U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 22–23

RIN 1515–AE75

EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS FROM MALI

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension and amendment of import restrictions on certain categories of archaeological and ethnological material from the Republic of Mali (Mali) to fulfill the terms of the new agreement, titled "Agreement Between the Government of the United States of America and the Government of the Republic of Mali Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Mali." The Designated List, which was last described in CBP Dec. 17–12, is amended in this document to reflect additional categories of archaeological material found throughout the entirety of Mali and additional categories of ethnological material associated with religious activities, ceremonies, or rites, and enforcement of import restrictions is being extended for an additional five years by this final rule.

DATES: Effective on September 15, 2022.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch @cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.,* which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)), the United States entered into a bilateral agreement with the Republic of Mali (Mali) on September 19, 1997, concerning the imposition of import restrictions on archaeological material from Mali (the 1997 Agreement).[1] The 1997 Agreement included among the materials covered by the restrictions, archaeological material from the region of the Niger River Valley of Mali and the Bandiagara Escarpment (Cliff), Mali, then subject to the emergency restrictions imposed by the former U.S. Customs Service (U.S. Customs and Border Protection's (CBP) predecessor) in Treasury Decision (T.D.) 93–74 (58 FR 49428 (September 23, 1993)). These emergency import restrictions were imposed pursuant to 19 U.S.C. 2603(c) and 19 CFR 12.104g(b) and effective for a period of five years.

On September 23, 1997, the former U.S. Customs Service published T.D. 97–80 in the **Federal Register** (62 FR 49594), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, and included a list designating the types of archaeological material covered by the restrictions.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States. This period may be extended for additional periods of no more than five years if it is determined that the factors which justified the agreement still pertain and no cause for suspension of the agreement exists. *See* 19 CFR 12.104g(a).

Since the initial final rule was published on September 23, 1997, the import restrictions were subsequently extended and/or amended four (4) times. First, on September 20, 2002, the former U.S. Customs Service published T.D. 02–55 in the **Federal Register** (67 FR 59159) to extend the import restrictions for an additional five-year period.

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[1] The 1997 Agreement was entered into following the emergency imposition of import restrictions on archaeological objects from the region of the Niger River Valley of Mali and the Bandiagara Escarpment (Cliff), Mali. The emergency restrictions were imposed by the former U.S. Customs Service in Treasury Decision (T.D.) 93–74 and were published in the **Federal Register** (58 FR 49428) on September 23, 1993. The 1997 Agreement replaced the emergency restrictions.

Second, on September 19, 2007, CBP published CBP Decision (Dec.) 07–77 in the **Federal Register** (72 FR 53414), to extend the import restrictions for an additional five-year period and to impose import restrictions on new subcategories of objects throughout Mali from the Paleolithic Era (Stone Age) to approximately the mid-eighteenth century.

Third, on September 19, 2012, CBP published CBP Dec. 12–14 in the **Federal Register** (77 FR 58020), to extend the import restrictions for an additional five-year period.

Fourth and lastly, on September 19, 2017, CBP published CBP Dec. 17–12 in the **Federal Register** (82 FR 43692), to extend the import restrictions for an additional five-year period and to impose import restrictions on certain categories of ethnological material, specifically, manuscripts dating between the twelfth and twentieth centuries, in paper.

On January 6, 2022, the United States Department of State proposed in the **Federal Register** (87 FR 791) to extend and amend the agreement between the United States and Mali concerning the import restrictions on certain categories of archaeological and ethnological material from Mali. On April 27, 2022, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that: (1) the cultural heritage of Mali continues to be in jeopardy from pillage of certain archaeological and ethnological material currently covered and that the import restrictions should be extended for an additional five years; and (2) the cultural heritage of Mali is in jeopardy from pillage of additional categories of archaeological material found throughout the entirety of Mali and additional categories of ethnological material associated with religious activities, ceremonies, or rites, and that import restrictions should be imposed on such additional categories. Pursuant to the new agreement, the existing import restrictions will remain in effect for an additional five years through September 13, 2027, along with the imposition of additional import restrictions on new categories of archaeological and ethnological material mentioned above and added to the Designated List, which will also be effective for a five-year period through September 13, 2027.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions and amending the Designated List of cultural property described in CBP Dec. 17–12 with the addition of categories of archaeological material including, but not limited to, objects of ceramic, leather, metal, stone, glass, textiles, and wood, and certain additional categories of ethnological material associated with religious activities, ceremonies, or rites of traditional African or Islamic cultures or religions; architectural elements; and funerary objects; all at least 100 years old. The restrictions on the importation of archaeological material and ethnological material continue to be in

effect through September 13, 2027. Importation of such materials from Mali continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting "Mali" from the list.

Designated List of Archaeological and Ethnological Material From Mali

This Designated List, amended as set forth in this document, includes archaeological material that originates in Mali, ranging in date from the Paleolithic Era (Stone Age) to approximately the mid-eighteenth-century A.D. The Designated List is amended to include additional categories of archaeological material found throughout the entirety of Mali. These categories include, but are not limited to, objects of ceramic, leather, metal, stone, glass, textiles, and wood. The Designated List also includes certain categories of ethnological material, namely, manuscripts dating between the twelfth and twentieth centuries A.D., in paper, and is amended to include new categories of ethnological material associated with religious activities, ceremonies, or rites of traditional African or Islamic cultures or religions; architectural elements; and funerary objects; all at least 100 years old.

The list set forth below is representative only. Any dimensions are approximate.

Archaeological Material

Includes objects dating from the Paleolithic Era (Stone Age) to approximately the mid-eighteenth-century A.D.

I. Ceramics/Terracotta/Fired Clay

The best-known types and sites include, but are not limited to, Djenné-Djeno or Jenne, Bankoni, Essouk-Tadmekka, Guimbala, Banamba, Bougouni, Bura, Gao, Kidal, Talohos, and Teghaza.

A. Figures/Statues

1. Anthropomorphic figures, often incised, impressed and with added motifs, such as scarification marks and serpentine patterns on their bodies, often depicting horsemen or individuals sitting, squatting, kneeling, embracing, or in a position of repose, arms elongated the length of the body or crossed over the chest, with the head tipped backwards. Includes terracotta masks. (H: 5 to 50 cm.)

2. Zoomorphic figures, often depicting a snake motif on statuettes or on the belly of globular vases. Sometimes the serpent is coiled in an independent form. A horse motif is common but is usually mounted. Includes quadrupeds.

B. Common Vessels

1. Funerary jars, ochre in color, often stamped with chevrons. (H: 50 to 82 cm.)
2. Globular vases often stamped with chevrons and serpentine forms. (H: under 10 cm.)
3. Bottles with a long neck and a belly that is either globular or streamlined. Some have lids shaped like a bird's head.
4. Ritual pottery of the Tellem culture, decorated with a characteristic plaited roulette.
a. Pots made on a convex mold built up by coiling.
b. Hemispherical pots made on three or four legs or feet resting on a stand.
5. Kitchen pottery of the Tellem culture with the paddle-and-anvil technique decorated with impressions from woven mats.
6. Vessels and containers often decorated with stamps, combs, incised linear decorations, and/or geometric forms. May have some surface treatment such as slip or a burnished finish.
7. Jars often with long, funnel-shaped neck and a flared rim. May be decorated with wide parallel incisions, grooves, or fluting. Jars often have surface treatment that is a combination of red slip with white or black paint. Typically associated with the Gao Saneye region.
8. Glazed ceramic vessels, containers, and lamps often decorated with bright colors such as red, green, turquoise, yellow, and/or black. Types have been recovered at Essouk-Tadmeka.
9. Terracotta crucibles, which may have vitrified residues in a blueish color used in craft production for melting copper.
10. Bed supports or frames that may be decorated with stamps, combs, incised linear decorations, and/or geometric forms. May have some surface treatment such as slip or a burnished finish.
11. Bottle stoppers made in terracotta. May be decorated with a zoomorphic figure such as a ram or rooster head. (H: approximately 20 cm.)

C. Jewelry

Terracotta beads in different shapes such as tapered, oval, cylindrical, segmented, elongated, and others. (H: typically, between 2 cm. to 8 cm.)

II. Leather

Objects of leather found in Tellem funerary caves of the Bandiagara Escarpment or other archaeological sites across Mali include, but are not limited to:

A. Sandals often decorated and furnished with a leather ankle protection.

B. Boots profusely painted with geometric designs.

C. Plaited bracelets.

D. Knife-sheaths.

E. Loinskins.

F. Bags.

III. Metal

Objects of copper, bronze, iron, and gold from Mali include, but are not limited to:

A. Copper and Copper Alloy (Such as Bronze)

1. Figures/Statues.

a. Anthropomorphic figures, including equestrian figures and kneeling figures. (Some are miniatures no taller than 5 centimeters; others range from 15 to 76 cm.)

b. Zoomorphic figures, such as the bull and the snake.

2. Bells (H: 10 to 12 cm.) and finger bells (H: 5 to 8 cm.).

3. Jewelry and items of personal adornment that include, but are not limited to, bracelets, pendants, finger rings, amulets, amulet holders, belts, brooches, buckles, buttons, charms, hair ornaments, hairpins, necklaces, ornaments, pectoral ornaments, rosettes, staffs, and others. Well-known motifs include bull's heads, snakes, and antelopes.

B. Iron

1. Figures/Statues.

a. Anthropomorphic figures. (H: 12 to 76 cm.)

b. Zoomorphic figures, sometimes representing a serpent or a quadruped animal. (H: 12 to 76 cm.)

2. Headrests of the Tellem culture.

3. Ring-bells or finger-bells of the Tellem culture.

4. Bracelets and armlets of the Tellem culture.

5. Hairpins, twisted and voluted, of the Tellem culture.

6. Tools and weapons that include knives, swords, hooks, harpoons, weights, axes, scrapers, trowels, and other tools.

C. Gold

Jewelry and items of personal adornment including, but not limited to, amulets, amulet holders, bracelets, belts, brooches, buckles, buttons, charms, hair ornaments, hairpins, necklaces, ornaments, pectoral ornaments, pendants, rings, rosettes, staffs, and others.

IV. Stone

Objects of stone from Mali include, but are not limited to:

A. Beads in carnelian (faceted) and other types of stone.

B. Quartz lip plugs.

C. Funerary stelae (headstones) inscribed in Arabic.

D. Chipped stone lithics from the Paleolithic and later eras including axes, knives, scrapers, arrowheads, and cores.

E. Ground stone from the Neolithic and later eras including axes, adzes, pestles, grinders, and bracelets.

F. Small carved statuary and figurines.

G. Rock art that is incised, engraved, pecked, and/or that displays painted drawings on natural rock surfaces. May have inscriptions in Arabic.

H. Megaliths, monoliths, or funerary stelae that may be carved, ground, and/ or pecked into a bell shape. May have incised geometric decorations. Often in shaped sandstone or laterite. Heights vary, but typically range from 45 centimeters to 150 centimeters.

V. Glass

A. Beads

A variety of glass beads have been recovered at archaeological sites in Mali. Glass beads typically come in cylindrical, oval, segmented, elongated or stretched pearl shapes. Beads are made with single (blue, red, white, green, black) or multiple colors. Beads may be brightly colored hues of blue, green, red, turquoise, yellow, and/or white. Beads typically range from 5 mm. to 3 cm.

B. Vessels

Vessel types may be conventional shapes and include small jars, bowls, goblets, spouted vessels, candle holders, perfume jars, and lamps. Ancient examples may be engraved and/or colorless or blue, green, yellow, or orange, while those from the Islamic period may include animal, floral, and/ or geometric motifs.

VI. Textiles

Textile objects, or fragments thereof, have been recovered in the Tellem funerary caves of the Bandiagara Escarpment and other archaeological sites across Mali and include, but are not limited to:

A. Cotton

1. Tunics.
2. Coifs.
3. Blankets.

B. Vegetable Fiber (e.g., Skirts, Aprons, and Belts Made of Twisted and Intricately Plaited Vegetable Fiber)

C. Wool (e.g., Blankets)

VII. Wood

Objects of wood may be found archaeologically (in funerary caves of the Tellem or Dogon peoples in the Bandiagara Escarpment, for example) and the following are representative examples of wood objects usually found:

A. Figures/Statues

1. Anthropomorphic figures—usually with abstract body and arms raised standing on a platform, sometimes kneeling. (H: 25 to 61 cm.)
2. Zoomorphic figures—depicting horses and other animals. (H: 25 to 61 cm.)

B. Headrests

C. Household Utensils

1. Bowls.
2. Spoons—carved and decorated.

D. Agricultural/Hunting Implements

1. Hoes and axes—with either a socketed or tanged shafting without iron blades.
2. Bows—with a notch and a hole at one end and a hole at the other with twisted, untanned leather straps for the "string".
3. Arrows, quivers.
4. Knife sheaths.

E. Musical Instruments

1. Flutes with end blown, bi-toned.

2. Harps.
3. Drums.

Ethnological Material

I. Manuscripts

Manuscripts and portions thereof from the Mali Empire, Songhai Empire, pre-Colonial, and French Colonial periods of Mali (twelfth to early twentieth centuries A.D.), including but not limited to Qur'ans and other religious texts, letters, treatises, doctrines, essays or other such papers spanning the subjects of astronomy, law, Islam, philosophy, mathematics, governance, medicine, slavery, commerce, poetry, and literature, either as single leaves or bound as a book (or "codex"), and written in Arabic using the Kufic, Hijazi, Maghribi, Saharan, Sudani, Suqi, Nashk, or Ajami scripts written on paper.

II. Funerary Markers

Includes tombstones and burial markers incised with Arabic writing and script. Shapes vary but include square or baguette-shapes. Primarily in laterite, marble, or quartz. Approximate dimensions 20 centimeters to 120 centimeters high. Approximate dates: A.D. 1100–1920.

III. Wooden Objects

A. Ancestor Figurines

Includes carved wooden figurines often carved in high relief with elongated forms and limbs. Forms may be abstract and stylized. Typically associated with the Bamana, Dogon, Minianka, Senufo, or Soninke. Approximate dates: A.D. 1200–1920.

B. Architectural Materials

Includes locks, shutters, and panels carved from wood in civic and community buildings, found primarily in the Dogon culture area.

C. Ritual Vessels

Includes wooden carved arks and containers, often known as *Aduno Koro* used for ceremonies and religious activities, primarily found in the Dogon culture area. May have carvings of humans, horses, lizards, and/or other designs.

IV. Masks and Headdresses

Includes types typically made from brass/bronze, coconut shell, iron, ivory, leather, raffia, wood, plant fibers, quills, animal horns, or

a combination of materials. They can be carved and adorned with decorative and symbolic designs. Beads, bells, and/or shells can be attached. They can be sculpted and decorated to represent human, animal, and composite forms (for example, a horse and its rider). Masks may be encrusted with layers of clay, kaolin, ochre, soil, and/or sediment. Masks and headdresses were typically created in three forms: (1) helmet-style; (2) facemasks; and (3) headcrests (worn on the top of the head). Masks and headdresses included are typically associated with religious activities and/ or ceremonies, including the various secret societies of the Mande (*e.g.,* Komo, Dojos, or the brotherhood of hunters) and communities of Mali, including, theBamana, Bobo, Bozo, Dogon, Malinké, Minianka, or Senufo. Approximate dates ofA.D. 1200–1920.

V. Textiles

Includes beaded and adorned garments such as diviner's bags, hunting shirts with protective amulets typically crafted out of cotton and leather. Textiles are typically associated with religious activities and/or ceremonies, including the various secret societies of the Mande (*e.g.,* Komo, Dojos, or the brotherhood of hunters) and communities of Mali, including theBamana, Bobo, Bozo, Dogon, Malinké, Minianka, Peuhl or Fulani, or Senufo. Approximate dates ofA.D. 1200–1920.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Mali to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
	* * * * * *	
Mali	Archaeological material from Mali from the Paleolithic Era (Stone Age) to approximately the mid-eighteenth century, and ethnological materials dating between the twelfth and twentieth centuries.	CBP Dec. 22–23.
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ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade
U.S. Customs and Border Protection.

THOMAS C. WEST, JR.,
Director,
Deputy Assistant Secretary of the
Treasury for Tax Policy.

[Published in the Federal Register, September 19, 2022 (85 FR 57142)]

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning October 1, 2022, the interest rates for overpayments will be 5 percent for corporations and 6 percent for non-corporations, and the interest rate for underpayments will be 6 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of October 1, 2022.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022–15, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2022, and ending on December 31, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (3%) plus two percentage points (2%) for a total of five percent (5%). For overpayments made by non-corporations, the rate is the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning January 1, 2023, and ending on March 31, 2023.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070174	063075	6	6	.....
070175	013176	9	9	.....
020176	013178	7	7	.....
020178	013180	6	6	.....
020180	013182	12	12	.....
020182	123182	20	20	.....
010183	063083	16	16	.....
070183	123184	11	11	.....
010185	063085	13	13	.....
070185	123185	11	11	.....
010186	063086	10	10	.....
070186	123186	9	9	.....
010187	093087	9	8	.....
100187	123187	10	9	.....
010188	033188	11	10	.....
040188	093088	10	9	.....
100188	033189	11	10	.....
040189	093089	12	11	.....
100189	033191	11	10	.....
040191	123191	10	9	.....
010192	033192	9	8	.....
040192	093092	8	7	.....
100192	063094	7	6	.....
070194	093094	8	7	.....
100194	033195	9	8	.....
040195	063095	10	9	.....
070195	033196	9	8	.....
040196	063096	8	7	.....
070196	033198	9	8	.....
040198	123198	8	7	.....
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5

Dated: September 14, 2022.

JEFFREY CAINE,
Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, September 20, 2022 (85 FR 57502)]

U.S. Court of International Trade

Slip Op. 22–106

NEW AMERICAN KEG, D/B/A AMERICAN KEG COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NINGBO MASTER INTERNATIONAL TRADE CO., LTD., AND GUANGZHOU JINGYE MACHINERY CO, LTD., Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 20–00008
PUBLIC VERSION

[Following remand, the court sustains Commerce's determination in part and remands in part.]

Dated: September 13, 2022

Whitney M. Rolig, *Andrew W. Kentz*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP of Washington, DC, on the briefs for Plaintiff.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne P. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, on the brief for Defendant-Intervenors.

OPINION

Baker, Judge:

This case returns to the court after remand in *New American Keg v. United States*, Court No. 20–00008, Slip Op. 21–30, at 56, 2021 WL 1206153, at **21–22 (CIT Mar. 23, 2021).[1] The Court remanded for the Department of Commerce to re-evaluate (1) its use of Malaysian surrogate value data, (2) its verification of submissions by Ningbo Master, and (3) its grant of separate rate status to Guangzhou Ulix Industrial & Trading Co., Ltd. (Ulix). *Id.*

On remand, Commerce reconsidered the Malaysian data and found that due to forced labor concerns, the "Malaysian labor [surrogate value] is not the best available information on record." ECF 40–1, at 7. Choosing from the remaining surrogate values on record, the Department selected 2016 Mexican labor data from International Labor Comparisons inflated to the period of investigation. *Id.* at 7.

[1] The court presumes familiarity with its previous decision.

Commerce further reconsidered its verification of Ningbo Master's corrections. Upon reexamination, the Department found no discrepancies in the documentation Ningbo Master submitted and therefore deemed the company's revised factors of production verified and accepted the data.[2] ECF 40–1, at 9. Finally, Commerce reaffirmed its grant of separate rate status to Ulix. *Id.* at 12.

American Keg now challenges: (1) Commerce's use of a Brazilian consumer price index to inflate 2016 Mexican wage data, (2) its use of the Mexican wage data in its final determination, and (3) the Department's reaffirmation of Ulix's separate rate status. ECF 54, at 2.

I

American Keg brought this suit under 19 U.S.C. § 1516a(a)(2)(B)(i), which allows an interested party who was a party to an antidumping proceeding to contest Commerce's final determination. The Court has subject-matter jurisdiction over such actions pursuant to 28 U.S.C. § 1581(c).

The standard of review of a remand determination is the same as that on previous review. *Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372, 1375 (CIT 2002). In actions brought under 19 U.S.C. § 1516a(a)(2), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the Court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

---

[2] No party challenges the decision to accept Ningbo Master's corrections as verified. ECF 54, at 1–2; ECF 52, at 1. The court therefore finds that Commerce complied with the remand order by reconsidering its verification of these corrections and that the Department's determination is supported by substantial evidence.

II

A

In the remand order, the court instructed Commerce to address record evidence describing the prevalence of forced labor in Malaysia and reconsider whether Malaysian surrogate labor data were the best available data. Slip Op. 21–30, at 28, 32, 35, 2021 WL 1206153, at **11, 12, 13–14.

Commerce did so and found that "the demonstrated forced labor from this record evidence outweighs our single country and contemporaneity rationale, and therefore we find the Malaysian labor [surrogate value] is not the best available information on the record." ECF 40–1, at 7.

In deciding between the two remaining surrogate values on the record, in its draft remand results the Department chose the 2016 Brazilian International Labor Comparisons' (ILC) data, Appx1006. In the final remand results, however, it chose the 2016 Mexican ILC data inflated with a Brazilian inflator because Mexico makes identical merchandise while Brazil only makes comparable merchandise. ECF 40–1, at 7, 13, 19.

American Keg argues that Commerce failed to "explain why [consumer price index] information specific to Brazil was a relevant or appropriate means of inflating a Mexican labor wage rate" or "why a Mexican labor wage rate inflated with a different country's CPI was superior to a Brazilian labor wage rate inflated with its own CPI." ECF 54, at 24–25. Although it claims that the chosen inflator does not have to be considered in determining which country's data are the best available information, the government acknowledges that the Department failed to explain why it used the Brazilian inflator on Mexican data and requests that, to the extent "that this explanation is relevant or necessary to Commerce's use of the Mexican ILC data," the court should grant "a voluntary remand for Commerce to explain whether and why the inflator used on the Mexican ILC was appropriate." ECF 51, at 21–22 (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).

Commerce used an inflator specific to a different country, a suspect choice, and it then failed to explain that choice. That alone would justify remand in view of Commerce's published guidance stating that "[t]he Department inflates the selected earnings data to the year that covers the majority of the period of the proceeding using the *relevant* Consumer Price Index." *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 (Dep't Commerce June 21, 2011)

(emphasis added). In other words, Commerce needs to explain how the Brazilian consumer price index is relevant to Mexican data.[3]

B

American Keg argues at length that the Department abused its discretion in abruptly changing course between its preliminary and final determinations. In the former, Commerce used Brazilian surrogate data suggested by American Keg in place of the compromised Malaysian data. In the latter, however, the Department instead used Mexican data. American Keg argues that it was surprised and that the Department's switch impedes both administrative and judicial efficiency.

Although the court can appreciate American Keg's frustration—it appears that the Department didn't give much thought to this switch in view of the necessity for another remand as discussed above—it can detect no abuse of discretion by Commerce. The Department was therefore within its rights to change its mind and use Mexican data instead of Brazilian data.

C

The remand order found that "Commerce simply failed to address American Keg's evidence that the U.S. customer was affiliated with Ulix," which needed to be addressed because it fairly detracted from the Department's conclusion. Slip Op. 21–30, at 48–49, 2021 WL 1206153, at *19. The court remanded for Commerce to explain why it found American Keg's evidence regarding eligibility for a separate rate unconvincing. *Id.* at 49, 2021 WL 1206153, at *19.

On remand, Commerce analyzed American Keg's rebuttal information, finding that the record established that the U.S. customer and a third company, "Company A," are affiliated with each other and that yet another company, "Company B," may be affiliated with both. ECF 40–1, at 12. The Department found, however, that "[n]one of this information, nor any other information on the record of this investigation, indicates that there is any ownership or familial connection between the owners of Guangzhou Ulix . . . and the owners of" the customer and the other companies. *Id.* Therefore, Commerce continued to find that "Guangzhou Ulix is eligible for a separate rate." *Id.* American Keg challenges this determination as unsupported by substantial evidence. ECF 54, at 31–32.

[3] At argument, American Keg argued that the court should bar Commerce from reopening the administrative record on remand. The court requested that the parties address this question through supplemental briefing. As American Keg has not identified any authority for the court to so limit the Department's discretion, the court declines the company's request.

It is the responsibility of separate rate applicants to rebut the presumption that they are "government controlled and therefore subject to the country-wide rate." *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1353 (Fed. Cir. 2015). Here, Commerce's determination that Ulix had met this burden is unsupported by substantial evidence.

Because the Department found that the U.S. customer and Company A are affiliated, there needs to be affirmative evidence on the record that the latter is unaffiliated with Ulix. There is no such evidence.

Commerce relied on these two statements: [[

]] ECF 39–1, at 11. These statements refer to past actions by individuals, not present affiliations, and they don't even deny an affiliation between Ulix and Company A. Without even a bare denial, there is no evidence on the record from which Commerce could conclude that the companies were not affiliated. Hence, Ulix has not carried its burden to show a lack of affiliation. The Department's separate rate determination therefore remains unsupported by substantial evidence.

* * *

For the reasons stated above, the court remands to Commerce to (1) explain why it was appropriate to inflate a Mexican labor wage rate using Brazilian data and why doing so was superior to using a Brazilian labor wage rate; and (2) identify the evidence in the administrative record that supports granting Ulix a separate rate. A separate remand order will issue.

Dated: September 13, 2022
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 22–109

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION AND UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 20–03799

[Sustaining the U.S. Department of Commerce's final results in the 2017 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea.]

Dated: September 19, 2022

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, and *Mary S. Hodgins*, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, *Christopher B. Weld*, and *Theodore P. Brackemyre*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

Thomas M. Beline, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai Steel") challenges the final results in the 2017 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea ("Korea"). *Certain Hot-Rolled Steel Flat Products From the Republic of Korea* ("*Final Results*"), 85 Fed. Reg. 64,122 (Dep't of Commerce Oct. 9, 2020) (final results of countervailing duty admin. review; 2017); *see also* Issues and Decision Mem. for the Final Results of the Admin. Review of the Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea; 2017 ("Final IDM"), ECF No. 26–4.

Before the Court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 38–1 ("*Remand Results*"), which the Court ordered in *Hyundai Steel Co. v. United States* ("*Hyundai Steel*"), 45 CIT __, 532 F. Supp. 3d 1397 (2021). Hyundai Steel supports Commerce's reversal of its use of facts available in calculating a *de minimis* subsidy rate for Hyundai Steel, but opposes Commerce's continued determination that the Government of Korea's provision of port usage rights to Hyundai Steel constituted a countervailable

benefit. Pl. Hyundai Steel Company's Comments U.S. Department Commerce's Oct. 20, 2021 Final Redetermination Pursuant Court Remand ("Pl.'s Cmts.") at 1, ECF No. 40. Defendant-Intervenor Nucor Corporation ("Nucor") argues that Commerce should have continued to apply facts available because Hyundai Steel's responses were not supported by the record. Def.-Interv. Nucor's Opp'n Final Results Redetermination Pursuant Court Remand ("Nucor's Cmts.") at 1–3, ECF Nos. 41, 43. For the following reasons, the Court sustains the *Remand Results*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior opinion and recounts the facts relevant to the Court's review of the *Remand Results*. *See Hyundai Steel*, 45 CIT at __, 532 F. Supp. 3d at 1399.

Commerce initiated this first administrative review of the countervailing duty order on certain hot-rolled steel flat products from Korea for the period covering January 1, 2017 through December 31, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 63,615, 63,618 (Dep't of Commerce Dec. 11, 2018). Commerce selected Hyundai Steel as the sole mandatory respondent for individual examination. *See Final Results*, 85 Fed. Reg. at 64,123.

Hyundai Steel reported to Commerce that it participated in a program involving port usage rights at the Port of Incheon pursuant to which it was scheduled to receive berthing income from shipping operators and "other" income from itself and third-party users. Final IDM at 7, 29. In the *Final Results*, Commerce determined that in addition to Hyundai Steel's reported berthing income, Hyundai Steel received a benefit related to the "other" income, i.e., certain fees, that it was entitled to receive. *Id.* at 29–30. Commerce determined that necessary information was not available on the record with respect to the fees, *see* 19 U.S.C. § 1677e(a)(1), and used facts available to calculate the benefit to Hyundai Steel. Final IDM at 5–6, 30. Commerce calculated a final subsidy rate of 0.51% for Hyundai Steel. *Final Results*, 85 Fed. Reg. at 64,123.

The Court granted Defendant's Motion for Voluntary Remand, in which Defendant represented that Commerce would review the procedures that were applied relative to the requirements of 19 U.S.C. §§ 1677m(d) and 1677e(a), and remanded for Commerce to reconsider application of facts available and, if appropriate, the rate assigned to Plaintiff. *Hyundai Steel*, 45 CIT at __, 532 F. Supp. 3d at 1400.

On remand, Commerce issued a supplemental questionnaire to Hyundai Steel and recalculated the benefit that Hyundai Steel received related to harbor exclusive usage fees based on Hyundai Steel's responses. *Remand Results* at 3, 5. Commerce did not use facts available because it determined that Hyundai Steel provided the missing information with which to calculate the benefit. *Id.* at 5. Commerce recalculated a program rate of 0.01% and a *de minimis* subsidy rate of 0.46% for Hyundai Steel. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of a countervailing duty order. The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Use of Hyundai Steel's Responses Instead of Facts Available

In the *Final Results*, Commerce applied facts available to calculate the benefit to Hyundai Steel of the provision of port usage rights at the Port of Incheon Program "because necessary information [wa]s not available on the record with respect to [the] fees." *Remand Results* at 7; *see also* Final IDM at 5–6, 30. On remand, Commerce issued a supplemental questionnaire to Hyundai Steel requesting descriptions and estimates of the harbor exclusive usage fees that Hyundai Steel could have collected under the program. *Remand Results* at 8, 10. Commerce determined that the measurements provided by Hyundai Steel for the quay wall length and the apron area, which were used to calculate the quay wall fee, were reasonable and that Hyundai Steel provided responses that were in the manner requested, adequately supported, and uncontradicted by other record evidence. *Id.* at 10. Commerce recalculated the benefit using the responses provided by Hyundai Steel. *Id.* at 10–11.

Hyundai Steel supports Commerce's decision not to apply facts available on remand. Pl.'s Cmts. at 2. Nucor argues that Commerce should have applied facts available because Hyundai Steel's responses to the supplemental questionnaire were incomplete. Nucor's

Cmts. at 1–3. While Hyundai Steel provided estimates of the harbor exclusive usage fees—quay wall lease fees (also referred to as apron usage fees), land usage fees, and open storage yard usage fees—that it could have collected, Nucor contends that the estimated fees were calculated based on area measurements for which Hyundai Steel did not provide source information. *Id.* at 2–3. Defendant asserts that Commerce determined that Hyundai Steel's responses were supported, nothing on the record contradicts Hyundai Steel's responses, and Hyundai Steel responded in the prescribed manner. Def.'s Resp. Supp. Remand Redetermination at 7, ECF No. 45.

Section 1677e(a) provides in relevant part:

(a) In general. If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified as provided in section 782(i) [19 U.S.C. § 1677m(i)],

the administering authority and the Commission shall, subject to section 782(d) [19 U.S.C. § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a).

The Court sustains Commerce's decision to not apply facts available. On remand, Commerce reopened the record and requested the information regarding the harbor exclusive usage fees that Commerce had determined in the Final IDM was not available on the record. Commerce determined that there were no deficiencies in Hyundai Steel's responses and determined specifically that the reported areas used to calculate the fee estimates were reasonable. *See Remand Results* at 10. Hyundai Steel's responses to the supplemental questionnaire placed the missing information on the record and Commerce's ground under 19 U.S.C. § 1677e(a)(1) for applying facts available in the *Final Results* no longer exists. There are other provisions under 19 U.S.C. § 1677e(a) for applying facts available, but Com-

merce did not rely on them and Nucor does not argue that Commerce could have or should have relied on them.

Because Commerce reopened the record and necessary information is available now, the Court concludes that Commerce's decision to recalculate Hyundai Steel's benefit without applying facts available is supported by substantial evidence.

II. Whether Commerce's Benefit Determination is Moot

Commerce maintained its determination that the provision of port usage rights associated with the Port of Incheon Program conferred a benefit to Hyundai Steel, but asserted that the issue is moot because Hyundai Steel's recalculated subsidy rate is *de minimis* and Commerce's instructions to U.S. Customs and Border Protection will be to liquidate Hyundai Steel's entries without countervailing duties. *Remand Results* at 11. Hyundai Steel argues that the issue is not moot because Commerce calculated a countervailable benefit of the program of 0.01%, which has implications for this case, ongoing cases, and future cases. Pl.'s Cmts. at 2. Hyundai Steel also contends that the "capable of repetition, yet evading review" exception to mootness applies. *Id.* at 3. Nucor agrees with Commerce's determination that the benefit issue is moot. Def.-Interv. Nucor's Supp. Final Results Redetermination Pursuant Court Remand, ECF No. 47.

The reiterated determination has no effect on the dumping margins because Commerce's recalculation of Hyundai Steel's dumping margin on remand is 0.46%. Because the Court sustains Commerce's decision to not use facts available in recalculating Hyundai Steel's margin, consideration of Commerce's reiterated benefit determination in the *Remand Results* would have no practical significance and is mooted. *See Saha Thai Steel Pipe Pub. Co. v. United States*, 45 CIT __, __, 538 F. Supp. 3d 1350, 1353–54 (2021) (quoting *Morton Int'l, Inc. v. Cardinal Chem. Co.*, 967 F.2d 1571, 1574 (Fed. Cir. 1992) (Nies, C.J., dissenting from the orders declining suggestions for rehearing en banc) (citations omitted) ("An issue is also said to be 'mooted' when a court, having decided one dispositive issue, chooses not to address another equally dispositive issue."); *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1513 (Fed. Cir. 1993) ("[O]ur disposition of the tax incidence issue moots two other issues . . . .")). The Court sustains the *Remand Results* without considering Commerce's mooted benefit determination in the *Remand Results*.

CONCLUSION

For the aforementioned reasons, the Court sustains the *Remand Results*.

Accordingly, it is hereby

ORDERED that the *Remand Results* are sustained.

Judgment will be entered accordingly.

Dated: September 19, 2022
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 22–110

UNITED STATES, Plaintiff, v. ZHE "JOHN" LIU, GL PAPER DISTRIBUTION, LLC, Defendants,

Before: Jane A. Restani, Judge
Court No. 22–00215

[Motion to strike portion of complaint denied.]

Dated: September 20, 2022

William George Kanellis, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Plaintiff United States of America. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC. Of counsel on the brief was *Steven J. Holtkamp*, Staff Attorney, U.S. Customs and Border Protection, Office of the Assistant Chief Counsel, of Chicago, IL.

David John Craven, Craven Trade Law LLC, of Chicago, IL, for Defendant Zhe "John" Liu and GL Paper Distribution, LLC.

OPINION AND ORDER

Zhe "John" Liu and GL Paper Distribution, LLC (collectively, "Liu"), has moved pursuant to USCIT Rule 12(f) to strike portions of the complaint presented by the United States ("Government"), arguing that paragraphs 5–10, 14, 16, 17, 21, 22, and the majority of paragraph 3 of the complaint are "wholly unrelated to the underlying action and contain allegations that are potentially prejudicial." Mot. to Strike at 2, ECF No. 6 (Aug. 8, 2022) ("Mot. to Strike"). The Government opposes this motion, arguing "these paragraphs are directly relevant" to the claim brought. Opp'n. Resp. to the Mot. to Strike at 2, ECF No. 9 (Sept. 8, 2022) ("Opp'n.").

USCIT Rule 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." USCIT Rule 12(f). The court has broad discretion to grant or deny motions to strike. *See Aero Rubber Co. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1363, 1366 (2019).

"The USCIT rules and procedures are designed to streamline litigation," *United States v. Peeples*, 17 CIT 326, 327 (1993), and courts administer rules "to secure the just, speedy, and inexpensive determination of every action and proceeding," *Aero Rubber Co.*, 43 CIT at __, 359 F. Supp. 3d at 1366. Therefore, the court has found Rule 12(f) motions to strike "constitut[e] an extraordinary remedy," and that "courts will not grant motions to strike unless the brief demonstrates a lack of good faith, or that the court would be prejudiced or misled by the inclusion in the brief of the improper material." *Sumecht NA, Inc. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1408, 1411 (2018)

(quoting *United States v. Am. Cas. Co. of Reading*, 39 CIT __, __, 49 F. Supp. 3d 1346, 1347, (2015)); *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986).

Liu argues that the challenged portions of the complaint referred to entities and transactions not involved with the import transactions at issue. Mot. to Strike at 2. Relevancy, as the Government properly notes, is not in the focus of USCIT Rule 12(f). *See* Opp'n. at 4; *see also* USCIT Rule 12(f). To strike such references as irrelevant to the case at hand would be premature, as the relevancy of these references is a question of evidence. *Wine Mkts. Int'l v. Bass*, 177 F.R.D. 128 (E.D.N.Y. 1998) ("Evidentiary questions . . . should especially be avoided at such a preliminary stage of the proceedings. Usually questions of relevancy . . . require the context of an ongoing and unfolding trial in which to be properly decided.") (quoting *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976)).

Removing the challenged paragraphs as "immaterial" or "impertinent" also would be inappropriate at this stage in the proceeding. The Government properly notes that at the heart of the case is whether Liu exercised "reasonable care." Opp'n. at 2 (citing *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006)). Liu's involvement, knowledge of, and prior experience in the wire hanger industry are material to this claim. The extent of this involvement is a matter to be proved or disproved by the parties, not a matter to be stricken at this stage. *Cf. Acciai Speciali Terni S.P.A. v. United States*, 24 CIT 1211, 1216, 120 F. Supp.2d 1101, 1106 (2000), ("There is no occasion for a party to move to strike portions of an opponent's brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not a part of the record. The proper method of raising those issues is by so arguing, either in the brief or in a supplemental memorandum, but not by filing a motion to strike.") (citing *Dillon v. United States*, 229 Ct. Cl. 631, 636 (1981)).

Liu contends that because allegations he deems "irrelevant" are included, they are also "prejudicial" and "could mislead." Mot. to Strike at 4, 5. The court may consider whether a proceeding would be prejudiced as a part of 12(f) analysis. *See Sumecht NA, Inc.*, 42 CIT at __, 331 F. Supp. 3d at 1408. Prejudice is found when a party is "unfairly disadvantaged or deprived of an opportunity to present facts or evidence." *Former Emps. of Quality Fabricating, Inc. v. United States*, 28 CIT 1061, 1071, 353 F. Supp. 2d 1284, 1293 (2004); *Ford Motor Co. v. United States*, 19 CIT 946, 956, 896 F. Supp. 1224, 1231 (1995). If Liu is not involved with the companies that he states are

irrelevant to the case, then this should be proven through evidence presented to the court at the appropriate time, not excluded through a motion to strike.

Therefore, upon consideration of Liu's motion to strike, and upon due deliberation, it is hereby

ORDERED that Liu's motion to strike is denied.

Dated: September 20, 2022
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 22–111

ETEROS TECHNOLOGIES USA, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Judge Gary S. Katzmann
Court No. 21–00287

[The court grants Eteros' Motion for Judgment on the Pleadings and denies the United States' Cross-Motion for Judgment on the Pleadings.]

Dated: September 21, 2022

Richard F. O'Neill, Neville Peterson LLP, of Seattle, WA, argued for Plaintiff Eteros Technologies USA, Inc. With him on the briefs were *John M. Peterson*, of New York, N.Y., and *Patrick B. Klein*.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney in Charge, International Trade Field Office, *Aimee Lee*, Assistant Director. Of Counsel on the briefs were *Mathias Rabinovitch* and *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Katzmann, Judge:

This case concerns the interplay between the federal and state systems, specifically the Washington State system, governing marijuana-related drug paraphernalia. It arises from Customs and Border Protection ("CBP")'s exclusion from entry at the Port of Blaine, Washington of Plaintiff's motor frame assemblies — component parts of an agricultural machine designed to separate the leaf from the flower of cannabis or other plant material — on the grounds that the machine constituted drug paraphernalia prohibited by the federal Controlled Substances Act ("CSA"). The resultant dispute presents a matter of first impression: whether Washington State's repeal of certain prohibitions attending marijuana-related drug paraphernalia "authorize[s]" Plaintiff such that Plaintiff's importation through the Port of Blaine is exempted by the CSA from the federal prohibition on importing drug paraphernalia. The court finds that Plaintiff is so authorized.

BACKGROUND

I. Legal Background

Under section 1595a of 19 U.S.C., "[m]erchandise which is introduced or attempted to be introduced into the United States" "may be seized and forfeited if," inter alia, "its importation or entry is subject

to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute." 19 U.S.C. § 1595a(c)(2)(A).[1] Where "merchandise may be seized and forfeited," Customs may instead "deny entry and permit the merchandise to be [re]exported." 19 C.F.R. § 151.16(j).[2] One "law relating to health" for the purposes of 19 U.S.C. § 1595a is the Controlled Substances Act ("CSA"), *see* 21 U.S.C. §§ 801–904, a federal statute with the "long title"[3] "An Act to amend the Public Health Service Act and other laws to provide increased research, into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse." Pub. L. No. 91–513, 84 Stat. 1236, 1236 (1970).

A. The Federal System on Drug Paraphernalia

Under the CSA, Congress made it unlawful for any person:

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

---

[1] 19 U.S.C. § 1595a — Aiding unlawful importation — provides in relevant part:

> . . .
>
> (c) Merchandise introduced contrary to law
> Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:
>
> . . .
>
> (2) The merchandise may be seized and forfeited if—
>
> (A) its importation or entry is subject to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute.

[2] 19 C.F.R. § 151.16(j) instructs that:

> . . .
>
> If otherwise provided by law, detained merchandise may be seized and forfeited. In lieu of seizure and forfeiture, where authorized by law, Customs may deny entry and permit the merchandise to be exported, with the importer responsible for paying all expenses of exportation.

[3] "The long title generally summarizes or describes the purpose of the bill" and "appears after the bill number and also immediately following the prefatory words 'A BILL.'" Victoria L. Killion, Cong. Rsch. Serv., R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations* 17 (2022).

21 U.S.C. § 863(a)(1)–(3).[4] "Any drug paraphernalia involved in any violation of subsection (a)" "shall be subject to seizure and forfeiture upon the conviction of a person for such violation." *Id.* § 863(c). However, the CSA specifies that "[t]his section shall not apply to" "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items." *Id.* § 863(f)(1). What constitutes "authoriz[ation]" by local, state, or federal law for the purposes of the (f)(1) exemption is otherwise undefined.

B. The Washington State System on Drug Paraphernalia

In November 2012, Washington State legalized adult recreational use of marijuana. *See* Initiative 502 to the Legislature, 2013 Wash. Sess. Laws ch. 3 (codified as amended at Wash. Rev. Code §§ 69.50.101–710) ("Initiative 502").[5] As part of Initiative 502, the Washington legislature amended its prohibitions on drug paraphernalia to read:

> (1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance *other than marijuana*. Any person who violates this subsection is guilty of a misdemeanor.
>
> (2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human

[4] Subsection 863(d) of 21 U.S.C. provides the federal definition of "drug paraphernalia." As established *infra*, Eteros has stipulated for the purposes of this litigation that its merchandise qualifies as "drug paraphernalia" under § 863(d). *See* Pl.'s Br. at 1. As such, the court need not parse the federal definition.

[5] The parties agree that Initiative 502 — as codified as part of the Revised Code of Washington ("RCW") at chapter 69.50 —*legalized* adult recreational marijuana use in Washington State. *See, e.g.*, Pl.'s Resp. in Opp. to Def.'s Cross-Mot. for J. on Pleadings and Reply in Supp. of Pl.'s Mot. for J. on Pleadings at 7–18, Dec. 10, 2021, ECF No. 20 ("Pl.'s Reply"); Def.'s Reply Br. in Supp. of Cross-Mot. for J. on Pleadings at 4, Jan. 31, 2022, ECF No. 25 ("Def.'s Reply") ("We do not contend that Washington state has 'not legalized' marijuana or marijuana-related drug paraphernalia"). However, as discussed *infra*, the parties disagree as to whether such legalization by Washington State confers "authoriz[ation]" for the purposes of the federal exemption at 21 U.S.C. § 863(f)(1). *See, e.g.*, Def.'s Reply at 9; Pl.'s Reply at 20–23.

> body a controlled substance *other than marijuana*. Any person who violates this subsection is guilty of a misdemeanor.

Wash. Rev. Code § 69.50.412 (2013) (emphasis added). Moreover:

> (1) Every person who sells or gives, or permits to be sold or given to any person any drug paraphernalia in any form commits a class I civil infraction under chapter 7.80 RCW. For purposes of this subsection, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance *other than marijuana*.

Id. § 69.50.4121 (emphasis added).[6]

II. Factual Background

The parties assert that the material facts of this case are not in dispute.[7] At issue is the Plaintiff corporation Eteros Technologies USA, Inc. ("Eteros")'s attempted importation into the United States of the Subject Merchandise — certain motor frame assemblies for an agricultural machine, dubbed the "Mobius M108S Trimmer," designed to separate the leaf from the flower of cannabis and/or other plant material — through the Port of Blaine, Washington on or around April 10, 2021. Compl. at 1–2, June 11, 2021, ECF No. 4; Answer to Compl. at 2, July 16, 2021, ECF No. 10 ("Answer"). After the Subject Merchandise was presented to Customs and Border Protection ("CBP") for examination, CBP issued a Notice of Detention to Eteros. Compl. at 2; Answer at 2.

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[6] The court notes that the statute as amended in 2013 applies to this dispute. Later amendments to sections 69.50.412 and 69.50.4121 in 2021 and 2022 — which removed certain uses of drug paraphernalia and replaced "marijuana" with "cannabis" — took effect after the May 10, 2021 CBP decision here at issue. Importantly, these amendments did not remove the marijuana exemptions established in sections 69.50.412 and 69.50.4121.

[7] Before the court, parties have each moved for judgment on the pleadings pursuant to USCIT Rule 12(c). *See* Pl.'s Mot. for J. on Pleadings, Sept. 10, 2021, ECF No. 15 ("Pl.'s Br."); Def.'s Cross-Mot. for J. on Pleadings, Nov. 5, 2021, ECF No. 19 ("Def.'s Br."). In so moving, both parties acknowledge that "[j]udgment on the pleadings is appropriate where there are no material facts in dispute." Pl.'s Br. at 10 (quoting *Forest Labs., Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007)); *see also* Def.'s Br. at 9 (quoting *United States v. Inn Foods, Inc.*, 27 CIT 698, 699, 264 F. Supp. 2d 1333, 1334 (2003), *rev'd on other grounds*, 383 F.3d 1319 (Fed. Cir. 2004)) (same).

On April 16, 2021, CBP sent Eteros a CF 28 Request for Information inquiring about the Subject Merchandise, particularly its intended end-use, to which Eteros timely responded on April 19, 2021. *See* Compl. at 6; Answer at 2. On April 27, 2021, CBP sent Eteros a second CF 28 Request for Information, this time asking whether the Subject Merchandise would "be used at any point, in any way, to manufacture, produce, or process a product that has a [THC][8] concentration over 0.3 percent." Compl. at 7, Ex. E (footnote not in original); Answer at 3. Eteros responded that although it lacked access to end-user records necessary to know the THC content of cannabis products used with the Subject Merchandise, the machine is capable of use with marijuana. Compl. at 7, Ex. E; Answer at 3.

Anticipating that CBP was seeking to discern whether the Subject Merchandise meets the federal definition of "drug paraphernalia" under 21 U.S.C. § 863(d) — and thereby, whether the Subject Merchandise contravened the import prohibition of § 863(a)(3) — Eteros further submitted that:

(i) the Subject Merchandise does not qualify as "drug paraphernalia" because the primary intended use of the Mobius M108S is with hemp, not marijuana; and

(ii) even if the Mobius M108S qualifies as "drug paraphernalia" under § 863(d), the exemption established in § 863(f)(1) renders § 863(a)(3)'s import prohibition inapplicable in light of Washington State's legalization of marijuana and marijuana-related paraphernalia.

Compl. at 7–9, Ex. E; Answer at 3 (admitting the allegations to the extent supported by Plaintiff's Protest Memorandum and Exhibits, but otherwise denying).

On May 10, 2021, CBP informed Eteros by email that it was excluding the Subject Merchandise under the authority of 19 C.F.R. § 151.16(j).[9] Compl. at 9–10, Ex. F; Answer at 3. In the Notice of Exclusion, CBP explained that Eteros' Subject Merchandise constitutes "drug paraphernalia" under 21 U.S.C. § 863(d) and that "§ 863(f)(1) does not provide an importer a means to enter drug para-

[8] "THC" stands for delta-9 tetrahydrocannabinol, the primary psychoactive component of cannabis. *See* Ziva D. Cooper & Margaret Haney, *Actions of Delta-9-tetrahydrocannabinol in Cannabis: Relation to Use, Abuse, Dependence*, 21 Int'l Rev. Psychiatry 104, 104 (2009). The CSA distinguishes hemp — which is federally legal — from marijuana — which is federally illegal — by THC levels. *See* 7 U.S.C. § 1639o (defining "hemp" as "the plant Cannabis sativa L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis").

[9] *Supra* note 2.

phernalia." Compl. at 10, Ex. F; Answer at 3 (admitting the allegations to the extent supported by Plaintiff's Protest Exhibits, but otherwise denying).

Eteros timely protested CBP's exclusion of the Subject Merchandise on or around May 11, 2021, *see* Compl. at 10; Answer at 3, which was denied by operation of law, pursuant to 19 U.S.C. § 1499(c)(5)(B),[10] on June 11, 2021, *see* Compl. at 10; Answer at 3.

III. Procedural Background

On June 11, 2021, Eteros timely filed this action against the United States to challenge CBP's denial of its protest. Compl. at 11; Answer at 3. On September 10, 2021, Eteros moved for judgment on the pleadings pursuant to USCIT Rule 12(c). *See* Pl.'s Mot. for J. on Pleadings, Sept. 10, 2021, ECF No. 15 ("Pl.'s Br."). In said motion, Eteros stipulated for the purpose of the litigation that the Subject Merchandise satisfies the federal statutory definition of "drug paraphernalia" under 21 U.S.C. § 863(d). *Id.* at 1. Defendant the United States ("the Government") responded with a cross-motion for judgment on the pleadings on November 5, 2021, *see* Def.'s Cross-Mot. for J. on Pleadings, Nov. 5, 2021, ECF No. 19 ("Def.'s Br."), to which Eteros responded in opposition and in support of its own motion on December 10, 2021, *see* Pl.'s Resp. in Opp. to Def.'s Cross-Mot. for J. on Pleadings and Reply in Supp. of Pl.'s Mot. for J. on Pleadings, Dec. 10, 2021, ECF No. 20 ("Pl.'s Reply"). The Government replied in kind on January 31, 2022. *See* Def.'s Reply Br. in Supp. of Cross-Mot. for J. on Pleadings, Jan. 31, 2022, ECF No. 25 ("Def.'s Reply").

In preparation for oral argument, the court issued questions on May 4, 2022, *see* Ct.'s Qs. for Oral Arg., May 4, 2022, ECF No. 29, and the parties responded in writing on May 16, 2022, *see* Pl.'s Resp. to Ct.'s Oral Arg. Qs., May 16, 2022, ECF No. 31 ("Pl.'s Oral Arg. Subm."); Def.'s Resp. to Ct.'s Oral Arg. Qs., May 16, 2022, ECF No. 32 (Def.'s Oral Arg. Subm."). Oral argument was held on May 19, 2022. *See* Oral Arg., May 19, 2022, ECF No. 33. Thereafter, on May 26, 2022, the parties each submitted a post-argument brief. *See* Pl.'s Post Oral Arg. Subm., May 26, 2022, ECF No. 35 ("Pl.'s Suppl. Br."); Def.'s Post Oral Arg. Subm., May 26, 2022, ECF No. 34 ("Def.'s Suppl. Br.").

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[10] 19 U.S.C. § 1499(c)(5) — Effect of failure to make determination — provides in relevant part:

. . .

> (B) For purposes of section 1581 of title 28, a protest against the decision to exclude the merchandise which has not been allowed or denied in whole or in part before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). The standard of review is *de novo* based upon the record developed before the court. *See* 28 U.S.C. § 2640(a)(1). The court will grant a party's motion for judgment on the pleadings pursuant to USCIT Rule 12(c) "where there are no material facts in dispute and the party is entitled to judgment as a matter of law." *Forest Labs.*, 476 F.3d at 881; *see also N.Z. Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994).

DISCUSSION

Before the court Eteros contends that even if — as it has stipulated — the Subject Merchandise is "drug paraphernalia" under 21 U.S.C. § 863(d), Washington State law "authorize[s]" Plaintiff to manufacture, possess, and distribute cannabis paraphernalia, such that Eteros is not subject to § 863(a)(3)'s import prohibition by operation of the federal exemption at § 863(f)(1); accordingly, Eteros asks the court to enter judgment on the pleadings for Plaintiff and to direct the Port Director of CBP in Blaine, Washington, to release Eteros' goods. *See* Pl.'s Br. at 1–2; Pl.'s Reply at 33. By contrast, the Government argues that Eteros' arguments fail as a matter of law because Washington State's mere legalization of marijuana and its paraphernalia does not constitute "authoriz[ation]" for the purposes of 21 U.S.C. § 863(f)(1), such that Eteros is still subject to and in contravention of § 863(a)(3)'s import prohibition. *See* Def.'s Reply at 3. Defendant, accordingly, asks the court to enter judgment on the pleadings for the Government. *Id.* at 2.

For the reasons articulated below, the court discerns that Eteros is "authorized" under 21 U.S.C. § 863(f)(1) and thereby exempted in Washington State from subsection 863(a)'s prohibition on importing drug paraphernalia. As such, the court holds that 21 U.S.C. § 863 does not justify seizure or forfeiture of Eteros' Subject Merchandise required for exclusion under 19 C.F.R. § 151.16(j).

I. The Parameters of the Federal Exemption.

The court begins by parsing the parameters of the federal exemption found at 21 U.S.C. § 863(f)(1), before attempting to apply the exemption to the particular facts of the case at bar. The court addresses two issues: (i) the scope of the (f)(1) exemption; and (ii) the conditions that trigger the exemption's applicability.

Recall that section 863 of the CSA instructs in relevant part:

(a) In general

It is unlawful for any person—

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

...

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation.

. . .

(f) Exemptions

This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items.

21 U.S.C. § 863(a), (c), (f)(1).

A. The Scope of 21 U.S.C. § 863(f)(1)'s Exemption

The court first discerns that the phrase "[t]his section shall not apply" within the (f)(1) exemption establishes that when the exemption is implicated, *none* of the provisions under section 863 apply — including neither the three prohibitions enumerated in 21 U.S.C. § 863(a)(1)–(3), nor the basis for seizure and forfeiture provided in § 863(c). Such a construction accords with both the conventional meaning of "section" and standard interpretive guides. For example, the Supreme Court has explained that "Congress ordinarily adheres to a hierarchical scheme in" drafting statutes, *see Koons Buick Pontiac GMC, Inc., v. Nigh*, 543 U.S. 50, 51 (2004), with "[a] bill . . . divided into numbered sections," which "are not repeated," *see* D. Hirsch, *Drafting Federal Law* § 3.8, p. 27 (2d ed. 1989). From there, a section is generally broken into—

(A) subsections (starting with (a));
(B) paragraphs (starting with (1));
(C) subparagraphs (starting with (A));
(D) clauses (starting with (i))

Koons, 543 U.S. at 60–61 (first reproducing instructions from the House Legislative Counsel's Manual on Drafting Style, HLC No. 104–1, p. 24 (1995); then reproducing substantively identical instructions from the Senate Office of the Legislative Counsel, Legislative

Drafting Manual 10 (1997)).[11] Congress followed this hierarchical scheme in drafting the CSA, including section 863.[12] Accordingly, the court agrees that "[t]here can be no question that subsection (f)'s use of the word 'section' refers to the entirety of 21 U.S.C. § 863," Pl.'s Br. at 20, such that when the (f)(1) exemption is implicated, none of the provisions under section 863 — including, as just one example, the federal prohibition on importing or exporting drug paraphernalia established at 21 U.S.C. § 863(a)(3) — apply.

B. The Conditions Triggering 21 U.S.C. § 863(f)(1)'s Applicability

The court next considers what conditions are sufficient to trigger the (f)(1) exemption's applicability. The exemption instructs "[t]his section shall not apply to" "any person authorized by local, State, *or* Federal law to manufacture, possess, *or* distribute such items." 21 U.S.C. § 863(f)(1) (emphasis added). In light of the exemption's double disjunctive "or," the court discerns that "authoriz[ation]" (putting aside the precise meaning of this term for the moment) by *one* relevant legislative body — be it local, state, or federal — to engage in *one* of the enumerated activities — be it manufacture, possession, or distribution of drug paraphernalia — would be sufficient to trigger the (f)(1) exemption's applicability. This construction accords with "the ordinary meaning of that language," *see Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)), as Merriam-Webster defines "or" in part "as a function word to indicate an alternative // coffee *or* tea," *see Or*, *Merriam-Webster Online Dictionary*, www[.]merriam-webster[.]com/dictionary/or (last visited Sept. 15, 2022).[13]

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[11] Although these Manuals post-date the enactment of section 863 of the CSA, *see, e.g.*, *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 516 n.5 (1994) (detailing Congress's enactment of 21 U.S.C. § 863 in 1990), they are consistent with earlier drafting guides, *see, e.g.*, Hirsch, *supra*, at 27 ("A bill is divided into numbered sections . . . The major subdivisions of a section are subsections. They appear as small letters in parentheses ('(a)', etc.) . . . Subsections are divided into numbered paragraphs ('(1)', '(2)', etc.) . . . Paragraphs are divided into tabulated lettered subparagraphs ('(A)', '(B)', etc.) . . . Subparagraphs are divided into clauses bearing small roman numerals ('(i)', '(ii)', '(iii)', '(iv)').").

[12] In the CSA, the word "section" is used to refer to a division preceded by a non-repeating number and the word "subsection" is used to refer to a subdivision preceded by a lower-case letter. *See, e.g.*, 21 U.S.C. § 863(b) ("Anyone convicted of an offense under *subsection (a) of this section* shall be imprisoned for not more than three years and fined under title 18." (emphasis added)).

[13] Please note the court has removed the "http" designations and bracketed the periods within all hyperlinks to outside webpages in order to disable those links. For archived copies of the webpages cited in this opinion, please consult the docket.

In light of the preceding discussion, the court finds that, for example, "authoriz[ation]"[14] by a relevant state to possess drug paraphernalia would *alone* be sufficient to implicate the (f)(1) exemption, thereby rendering the entirety of section 863 — including the prohibitions contained at 21 U.S.C. § 863(a) and the basis for seizure and forfeiture under § 863(c) — inapplicable.

II. The Interplay between the Federal and Washington State Systems Necessitates Construing the Term "Authorized" in 21 U.S.C. § 863(f)(1) as a Matter of First Impression.

Applying the above parameters to the case at bar, the court finds that the interplay between the federal and Washington State systems on marijuana-related drug paraphernalia necessitates construing the term "authorized" in 21 U.S.C. § 863(f)(1) as a matter of first impression.

Recall that consistent with Washington State's legalization of adult recreational marijuana use, the Washington legislature amended its prohibitions on drug paraphernalia to read in relevant part:

> (2) It is unlawful for any person to *deliver*, *possess* with intent to deliver, or *manufacture* with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance *other than marijuana*. Any person who violates this subsection is guilty of a misdemeanor.

Wash. Rev. Code § 69.50.412 (2013) (emphasis added). By including the phrase "other than marijuana," the Washington legislature established that it is not unlawful — or that, in other words, it is legal[15] — to deliver, possess, and/or manufacture marijuana-related drug paraphernalia.

Above, the court discerned that it need only find "authoriz[ation]" by *one* enumerated legislative body — local, state, *or* federal — to engage in *one* enumerated activity — possession, distribution, *or* manufacture — to trigger the (f)(1) exemption, and here, Washington State has made it legal to, inter alia, possess marijuana-related drug paraphernalia. Thus, the next question is whether this legalization of

[14] Again, putting aside the precise meaning of this term for the moment.

[15] Merriam-Webster enumerates the words "lawful," "legal," and "legitimate" as antonyms to the word "unlawful." *See Unlawful*, *Merriam-Webster Online Dictionary*, www[.]merriamwebster[.]com/dictionary/unlawful#synonyms (last visited Sept. 15, 2022).

possession afforded by section 69.50.412 of the Revised Code of Washington amounts to "authoriz[ation]" for the purposes of the federal exemption under 21 U.S.C. § 863(f)(1). The court turns now to this matter of statutory interpretation.

III. Washington State "Authorize[s]" Eteros for the Purposes of 21 U.S.C. § 863(f)(1).

The Government maintains that Washington State law does not "authorize[]" Eteros for the purposes of the federal exemption because "21 U.S.C. § 863(f)(1) explicitly requires a person to [be] specifically . . . authorized" — through, for example, the grant of a personal license, permit, or the like — such that "a [S]tate's legalization of marijuana-related drug paraphernalia does not satisfy th[is] specific personal authorization" requirement. *See* Def.'s Reply at 2, 10–11. By contrast, Eteros argues that Washington State law, specifically Wash. Rev. Code § 69.50.412, "authorize[s]" Eteros for the purposes of 21 U.S.C. § 863(f)(1) and that the Government's requirement of person-specific authorization is impermissible. *See* Pl.'s Reply at 20–23.

In adjudicating this dispute, the court — informed by fundamental principles of statutory construction — looks to the plain meaning of the statute, caselaw, as well as legislative history and other indicia of Congressional intent, as available and appropriate. *See, e.g.*, *Cook v. Wilkie*, 908 F.3d 813, 817 (Fed. Cir. 2018) (discerning statutory meaning "by employing the traditional tools of statutory construction," including "the statute's text, structure, . . . legislative history, and . . . relevant canons of interpretation" (internal quotation marks omitted) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000))). *See generally* Robert A. Katzmann, *Judging Statutes* (2014). Upon deploying these "traditional tools," the court adopts Eteros' interpretation.

A. Ordinary Meaning is Inconclusive

The court construes the statutory exemption of 21 U.S.C. § 863(f)(1) *de novo*[16] and begins the inquiry, as it must, with the text. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1997). Again, the text reads in relevant part:

[16] The Government has not requested deference for its statutory interpretation under the framework developed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. See* 467 U.S. 837 (1984); *see also* Oral Arg. at 1:07:12–25 (Government Counsel's assertion at oral argument that "[t]he Government does not seek deference to the agency's interpretation of (f)(1). In fact, here, there is really no applicable administrative interpretation to which the court can defer"); *see also Wilkie*, 908 F.3d at 817 (reviewing a matter of statutory interpretation *de novo* where "[t]he Secretary [did] not request[] *Chevron* deference for his interpretation" and the Federal Circuit agreed "that no such deference [wa]s warranted"). Because the court agrees that there is no applicable administrative interpretation here to defer to, the court proceeds to construe the federal statute *de novo.*

(f) Exemptions
This section shall not apply to—

(1) *any person authorized* by local, State, or Federal law to manufacture, possess, or distribute such items;

21 U.S.C. § 863(f)(1) (emphasis added). The Government argues that by its plain terms, the combination of "person"[17] and "authorized" in 21 U.S.C. § 863(f)(1) "explicitly requires a person to [be] specifically . . . authorized to engage in the conduct at issue." *See* Def.'s Reply at 11; *see also* Oral Arg. at 1:04:15–25. For its part, Plaintiff contends that Washington plainly "authorized" Eteros for purposes of 21 U.S.C. § 863(f)(1) by repealing its prior prohibitions on marijuana-related drug paraphernalia, *see* Pl.'s Reply at 20, and that the court cannot accept the Government's person-specific construction without adding words to the statute, *see* Pl.'s Oral Arg. Subm. at 3.

Proceeding on "the assumption that the ordinary meaning of . . . language accurately expresses the legislative purpose," *Milner*, 562 U.S. at 569 (quoting *Park 'N Fly*, 469 U.S. at 194), the court notes that Merriam-Webster defines "authorize" as (1) "to endorse, empower, justify, or permit by or as if by some recognized or proper authority (such as custom, evidence, personal right, or regulating power) // a custom authorized by time" and (2) "to invest especially with legal authority: EMPOWER // He is authorized to act for his father." *Authorize*, *Merriam-Webster Online Dictionary*, www[.]merriam-webster[.]com/dictionary/authorize (last visited Sept. 15, 2022). In addition, Black's Law Dictionary defines "authorize" as "[t]his enables a person to act; it gives the authority for a person to carry out an act." *Authorize*, *Black's L. Online Dictionary*, thelawdictionary[.]org/authorize/ (last visited Sept. 15, 2022).

The court assesses that it can derive support for either party's proposed construction from these definitions. For example, on the one hand, Merriam-Webster's partial definition to "permit . . . by . . . regulating power" could be found to accommodate Eteros' position that the repeal of a prohibition by state legislative act permits the previously prohibited activity, thereby conferring "authoriz[ation]." On the other hand, Black's Law Dictionary's definition to "enable[] a person to act" and "give[] the authority for a person to carry out an act" could be found to support the Government's position that "authoriz[ation]" requires an individual endowment of authority.

The court must further consider that (f)(1) specifies that "[t]his

[17] The parties do not dispute that the term "person" in 21 U.S.C. § 863(f)(1) encompasses both human and corporate persons, like Eteros. *See* Pl.'s Br. at 26; Def.'s Br. at 18; Def.'s Reply at 9.

section shall not apply to" "*any* person authorized." 21 U.S.C. § 863(f)(1) (emphasis added). The term "any" "has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute." *Any*, *Black's Law Dictionary* (6th ed. 1996). Thus, accounting for the ordinary meaning of "any," the phrase "any person authorized" could conceivably be construed to encompass a class of persons authorized, as advocated by Eteros — i.e., if "any" means "every" person authorized — or a single person authorized, as advocated by the Government — i.e., if "any" means "one" person authorized.

Because the court cannot discern the proper meaning of the phrase "any person authorized" by considering ordinary meaning *in vacuo*, the court next turns to relevant case law for guidance.

B. Supreme Court Case Law Suggests that Eteros is "authorized"

Eteros argues that the Supreme Court case —*Murphy v. NCAA*, 138 S. Ct. 1461 (2018) — establishes that Eteros is "authorized" and that the Government's person-specific "authorization" requirement directly conflicts with this precedent. *See* Pl.'s Reply at 1–2, 20–21. By contrast, the Government maintains that *Murphy* is inapposite, *see* Def.'s Reply at 12–14, and that Eteros lacks the requisite authorization the (f)(1) exemption plainly contemplates, *see* Def.'s Oral Arg. Subm. at 3, 8. Although the Government is correct that *Murphy* adjudicates a different statute than the one here at issue, nevertheless, the court adheres to the reasoning of *Murphy* to hold that Eteros is "authorized" for the purposes of 21 U.S.C. § 863(f)(1).

The court proceeds by first laying out *Murphy*'s holding, then by establishing the pertinence of this holding to the task of interpreting the CSA, and finally by applying *Murphy*'s holding to the particular facts of the case at bar.

1. Murphy's Holding

In *Murphy*, the Supreme Court considered, in part, whether a New Jersey state law, *see* 2014 N.J. Laws 602 (codified at N.J. Rev. Stat. §§ 5:12A-7 to -9) (repealed 2018) ("the 2014 Act" or "the Act"), contravened the federal Professional and Amateur Sports Protection Act ("PASPA"), *see* 28 U.S.C. §§ 3701–3704; *see also Murphy*, 138 S. Ct. at 1473–75. Until its invalidation by the *Murphy* Court in 2018, PASPA made it unlawful for a state to "authorize" sports gambling schemes.

See 28 U.S.C. § 3702(1).[18] In 2014, the New Jersey Legislature enacted the contested Act, which "repeal[ed] provisions of [New Jersey] state law [that] prohibit[ed] sports gambling insofar as they concerned the 'placement and acceptance of wagers' on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City." *Murphy*, 138 S. Ct. at 1472 (describing New Jersey's 2014 Act). The Supreme Court was, thereafter, called on to resolve whether New Jersey's repeal of these certain state prohibitions "authorized" sports gambling such that the 2014 Act violated PASPA.

The *Murphy* Court answered this question in the affirmative. Writing for the Majority, Justice Alito explained that "[t]he repeal of a state law banning sports gambling . . . gives those now free to conduct a sports betting operation the 'right or authority to act.'" *Id.* at 1474. In fact, the Court explained, "[t]he concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation. . . . [as] [w]e commonly speak of state authorization only if the activity in question would otherwise be restricted." *Id.* Thus, on the grounds that "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity," *id.* (second alteration in original), the Court held that the 2014 New Jersey Act repealing certain state prohibitions on sports gambling "authorized" those activities such that the 2014 Act violated section 3702 of PASPA.[19]

2. Pertinence of Murphy to Interpreting the CSA

Eteros argues that "[a]pplying the U.S. Supreme Court's decision in *Murphy* . . . as this Court must, Eteros' conduct is *clearly* authorized by Washington State law." Pl.'s Suppl. Br. at 2 (emphasis in original). Disagreeing, the Government argues that *Murphy* is inapposite because the "case interpreted a different Federal statute that uses meaningfully different language." Def.'s Reply at 14.

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[18] The since-invalidated PAPSA read in relevant part:

> It shall be unlawful for—
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or *authorize* by law or compact, or
>
> . . .
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702(1) (emphasis added).

[19] Having found that the New Jersey Act violated PASPA's prohibition on state "authorization" of sports gambling, the Court next considered whether such a federal prohibition was constitutional and determined that it was not. *Murphy*, 138 S. Ct. at 1478–85.

As a general proposition, the Government is correct that just "because words used in one statute have a particular meaning[,] they do not necessarily denote an identical meaning when used in another and different statute." *United States ex rel. Chi., N.Y. & Bos. Refrigerator Co. v. Interstate Com. Comm'n*, 265 U.S. 292, 295 (1924) ("*Boston Refrigerator Co.*"); *see also Yates v. United States*, 574 U.S. 528, 537 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes . . . ."). However, this proposition does not preclude, in appropriate circumstances, using the same or similar definitions across statutes. *See, e.g.*, *Owen v. United States*, 861 F.2d 1273, 1274 (Fed. Cir. 1988) (asserting "[w]e are shown no reason and no authority for applying a different interpretation because the term as defined appears in different statutes"). While *Murphy* does not explicitly direct lower courts to use its definition of "authorize" to construe statutes beyond PASPA, the court finds there are good reasons for doing so here.

First, the *Murphy* Court's interpretation of "authorize" turned on the word's ordinary meaning. In *Boston Refrigerator Co.*, the Supreme Court rejected the contention that its prior construction of the words "common carrier by railroad" "was confined to the words as used in the Employers' Liability Act" where "the definition was not made to rest upon any peculiarity in the act under review, but was said to 'accord with the ordinary acceptation of the words.'" 265 U.S. at 295 (quoting *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920)). Pertinently, in *Murphy*, the Court dedicated much discussion to the ordinary meaning of "authorize":

> One of the accepted meanings of the term "authorize," . . . is "permit." Brief for Petitioners in No. 16–476, p. 42 (citing Black's Law Dictionary 133 (6th ed. 1990); Webster's Third New International Dictionary 146 (1992)). [Petitioners] therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization. Brief for Petitioners in No. 16–476, at 42.
>
> Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. Brief for Respondents 39. To authorize, they maintain, means "'[t]o empower; to give a right or authority to act; to endow with authority.'" *Ibid.* (quoting Black's Law Dictionary, at 133).

138 S. Ct. at 1473 (emphasis in original).[20] In concluding that New Jersey's repeal of certain prohibitions on sports gambling "authorized" those activities, the Court explained how its holding comports with the ordinary meaning of the term: "The repeal of a state law banning sports gambling not only 'permits' sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the 'right or authority to act'; it 'empowers' them (respondents' and the United States'[] definition)." *Id.* at 1474. In short, because the *Murphy* Court's construction of "authorize" "was not made to rest upon any peculiarity in the" PASPA, but rather "accord[s] with the ordinary acceptation of the word[]," *see Boston Refrigerator Co.*, 265 U.S. at 295, this court assesses that *Murphy*'s definition is relevant to the CSA.[21]

Moreover, *Murphy* suggests that the Court anticipated the relevance of its construction of "authorize" to realms beyond PASPA, including to marijuana-related contexts. For example, immediately after stating "[t]he concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation . . . [and] [w]e commonly speak of state authorization only if the activity in question would otherwise be restricted," 138 S. Ct. at 1474, the Court quoted an online newspaper article on Vermont's legalization of recreational marijuana, *see id.* at 1474 n.28 ("'Vermont . . . bec[ame] the first [State] in the country to *authorize* the recreational use of [marijuana] by an act of a state legislature.'" (emphasis and alterations in original)).[22] In addition, the Court opined that "one might well say" that a person is acting "pursuant to" state law "if the person previously was

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[20] The court notes that its own discussion of the ordinary meaning of "authorize," *supra* p. 14–16, relies on the same Dictionaries and largely the same definitions as those discussed in *Murphy*.

[21] The Government disagrees, arguing that "the language of section 863 is not only dissimilar, but *opposite* to the language in PASPA." Def.'s Reply at 13 (emphasis in original). This is so, in the Government's estimation, because Congress sought with PASPA to ban States from enacting laws authorizing certain activities, and bans — by nature — should be interpreted broadly; whereas, Congress seeks with the (f)(1) exemption of the CSA to recognize state laws authorizing certain activities, and exemptions — by nature — should be interpreted narrowly.

While this argument has some initial appeal, it is undercut because the Government ultimately asks the court "to give ['authorize'] its plain meaning under its primary definition, which is '[t]o empower, to give a right or authority to act,'" Def.'s Reply at 13–14 (quoting *Black's Law Dictionary* (6th ed. 1990)); the *Murphy* Court explained that "the repeal of a state law ban[] . . . gives those now free to conduct [the implicated activity] the 'right or authority to act'; it 'empowers' them," 138 S. Ct. at 1474. As such, *Murphy*'s construction encompasses Defendant's own assessment of the "primary" — or "plain meaning" — of "authorize."

[22] The court notes that Vermont's "act of state legislature" is pertinently entitled "An act relating to *eliminating penalties* for possession of limited amounts of marijuana by adults 21 years of age or older" (emphasis added)).

prohibited from engaging in the activity," and gave as a hypothetical example "[n]ow that the State has legalized the sale of marijuana, Joe is able to sell the drug pursuant to state law." *Id.* at 1474. This marijuana-specific reference further convinces the court that *Murphy*'s definition of "authorize" should inform the construction of the same term as used in the CSA.

Having determined that *Murphy* is pertinent to interpreting the CSA, the court proceeds to apply *Murphy*'s holding to the case at bar.

3. Applying Murphy

Applying a generalized version of *Murphy*'s ruling[23] — namely, that the repeal of a state law banning an activity gives those now free to conduct the activity in question the "right or authority" to so act — the court concludes that Eteros is "authorized" for the purposes of 21 U.S.C. § 863(f)(1).

Consistent with *Murphy*'s declaration that "[t]he concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation," when Congress enacted section 863 of the CSA in 1990,[24] Washington State prohibited the use, delivery, manufacture, possession, and advertisement of drug paraphernalia. *See, e.g.*, Kerry Murphy Healey, Nat'l Inst. Just., *State and Local Experience with Drug Paraphernalia Laws* 135 (1988):

STATE/ STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
WASHINGTON: Rev. Code of WA. 69.50.102 (1981)			
69.50.412(1) (1981)	use	misdemeanor	imprisonment in county jail not more than 90 days, or fine not [more] than $1,000, or both
69.50.412(2) (1981)	delivery, manufacture, possession	misdemeanor	(see above)
69.50.412(3) (1981)	delivery to minor at least 3 yrs. younger	gross misdemeanor	imprisonment in county jail not more than 1 yr., or fine not [more] than $5,000, or both
69.50.412(4) (1981)	advertisement	misdemeanor	(see above)

Part and parcel to Washington State's legalization of adult recreational marijuana use via Initiative 502 in November 2012, *supra* p. 4, the Washington legislature amended its prohibitions on drug paraphernalia to read in relevant part:

[23] Recall that *Murphy* held "[t]he repeal of a state law banning sports gambling . . . gives those now free to conduct a sports betting operation the 'right or authority to act.'" 138 S. Ct. at 1474.

[24] *See Posters 'N' Things*, 511 U.S. at 516 n.5.

> (1) It is unlawful for any person to *use* drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance *other than marijuana*. Any person who violates this subsection is guilty of a misdemeanor.
>
> (2) It is unlawful for any person to *deliver*, *possess* with intent to deliver, or *manufacture* with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance *other than marijuana*. Any person who violates this subsection is guilty of a misdemeanor.

Wash. Rev. Code § 69.50.412 (2013) (emphasis added). Moreover:

> (1) Every person who *sells* or gives, or permits to be sold or given to any person any drug paraphernalia in any form commits a class I civil infraction under chapter 7.80 RCW. For purposes of this subsection, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance *other than marijuana*.

Id. § 69.50.4121 (emphasis added). As previously discussed, *supra* p. 13, by including the phrase "other than marijuana," the Washington legislature established that it is no longer "unlawful" — or in other words, that it is now legal — to deliver, possess, and/or manufacture marijuana-related drug paraphernalia in Washington State. Thus, per *Murphy*, against this "backdrop of prohibition," Washington State's "repeal[of] old laws banning" certain conduct surrounding

drug paraphernalia "'authorize[s]' that activity." *See* 138 S. Ct. at 1474.[25]

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[25] Having determined that *Murphy* applies, the court disposes of several of the Government's counterarguments on the basis of *Murphy*'s reasoning:

First, the Government contends that Wash. Rev. Code § 69.50.412 does not "authorize" anyone for the purposes of the (f)(1) exemption because "[t]he word 'authorize . . . ordinarily denotes affirmative enabling action.'" Def.'s Reply at 6 (quoting *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981)). In *Murphy*, the Respondent National Collegiate Athletic Association made just such an argument, *see* 138 S. Ct. at 1473 ("[Respondents] claim that the *primary* definition of 'authorize' requires affirmative action." (emphasis in original)), but the *Murphy* Majority instead adopted the Petitioner's view, *see id.* at 1474 ("In our view, petitioners' interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity." (alteration in original)). Here, Washington State repealed certain prohibitions on marijuana-related drug paraphernalia, and thus, per *Murphy*'s instruction, "authorized" the implicated activities.

Next, the Government asserts that "[a]uthorization . . . requires a person-specific endowment of authority" and that mere "legality" is not the standard. *See* Def.'s Oral Arg. Subm. at 9. Noting that Washington administers a "marijuana retailer license" under section 314–55–079 of the Washington Administrative Code, the Government contends that "[i]f legalization constituted the type of blanket authorization suggested by Eteros, then Washington would not have needed to create a licensing regime." *See* Def.'s Reply at 10. Such an argument resembles the United States' position in *Murphy* that the Court should reject Petitioners' interpretation of "authorize" because "one 'would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting "pursuant to" state law.'" 138 S. Ct. at 1474 (citation omitted). The Court disagreed, asserting "one might well say exactly that if the person previously was prohibited from engaging in the activity." *Id.* Here, Washington State previously prohibited, inter alia, the possession of marijuana-related drug paraphernalia, *supra* p. 22; today, Washington State allows such possession, *see* Wash. Rev. Code § 69.50.412 (2022). As previously established, Washington's "authorization" of Eteros to possess marijuana-related drug paraphernalia is alone sufficient to render all of section 863 inapplicable under the (f)(1) exemption. *Supra* p. 12. Per *Murphy*, that Washington does not now require a license or other person-specific endorsement to possess marijuana-related drug paraphernalia — or in other words, has "left [possession] unregulated," 138 S. Ct. at 1474 — does not vitiate the authorization conferred by Washington's repeal. (The court, however, notes that even though Washington State's "authorization" of possession is sufficient to render section 863 of the CSA inapplicable, persons must — of course — abide by remaining applicable laws, including if relevant, Washington's retail license requirement.)

Finally, the Government argues that Eteros' construction of "authorize" "effectively nullif[ies] section 863." Def.'s Oral Arg. Subm. at 6. This is so, in the Government's view, because the (f)(1) exemption only requires "authorization" by one legislative body — be it local, state, *or* federal — to engage in one enumerated activity — be it manufacturing, possessing, *or* distributing drug paraphernalia — and "[p]ossession of drug paraphernalia has always been legal under Federal law." *Id.* at 2. Thus, the Government maintains that "under Eteros'[] interpretation, every person already qualifies for the (f)(1) exemption." *Id.* The Government's argument overlooks a critical component of *Murphy*'s holding, namely that "[t]he concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation." 138 S. Ct. at 1474. The Court explained:

> A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.

Id. The Government itself acknowledges that "[p]ossession of drug paraphernalia has always been legal under Federal law." Def.'s Oral Arg. Subm. at 2; *see also Mellouli v. Lynch*, 575 U.S. 798, 803–04 (2015) ("Federal law criminalizes the sale of or commerce in drug paraphernalia, but possession alone is not criminalized at all."). Thus, there is no "backdrop of prohibition" against which to find the Federal Government has "authorized" possession

Accordingly, the court concludes that Washington State "authorize[s]" Eteros for the purposes of 21 U.S.C. § 863(f)(1).[26]

C. The Court's Holding Is Consistent with the Statute's Purpose.

Having applied *Murphy* to hold that Washington State law "authorize[s]" Eteros under 21 U.S.C. § 863(f)(1), the court pauses briefly to consider the Government's arguments that such a construction is incompatible with the purpose of the CSA. While courts must indeed "be sensitive to the possibility [that] a statutory term that means one thing . . . in one context might . . . mean something different in another context," *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020), the court discerns no inconsistency here.

To start, the plain text of the (f)(1) exemption suggests Congress contemplated nonuniform applications of subsection 863(a)'s prohibitions on selling, transporting, and importing/exporting drug paraphernalia. This is so because Congress used a disjunctive "or" to make local, state, and federal "authoriz[ation]" each individually sufficient to render all of section 863 inapplicable. *See* 21 U.S.C. § 863(f)(1) ("This section shall not apply to" "any person authorized by local, State, *or* Federal law to manufacture, possess, or distribute such items." (emphasis added)); *see also supra* p. 11–12. Because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992), the court assesses that it is Congress's design that subsection 863's applicability can — and will — vary state to state and even locality to locality.

For its part, the Government invokes the legislative history of the Mail Order Drug Paraphernalia Control Act — which became 21 U.S.C. § 857 and was ultimately transferred to the current 21 U.S.C. § 863 — to argue that Congress's overarching intent was "to create national uniformity with regard to drug paraphernalia." Def.'s Br. at 17. Quite apart from the argument's incongruity with Congress's use

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of marijuana-related drug paraphernalia. Where the Federal Government simply has "not prohibit[ed] or regulate[d]" drug paraphernalia possession, *see Murphy*, 138 S. Ct. at 1474, this court cannot find authorization for the purposes of 21 U.S.C. § 863(f)(1).

In short, the Government's counterarguments fail to displace Eteros' construction in light of *Murphy*.

[26] Because the court deems Eteros "authorized" on the basis of *Murphy*, the court need not address Plaintiff's additional arguments that the Government's proposed construction violates the constitutional anticommandeering doctrine or 21 U.S.C. § 903 (instructing that no provision of the subchapter within which section 863 falls "shall be construed as indicating an intent on the part of the Congress to occupy the field . . . to the exclusion of any State law . . . unless there is a positive conflict . . . so that the two cannot consistently stand together"). *See* Pl.'s Reply at 24–30, 33–36.

of the disjunctive "or," *see Bostock*, 140 S. Ct. at 1750 ("[L]egislative history can never defeat unambiguous statutory text."), this legislative history — which concerns a predecessor of section 863 that contained no exemptions at all, let alone an exemption akin to that of (f)(1) — is inapposite. *See Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 2–5 (1986) (text of the bill referred to the Committee). The Government itself acknowledges that "there is no legislative history specific to the text that became the 21 U.S.C. § 863(f)(1) exemption." Def.'s Oral Arg. Subm. at 11. As such, the court privileges — as it must — the current text of the statute to discern Congress's purpose, which clearly contemplated nonuniform applications of section 863's provisions.[27]

Nor does the court agree with the Government's implication that Congress intended with the exemptions provided at 21 U.S.C. § 863(f) to shield only persons from prosecution, but not items from seizure. *See* Def.'s Br. at 18 n.17; Def.'s Reply at 7.[28] Such an interpretation does not comport with a full reading of section 863. While it is true that "subsection 863(f)(2) exempts an entire category of *items*,[29] while

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[27] The court is also unpersuaded that the holding here will "recreate...[a] loophole" "whereby the prohibition of drug paraphernalia in one state [will] easily [be] overcome by the lack of such prohibition in other states." Def.'s Br. at 17. Washington State can only "authorize" persons to partake in the enumerated activities of the (f)(1) exemption within the confines of its own borders; if the drug paraphernalia leaves Washington, the "authoriz[ation]" inquiry begins anew in the context of the new state. Perhaps, as the Government suggests, "requir[ing] an authorization that is specific to the person" would "ensur[e] greater tracking and verifiability" of drug paraphernalia. *See* Def.'s Oral Arg. Subm. at 13–14. However, these are policy considerations best left to Congress's sound discretion.

[28] The Government quotes an unpublished opinion from the United States District Court for the District of New Mexico. *See United States v. Assorted Drug Paraphernalia Valued at $29,627.07 & Jason Fernandez*, No. 18–143, 2018 WL 6630524, at *8 (D.N.M. Dec. 19, 2018) ("*Jason Fernandez*") ("Congress intended to shield from prosecution those persons who were 'authorized by [law] to manufacture, possess, or distribute [drug paraphernalia],' but did not intend to also shield the drug paraphernalia itself from lawful forfeiture." (alterations in original)). This court notes that *Jason Fernandez* dealt with a cause of action brought under 21 U.S.C. § 881, a civil forfeiture provision that provides, in relevant part, "[t]he following [property] shall be subject to forfeiture to the United States and no property right shall exist in . . . any drug paraphernalia (as defined in section 863 of this title)." 21 U.S.C. § 881(a)(10). The parties to the case at bar have not submitted any briefing on 21 U.S.C. § 881 and the court takes no view on whether section 881 — or any other basis — could justify excluding merchandise similar to the Subject Merchandise in future cases.

[29] 21 U.S.C. § 863(f)(2) provides in relevant part:

> (f) Exemptions
>
> This section shall not apply to—
>
> . . .
>
> (2) *any item* that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. § 863(f)(2) (emphasis added).

subsection 863(f)(1) . . . applies to . . . *person[s]*," Def.'s Br. at 17–18 (emphasis in original) (footnote and alterations added), recall that when the (f)(1) exemption is implicated, the entirety of section 863 no longer applies, including subsection 863(c)'s basis for seizure and forfeiture, *see* 21 U.S.C. § 863(c) (instructing "[a]ny drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture *upon the conviction of a person for such violation*" (emphasis added)). Thus, at least for the purposes of 21 U.S.C. § 863, where a person is "authorized" and cannot be convicted under subsection 863(a), there can correspondingly be no "seizure and forfeiture" of the implicated drug paraphernalia "upon the conviction of a person" under subsection 863(c).

In sum, upon consideration of the ordinary meaning of the statutory terms, relevant case law, and Congress's purpose, the court determines that Eteros is "authorized" under 21 U.S.C. § 863(f)(1) such that § 863(a)(3)'s federal prohibition on importing drug paraphernalia does not apply to Eteros' Subject Merchandise at the Port of Blaine, Washington. The court reiterates that it is not within its province to weigh policy arguments regarding the merits of legislation or to entertain invitations to rewrite legislation; its charge is to interpret and apply the statute as enacted by Congress. Insofar as the Government seeks a different statute, that argument can be addressed to Congress. *See Bostock*, 140 S. Ct. at 1753 ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.").

CONCLUSION

CBP excluded Eteros' Subject Merchandise "under the authority of 19 C.F.R. § 151.16(j)," *see* Compl. at 9–10, Ex. F; Answer at 3, which allows for the seizure, forfeiture, and/or exclusion of detained merchandise "*[i]f otherwise provided by law*," 19 C.F.R. § 151.16(j) (emphasis added). In so excluding, CBP reasoned that "[21 U.S.C.] § 863(f)(1) does not provide an importer a means to enter drug paraphernalia," like the Subject Merchandise. Compl. at 9–10, Ex. F; Answer at 3. The court now holds that Washington State "authorize[s]" Eteros under the exemption at 21 U.S.C. § 863(f)(1) such that section 863 — including the prohibitions of subsection (a) and the basis for seizure and forfeiture under subsection (c) — is inapplicable to Eteros' Subject Merchandise at the Port of Blaine, Washington. In so holding, the court concludes that in light of the particular circumstances, 21 U.S.C. § 863 does not justify the seizure or forfeiture of the Subject Merchandise required for exclusion under 19 C.F.R. § 151.16(j).

Accordingly, the court directs CBP to release Eteros' Subject Merchandise at the Port of Blaine, Washington.

SO ORDERED.

Dated: September 21, 2022
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

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