenters—the AAFA, ABA-IPL, the Global Brand Owner and Consumer Protection Coalition, and the International Anti-Counterfeiting Coalition—make the point that “[e]stablishing e-commerce platforms’ knowledge of counterfeit products is too difficult a burden for brand owners.”⁹⁷ The AAFA elaborates that the cost of providing information to online marketplaces of specific knowledge is “prohibitively high,” and that those marketplaces are able to take advantage of the current framework to avoid responsibility.⁹⁸

⁸⁹ *See id.* at 7.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.* at 8.

⁹³ *See id.* at 4.

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ *Id.* at 5–6.

⁹⁷ *Id.* at 6.

⁹⁸ *Id.*

Another argument is that “[t]he law has not been able to keep pace with current technology.”⁹⁹ The AAFA and the Center for Anti-Counterfeiting and Product Protection state that the changes in and growth of the e-commerce landscape makes it unsuitable for the traditional standards of secondary liability.¹⁰⁰ In particular the AAFA highlights the volume of information and control that platforms have over third-party sellers.¹⁰¹ The AAFA shares the Toy Association position that the sheer volume of sellers and products, which platforms cite to justify their inability to police counterfeits, stems from “business decision[s] that online marketplaces themselves make.”¹⁰² The Footwear Distributors and Retailers of America states that “the current regime effectively operates as a shield for [p]latforms’ and that ‘[p]latforms are incentivized to refrain from vetting sellers and their products before the sellers conduct business through the [p]latforms’ in order to avoid ‘actual knowledge, and thus, liability.’”¹⁰³ In support of this view, the Automotive Anti-Counterfeiting Council points to how sellers can easily enter into many online marketplaces by simply setting up an account with a unique email address.¹⁰⁴

III. Arguments

Considering current developments in the e-commerce marketplace and the advancement of technology, the tradition of laying the burden of trademark infringement policing solely on the trademark owner should be modified.

This Note argues that the present premise, based on the assumption that trademark owners alone are best positioned with the knowledge and skills necessary to protect their trademarks,¹⁰⁵ is no longer applicable in the modern market. Because the evidence leaves no doubt that counterfeits or cases of trademark infringement exists on online platforms, the owners of such platforms have actual knowledge of such instances.¹⁰⁶ Additionally, the simple sign-up process makes it easy for bad actors to exist unmonitored, which adds to the assumption about counterfeits.¹⁰⁷ By not acting to prevent or deter such bad actors, online platforms are essentially exhibiting willful blindness.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6–7.

¹⁰¹ *Id.*

¹⁰² *Id.* at 7.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Robert C. Cumbow, *The Most Important Trademark Fact You Probably Don't Know*, MILLER NASH LLP (Jan. 23, 2023), [<https://perma.cc/YY9D-MRM9>].

¹⁰⁶ See discussion Section I.A.

¹⁰⁷ See discussion Section I.B.

Furthermore, this Note argues that online marketplaces are now better situated than trademark owners to police counterfeits and trademark infringement.¹⁰⁸ Additionally, it is not uncommon for the burden of protecting an individual's property to be shared between the owner and some other individual or organization, in cases where duties are owed between them.¹⁰⁹ Liability for trademark infringement in the context of online marketplaces should not be the exception.

A. E-commerce Online Platforms' Failure to Vet or Otherwise Police Trademark Infringement is in Essence Willful Blindness Because the Proliferation of Counterfeits Creates a Presumption of Their Existence on Such Platforms

In-person distributors are largely made up of street vendors and markets. However, well-known online distributors include e-commerce giants such as Amazon and eBay.¹¹⁰ An online distributor tends to be much larger in scale than the typical street market, catering to customers around the world, offering a nearly limitless variety of products, and is available all hours of the day.¹¹¹ The most significant distinctions between online and in-person distributors are that online sellers can promote their goods at a much lower cost and can target their audiences more conveniently and precisely.¹¹² These characteristics have led to a surge in sales through online marketplaces, and numbers are expected to only increase.¹¹³ There is also an increase in the number of counterfeit goods and sales of such goods.¹¹⁴

Over the last two decades, numerous studies and reports have made clear that transactions involving counterfeit goods through online marketplace are a

¹⁰⁸ See discussion Section II.B.

¹⁰⁹ See generally *Tenants' Legal Rights & Duties*, JUSTIA, <https://www.justia.com/real-estate/landlord-tenant/information-for-tenants/> (Oct. 2025) (the landlord and the tenant share certain responsibilities of maintaining the rented property); Jen Deming, *Logistics and Legal Rights: Where Do Shippers Stand?*, PARTNERSHIP (Jan. 23, 2020), [<https://perma.cc/7L49-BABL>] (the shipper and carrier both have rights and responsibilities regarding the safety of the package being shipped).

¹¹⁰ See Stephanie Chevalier, *Largest Online Retailers in the U.S. 2023*, STATISTA (Nov. 6, 2023), [<https://perma.cc/8G8M-E669>].

¹¹¹ See *What is E-commerce?*, MCKINSEY & CO. (Jan. 24, 2025), [<https://perma.cc/2C93-EXE9>].

¹¹² See *Online Marketing vs. Offline Marketing: What Works in 2025?*, SEKEL TECHS. (Nov. 18, 2024), [<https://perma.cc/X2U7-Z2WG>].

¹¹³ See Jennifer King, *3 Reasons US Online Marketplace are Growing, and What Brands and Retailers Need to Know*, EMAREKTER (July 10, 2024), [<https://perma.cc/HK8L-J28R>].

¹¹⁴ See DEP'T OF HOMELAND SEC., *supra* note 29, at 4.

prevalent problem.¹¹⁵ Amazon's CCU, created in 2020, claimed to have seized over seven million counterfeit goods from its marketplace in 2023 alone.¹¹⁶ A number of different reports have advanced different estimates of the number of counterfeits on Amazon, ranging anywhere from 10% to 60%, though Amazon itself has not made it known of any such research.¹¹⁷ Similarly, eBay has been dubbed a "counterfeiter's paradise" going all the way back to 2008, making counterfeiting an issue the platform has long been aware of.¹¹⁸

Online platforms have the understanding that counterfeit trademark infringement issues exist on their sites.¹¹⁹ As such, these online platforms operate under the premise of counterfeiting, or in other words, online marketplaces have sufficient actual knowledge of cases of counterfeiting.¹²⁰

This premise is easily applicable to the current doctrine of willful blindness, which states "[t]o be willfully blind, a person must suspect wrongdoing and deliberately fail to investigate."¹²¹ Here, it is not simply a suspicion of the existence of counterfeit, but a near certainty about its prevalence and inescapable existence. The distributing online marketplace would then be required to investigate and monitor listings and transactions on its platform or be found to be willfully negligent.

This premise was not under consideration when the specific knowledge requirement, which is that there is secondary liability only when the distributor has specific knowledge of particular acts of infringement, was created.¹²² There was no extreme growth of online marketplaces nor a sufficient understanding of the impact on counterfeit trademark infringement.¹²³ Nowadays, because general knowledge exists, the investigation requirement must be triggered, and the results of the investigation would in turn satisfy the specific knowledge requirement.¹²⁴

¹¹⁵ See discussion Section I.A.

¹¹⁶ David Dayen, *Amazon Still Has a Counterfeit Problem*, THE AM. PROSPECT (Aug. 28, 2024), [<https://perma.cc/PH46-WNGE>].

¹¹⁷ See Sravanthi Munagapati, *How to Remove Amazon Counterfeit Products*, SELLERRAPP (Oct. 26, 2023), [<https://perma.cc/MKP7-MH8G>].

¹¹⁸ Emily Barber, *Fake Goods and eBay*, SOC'Y FOR COMPUTS. & L. (May 27, 2008), [<https://perma.cc/SYN5-EWCK>].

¹¹⁹ See U.S. PAT. & TRADEMARK OFF., *supra* note 85, at 7.

¹²⁰ See *id.*

¹²¹ *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992).

¹²² See *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 107 (2d. Cir. 2010); see also discussion Section II.A (describing how the leading cases on secondary liability predate e-commerce).

¹²³ See U.S. PAT. & TRADEMARK OFF., *supra* note 85, at 6.

¹²⁴ See *id.* at 10 (noting how the change respondents suggested passing legislation that would require e-commerce platforms to vet third-party sellers and investigate them for

The specific knowledge requirement is incorrect without also imposing an investigation requirement. To have the former without the latter would also mean requiring trademark owners to give notice to the distributing platform, which poses an unreasonable burden on trademark owners.¹²⁵ The traditional stance that trademark protection ought to be left to the trademark owners to police and protect on their own is based on an outdated belief that they—and not the distributing platforms—are best situated to do so.¹²⁶

The investigation requirement would not be too harsh for the online platform. The requirement would not be to achieve a perfect result, but only that the platform or distributor undertakes reasonable efforts to police for counterfeits.

B. Online Distributors Are Better Positioned Than Trademark Owners to Police Counterfeits and Have Both the Incentive and the Obligation to Do So

In a transaction through an online distributing platform, the distributing platform serves as an intermediary between the buyer and the vendor.¹²⁷ It ensures that the routes between seller and buyer are clear and easy to navigate, with on focus on efficiency and innovation.¹²⁸ There are new technologies at the disposal of the distributor that make them the “masters of marketplaces.”¹²⁹ Analytics allow for the forecasting and streamlining of purchases and deliveries, Internet of Things technology makes the monitoring and tracking of orders more accurate, and blockchain technology facilitates tamper-proof record keeping.¹³⁰ Artificial intelligence and blockchain are especially powerful when it comes to “helping to enforce trademark, patent and design rights” and “providing secure, traceable product records.”¹³¹

trademark infringement).

¹²⁵ See *id.* at 6.

¹²⁶ See *id.* at 3, 3 n.16.

¹²⁷ *The Evolution of Technology Distribution and the Role of Distributors*, VATION VENTURES (Feb 16, 2023), [https://perma.cc/RSR6-AZNF].

¹²⁸ See *id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Sienna Bentley, *Technology Poses Biggest Threat to Brands Yet Best Hope Against Counterfeits*, WORLD TRADEMARK REV. (Oct. 9, 2023), [https://perma.cc/Z8YH-ZGBL] (quoting Reinhard Fischer & Tamara Moll, *Germany: EU Directives, International Treaties, and Domestic Incentives Boost IP Protection*, WORLD TRADEMARK REV. (Sep. 23, 2023), [https://perma.cc/4TTP-8Q6P]).

Distributing online marketplaces collect and maintain significant amounts of data, especially about their users.¹³² Because distributors have behind-the-scenes access to such data and various data sorting technologies, they are equipped with basic tools which may be used to implement large-scale counterfeit monitoring.¹³³ Outsiders to the platform, including trademark owners of goods being sold, have access to neither, and cannot attempt to monitor goods and transactions that come across the platform.

Amazon's Project Zero, Brand Registry, and the CCU as well as eBay's proactive detection system are prime examples of how online platform can act to police counterfeits.¹³⁴ Kari Kammel, Director of the Michigan State Anti-Counterfeiting Center, summarized the result of such advances of technology: "it's no longer unreasonable for a platform to be able to see what's on its own platform . . ." [the platform] should be able to proactively vet sellers, their postings and the images uploaded 'to make sure once something's posted it's actually safe for the consumer to purchase.'"¹³⁵

Online marketplaces also have the strong incentive to build a positive reputation among consumers. In a day and age where consumers cannot help but be concerned about inadvertently buying counterfeit products, platforms that are acting to protect the safety of customers from counterfeits are more attractive and looked upon with more trust.¹³⁶

It is also not uncommon for an intermediary that houses the property of others to share in the responsibility of protecting such property.¹³⁷ A close analogy appears in tenant law where a landlord is generally responsible for ensuring their tenant's safety, which includes the safety of their property.¹³⁸ This includes reasonable or foreseeable dangers from both "criminal acts by other tenants but also crimes by third parties in the area" that the landlord

¹³² See Jeff Sakasegawa, *Customer Data Protection: How Online Marketplaces Can Secure Private Customer Information*, SHARETRIBE (Oct. 2, 2025), [<https://perma.cc/XJW9-8D6M>]; Cem Dilmegani & Sila Ermut, *eCommerce Data Collection: Best Practices & Examples*, AiMULTIPLE (June 19, 2025), [<https://perma.cc/B7A4-FNLW>].

¹³³ See Dilmegani & Ermut, *supra* note 132.

¹³⁴ See Palmer & Tarasov, *supra* note 35; Amazon, *supra* note 49; eBay, *supra* note 51, at 19.

¹³⁵ Ratnam, *supra* note 33.

¹³⁶ See Krista Chavez, *Online Marketplaces Lead the Way in Protecting Shoppers From Counterfeits*, NETCHOICE (May 17, 2023), [<https://perma.cc/6CEP-8VM4>].

¹³⁷ See *Inadequate Security at Rental Property & Tenants' Legal Options*, JUSTIA (Oct. 2025), <https://www.justia.com/real-estate/landlord-tenant/information-for-tenants/crimes-on-the-premises/>.

¹³⁸ See *id.*

could have prevented by reasonable measures or—in cases they cannot address—that they warned the tenants about.¹³⁹

Similarly in trademark law, the owners of their property have a responsibility to look after their product – be that the physical items a tenant have, or the intellectual property owned by a business. Like how a landlord allows the tenant to have temporary rights to the leased home where physical property is kept, an online marketplace in essence allows sellers to have the temporary right to conduct their business through its platform. Because the landlord owes duties to the tenant, then logic follows that the online marketplace must be in similar ways obliged to the trademark owner of goods being sold there. Even if not absolute, the online marketplace ought to protect trademark owners from reasonable or foreseeable dangers, similar to the landlord-tenant relationship.¹⁴⁰ The dangers of bad actors selling counterfeit goods is more than reasonable and foreseeable and is common among transactional relationships.¹⁴¹

A harsher comparison would be with the crime of receiving stolen property, which is the knowing reception of a stolen item with the intent to convert the item to one's own.¹⁴² The online marketplace, in allowing bad actors to profit from the sale of goods with “stolen” trademarks, is receiving stolen goods onto its platform to then converting them into its own. A receiver of stolen goods has an obligation to return the goods to the rightful owner.¹⁴³ As such, inaction by the online marketplace upon receiving stolen trademarks cannot be the correct approach.

Opponents of requiring platforms to affirmatively police for counterfeits may present as a problem the potential effect of those platforms passing the costs of such initiatives down to their consumers.¹⁴⁴ In making its proposal, this Note acknowledges this may result. However, emphasis ought to be on the overall benefit to consumers that would certainly result from active policing both in terms of the quality of products they would receive and a general bolstering of consumer trust in e-commerce.¹⁴⁵ Additionally, mere concerns about cost should not discourage online platform from creating policies to

¹³⁹ *Id.*; see Ann O’Connell, *Criminal Acts and Activities: Landlord Liability FAQ*, NOLO (May 22, 2023), [<https://perma.cc/BP6W-66SA>].

¹⁴⁰ See JUSTIA, *supra* note 137; O’Connell, *supra* note 139.

¹⁴¹ See Celestino, *supra* note 4.

¹⁴² See U.S. Dep’t of Just., *Crim. Res. Manual* § 1642.

¹⁴³ See Mark Theoharis, *Receiving Stolen Property*, CRIM. DEF. LAW. (Feb. 15, 2023), [<https://perma.cc/ZQV4-J4F5>].

¹⁴⁴ See U.S. PAT. & TRADEMARK OFF., *supra* note 85, at 7.

¹⁴⁵ See NAT’L ASS’N OF MFRS, *supra* note 24, at 4.

the benefit of consumers because it is the obligation of the market to provide quality goods as advertised.¹⁴⁶

IV. Policy and Legislation

Consumer advocates and legal experts have long argued for the strengthening of legislation making online marketplaces liable for the dangers of counterfeit goods being sold through their platform.¹⁴⁷

A joint venture between the U.S. Customs and Border Protection Agency and the U.S. Chamber of Commerce enables various agencies to “exchange information regarding known or suspected violations of intellectual property rights and to conduct training and outreach to raise awareness of efforts directed to combating the sale of counterfeit and pirated goods.”¹⁴⁸

On June 27, 2023, Congress’ Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (“INFORM Consumers Act”) came into effect.¹⁴⁹ According to Samuel Levine, Director of the Federal Trade Commission’s (“FTC”) Bureau of Consumer Protection, “[t]he INFORM Consumers Act requires online marketplaces to protect consumers from counterfeit, unsafe, and stolen goods by verifying their high-volume third-party sellers’ identities, and making it easier for consumers to report suspicious marketplace activity.”¹⁵⁰ The goal of the INFORM Consumers Act is to increase transparency regarding sellers and goods.¹⁵¹ Mr. Levine further stated that the FTC will “enforce the Act to the fullest extent possible and will collaborate with our state partners to hold online marketplaces accountable.”¹⁵² Failure to disclose the required information constitutes a violation of the Act, and the marketplace could receive civil penalties of \$50,120 per violation.¹⁵³

The U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property is also working to create additional legislation that would hold online platforms liable for facilitating the sale of counterfeits that pose danger to health and safety.¹⁵⁴ By requiring transparency and liability, the belief is that

¹⁴⁶ See *id.*

¹⁴⁷ See Ratnam, *supra* note 33.

¹⁴⁸ See Caroline Chicoine, *Counterfeit Goods Online: The Government Acts, Despite Platforms’ Efforts*, DIGIT. COM. 360 (Aug. 2, 2021), [<https://perma.cc/NTA2-TAX5>].

¹⁴⁹ 15 U.S.C. § 45f; Press Release, Fed. Trade Comm’n, FTC Puts Online Marketplaces on Notice About Their Responsibilities Under the New INFORM Consumers Act (June 20, 2023), [<https://perma.cc/QWC2-P9VE>].

¹⁵⁰ Press Release, Fed. Trade Comm’n, *supra* note 149.

¹⁵¹ See Ratnam, *supra* note 33.

¹⁵² Press Release, Fed. Trade Comm’n, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ Ratnam, *supra* note 33.

online marketplaces ought to be held on par with traditional physical stores in terms of their responsibility for the goods being sold, and they should not be allowed to ignore potential risks.¹⁵⁵

The INFORM Consumers Act became law following the failed Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce Act, or the Shop Safe Act 2020.¹⁵⁶ The Shop Safe Act was reintroduced in 2023 and seeks to make online marketplaces contributorily liable for the sale of counterfeits through its platform.¹⁵⁷ Under this Act, platforms would be required to vet every seller and listing, allow alerts on potential counterfeits, and expediate removal of counterfeit listings.¹⁵⁸

The INFORM Consumers Act is in line with the burden-shifting proposal of this Note and is a first step toward increasing the accountability of e-commerce platforms, however, more has to be done to reflect the growing problem of counterfeits sales in e-commerce. Opponents of this Act, or proponents of the status quo and the specific knowledge requirement may state the unreasonable burden upon online marketplaces.¹⁵⁹ However, as discussed above, technological advances have made active and proactive policing by the distributors possible.¹⁶⁰ Furthermore, it is not that distributor must catch every bad actor or every counterfeit that comes onto their platform. There is flexibility in the proposal that emphasizes merely the requirement that online marketplaces make a reasonable effort to monitor and police for counterfeit.

V. Proposal

A new approach to finding secondary liability in distributors of goods is needed for when such goods are found to be counterfeits that misappropriate a registered trademark. This proposal is made in response to (1) developments in technology that continue to facilitate the already prosperous online market for counterfeit goods, and (2) public sentiments as well as clear statistics showing how existing protections are insufficient to guard against counterfeits in e-commerce.¹⁶¹

¹⁵⁵ See *id.*

¹⁵⁶ See Megan Bannigan, Christopher Ford, & Kate Saba, Does the U.S. SHOP SAFE Act Go Too Far in Shifting Liability?, *DEBEVOISE & PLIMPTON* (May 2024), [<https://perma.cc/V3F7-PQR7>].

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ See U.S. PAT. & TRADEMARK OFF., *supra* note 85, at 7–8.

¹⁶⁰ See Bentley, *supra* note 131; Dilmegani & Ermut, *supra* note 132; VATION VENTURES, *supra* note 127; Palmer & Tarasov, *supra* note 35; Amazon, *supra* note 49; EBAY, *supra* note 51, at 19.

¹⁶¹ See discussion Sections II.B, III.B.

The doctrine of secondary liability states that a distributor of goods is culpable for trademark infringement under secondary liability if it “intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”¹⁶² When distributors are found to have purposefully looked away or failed to investigate when they suspected the existence of counterfeit or acts of misappropriation, the second prong knowledge requirement is met by such “willful blindness,” in place of the requirement of knowing or having reason to know of such acts.¹⁶³ Distributors are required to take reasonably prompt remedial steps in response to such knowledge.¹⁶⁴

Without changing the basis of this doctrine, the knowledge requirement should be considered satisfied by the online marketplace having general knowledge of the existence of counterfeits on its platform.¹⁶⁵ Indeed, there can be no doubt that counterfeit goods are being listed and sold through online marketplaces, where the distributor merely provides a service or platform for simple transactions between third-party vendors and buyers.¹⁶⁶ This provides that the distributor must have “reason to know” of the existence and sale of counterfeit goods.¹⁶⁷ Thus, the distributor must take “remedial steps” to address the situation, through monitoring and policing their platform for cases of trademark misappropriation.¹⁶⁸

Online marketplaces or distributors ought to be required to monitor and police for counterfeit goods being sold through use of their service or platform. Failure to exercise reasonable effort to do so may make them secondarily liable for trademark infringement. As such, when the issue of secondary trademark infringement comes before the United States Court of Appeals of the Federal Circuit in the future, the court should adopt the proposal that the knowledge required is assumed to be satisfied. Alternatively, Congress should expand existing legislation to more adequately reflect the current state of online marketplace e-commerce.

¹⁶² *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982).

¹⁶³ *See Hard Rock Cafe Licensing Corp. v. Concessions Servs. Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992).

¹⁶⁴ *See Rich & Ho*, *supra* note 13, at 6.

¹⁶⁵ *But see Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 106–07 (2d Cir. 2010).

¹⁶⁶ *See* discussion Section III.A.

¹⁶⁷ *See* discussion Section III.A; *Hard Rock Cafe Licensing*, 955 F.2d at 1149.

¹⁶⁸ *Rich & Ho*, *supra* note 13, at 6.

Conclusion

The world has changed drastically since the days when *Tiffany (NJ) Inc. v. eBay, Inc.* was decided.¹⁶⁹ The power and the role of online marketplaces have changed as distributors of trademarked goods.¹⁷⁰ There is such a proliferation of counterfeit goods that online distributors must assume the existence of such goods.¹⁷¹ Online marketplaces, by providing the platform for the sale of counterfeits, should have a duty to monitor and police their existence.

Hence, the current legal doctrine of secondary liability in trademark infringement has become outdated. A more accurate doctrine that reflects the current environment of e-commerce and online counterfeit trademark infringement advances the following presumption: in situations where the online distributor provides a service or platform for the third-party sale of goods between individuals, it is general understanding that counterfeit goods being listed and sold.¹⁷² This presumption satisfies the knowledge requirement for secondary liability, which means the distributor's failure to investigate and monitor for trademark infringement constitutes willful blindness. In other words, if the distributor fails to satisfy its duty to monitor and police for counterfeits on its platform, it may be found liable for the sale of such goods through the secondary liability doctrine.

¹⁶⁹ See discussion Part I.

¹⁷⁰ See *supra* notes 17–20, 99–101 and accompanying text.

¹⁷¹ See *supra* notes 115–20 and accompanying text.

¹⁷² See *supra* notes 115–20 and accompanying text.