No. 13-

IN THE

Supreme Court of the United States

NSK CORP. *et al.*

Petitioners,

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 19 U.S.C. § 1516a, the United States Court of International Trade ("Trade Court") is granted exclusive jurisdiction to review determinations by the U.S. International Trade Commission ("ITC") and the Department of Commerce ("Commerce") in antidumping and countervailing duty proceedings. The statute makes clear that in such cases, the Trade 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). The Trade Court's decisions are subject to review exclusively by the Federal Circuit under 28 U.S.C. § 1295(a)(5). The judges on the court of appeals are sharply divided over the proper standard of appellate review.

In the current case, the Federal Circuit applied a judicially-created standard, cobbled together over the past 30 years, under which it undertakes *de novo* review of the administrative determination (but with an undefined degree of "due respect" to the decision of the Trade Court)—unless the Trade Court remands for further explanation, in which case the Federal Circuit reviews for abuse of discretion. Judges on the Federal Circuit have repeatedly criticized this convoluted standard of appellate review and called for its replacement with a more consistently deferential standard, most recently in a dissent from the denial of rehearing en banc in this case. Accordingly, the question presented is:

What is the proper standard of appellate review after the Trade Court reviews an agency determination, finding, or conclusion for substantial evidence under 19 U.S.C. § 1516a?

PARTIES TO THE PROCEEDING

Petitioners are JTEKT Corporation, JTEKT North America, Inc., NSK Corporation, NSK Ltd., and NSK Europe Ltd. In the proceedings below, JTEKT North America, Inc. was referred to by its former name, Koyo Corporation of U.S.A.

Respondents are the United States International Trade Commission and The Timken Company, the latter of whom intervened as a defendant in the Court of International Trade.

FAG Italia, S.P.A.; Schaeffler Group USA, Inc.; Schaeffler KG; The Barden Corporation; The Barden Corporation (U.K.) Ltd.; SKF Aeroengine Bearings UK; and SKF USA Inc. intervened as plaintiffs in the Court of International Trade.

RULE 29.6 STATEMENT

JTEKT North America, Inc. is a wholly owned subsidiary of JTEKT Corporation, a publicly-traded company in Japan. Toyota Motor Corp. is a publicly-owned company that owns more than 10 percent of JTEKT Corporation.

NSK Corporation is a wholly-owned subsidiary of NSK Americas, Inc. NSK Americas, Inc. and NSK Europe Ltd. are wholly-owned subsidiaries of NSK Overseas Holdings Co., Ltd. NSK Overseas Holding Co., Ltd. is a wholly-owned subsidiary of NSK Ltd., a publicly traded company in Japan. There is no publicly held company that owns 10 percent or more of the stock of NSK Ltd.

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OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 716 F.3d 1352 and reproduced at Petition Appendix ("Pet. App.") 1a-34a. The order of the Federal Circuit denying rehearing en banc, including opinions concurring in or dissenting from the denial of rehearing en banc, is available at 2013 WL 6009657 and is reproduced at Pet. App. 644a-669a. The opinions of the United States Court of International Trade ("Trade Court") are reported at 774 F. Supp. 2d 1296 ("*NSK VI*"), 744 F. Supp. 2d 1359 ("*NSK V*"), 712 F. Supp. 2d 1356 ("*NSK IV*"), 637 F. Supp. 2d 1311 ("*NSK III*"), 593 F. Supp. 2d 1355 ("*NSK II*"), 577 F. Supp. 2d 1322 ("*NSK I*"), and are reproduced at Pet. App. 35a-41a, 65a-79a, 131a-150a, 256a-288a, 378a-408a, 409a-454a, respectively.

JURISDICTION

The court of appeals entered judgment on May 16, 2013, Pet. App. 1a, and denied the petition for rehearing on October 25, 2013, Pet. App. 654a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 1516a of Title 19 is reproduced at Pet. App. 670a-698a.

STATEMENT OF THE CASE

In the decision below, the Federal Circuit applied a *sui generis*, judicially-crafted standard of appellate review that required it to duplicate the extensive work of the uniquely expert Trade Court in a complex antidumping proceeding. Although its judges are sharply divided over this standard, the Federal Circuit has repeatedly declined to reconsider the precedent establishing it—most recently in a 7-3 decision denying rehearing en banc in this case. This Court should grant review to ensure that decisions of the Trade Court are reviewed under the correct standard.

At issue is the standard of appellate review to be applied after the Trade Court reviews record findings of the ITC or Commerce under 19 U.S.C. § 1516a, to determine whether they are supported by substantial evidence. The statute establishes a unique review structure under which agency determinations in antidumping or countervailing duty proceedings are reviewed exclusively by the Trade Court, the only Article III trial-level court with jurisdiction defined solely by subject matter, 28 U.S.C. §§ 251(a), 1581-1584. But, although Congress granted the Federal Circuit exclusive jurisdiction to hear appeals from the Trade Court, *id.* § 1295(a)(5), it did not expressly provide the standard of appellate review.

Faced with this statutory silence, the Federal Circuit should have followed this Court's well-established framework for ascertaining standards of appellate review. Under that framework, when congressional intent regarding the standard of appellate review under a statutory scheme is not clear from the statutory text or historical tradition, it must be inferred from textual clues, the relative competencies of the trial and appellate courts, and the statutory purpose. *Pierce* v. *Underwood*, 487 U.S. 552, 558-61

(1988); *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 403-04 (1990).

The Federal Circuit, however, did not follow this approach. Instead, it adopted its own unique standard, under which it was required to duplicate the Trade Court's extensive work in this case by "step[ping] into the [Trade Court's] shoes" to conduct *de novo* review. Pet. App. 21a. This standard originated in an opinion issued 30 years ago, when a panel asserted in a footnote, without explanation, that "[w]e review [the Trade Court's] review of an ITC determination by applying anew the statute's express judicial review standard." *Atl. Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984). Over time, the court has modified this standard, first by suggesting that it will give the Trade Court an unspecified (and unpredictable) amount of "due respect," *Suramerica De Aleaciones Laminadas, C.A.* v. *United States*, 44 F.3d 978, 983 (Fed. Cir. 1994), and second by bifurcating the standard to apply deferential "abuse of discretion" review when the Trade Court remands to the ITC for "further explanation," *Nippon Steel Corp.* v. *U.S. ITC*, 494 F.3d 1371, 1378 (Fed. Cir. 2007).

The result is an unpredictable, convoluted, and wasteful system that Congress never intended. Judges on the Federal Circuit have repeatedly criticized the standard for, among other things, requiring duplicative proceedings at odds with Congress's intent to streamline judicial review, rendering the Trade Court effectively superfluous, and being difficult to apply in practice. See, *e.g.*, *Zenith Elecs. Corp.* v. *United States*, 99 F.3d 1576, 1579 (Fed. Cir. 1996) (Plager, J., concurring); *id.* at 1579-83 (Rader, J., concurring); Pet. App. 655a-667a (Wallach, J., dissenting). These judges have argued that deferential ap-

pellate review would be more consonant with congressional intent, and they have called upon the Federal Circuit to adopt a review standard akin to this Court's practice of reviewing substantial evidence determinations by the courts of appeals for whether they "'misapprehended or grossly misapplied'" their own review standard. See *Zenith*, 99 F.3d at 1579 (Fed. Cir. 1996) (Plager, J., concurring); *id.* at 1583-84 (Rader, J., concurring); Pet. App. 656a-658a (Wallach, J., dissenting).

Repeatedly, however, the en banc Federal Circuit has declined to resolve this conflict. See Pet. App. 645a-646a; *Nippon Steel Corp.* v. *United States*, 458 F.3d 1345, 1351 n.3 (Fed. Cir. 2006) (rehearing en banc denied). Because the Federal Circuit is the only court that hears appeals from the Trade Court, its refusal to address the issue means that the conflict—and the wasteful litigation that the court's current rule spawns—will continue absent this Court's review.

This case presents an ideal vehicle for resolving this conflict. Indeed, it offers "a perfect example" of the problems that the Federal Circuit's standard creates. Pet. App. 666a (Wallach, J., dissenting). Here, after the panel "wrestled" to determine which standard to apply based on the nature of the Trade Court's remands, *id.* at 662a, it purported to duplicate the Trade Court's extensive work—which included reviewing five successive ITC determinations and analyzing thousands of pages of record evidence—with only scant analysis, *id.* at 666a. This Court should intervene to ensure that the Federal Circuit does not continue to burden the international trade community with a wasteful standard that runs contrary to congressional intent.

I. STATUTORY BACKGROUND

A. Imposition Of Duties

The Tariff Act of 1930, as amended, authorizes the ITC and Commerce to impose antidumping or countervailing duties on imported products that are, respectively, (a) being sold, or are likely to be sold, in the United States at less than fair value (a practice known as "dumping"), 19 U.S.C. § 1673, or (b) receiving a subsidy from a foreign government, *id.* § 1671(a). Before either type of duty may be imposed, Commerce must determine whether the subject merchandise is being dumped or subsidized and by how much, *id.* §§ 1671(a), (b)(1), 1671d(a), 1673, 1673b(1)(A), 1673d(a), and the ITC must determine whether the subject merchandise causes or threatens to cause material injury to, or retards the development of, the domestic industry, *id.* §§ 1671b(a)(1), 1671d(b)(1), 1673b(a)(1), 1673d(b)(1). A duty will be imposed only if both the ITC and Commerce issue affirmative final determinations. *Id.* §§ 1671d(c)(2); 1673d(c)(2).

After a duty order is imposed, it remains subject to annual administrative reviews whereby Commerce adjusts the duty levels, as well as five-year "sunset" reviews, whereby the ITC and Commerce consider whether revoking the order would cause a continuation or recurrence of (a) material injury to domestic industry and (b) the dumping or subsidy. *Id.* § 1675. If either agency returns a negative determination, the order "sunsets." *Id.* § 1675(c).

B. Trade Court Review

Judicial review of these administrative determinations is accomplished through an arrangement unique to the trade context. Exclusive jurisdiction is vested in the Trade Court, 28 U.S.C. § 1581(c), an Ar-

ticle III court with full powers in law and equity, *id.* §§ 251(a), 1585. Unlike other Article III trial-level courts, the Trade Court's jurisdiction is defined solely by subject matter and is limited to cases involving matters of international trade. See *id.* §§ 1581-1584. Accordingly, judges on the Trade Court have significant "expertise in addressing antidumping issues and deal[ ] on a daily basis with the practical aspects of trade practice." *Int'l Trading Co.* v. *United States*, 281 F.3d 1268, 1274 (Fed. Cir. 2002).

Congress established the Trade Court after a long history of experimenting with other review mechanisms. See generally *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 232-34 (1927). Prior to 1890, trade disputes were brought in the regional district courts, resulting in a patchwork of conflicting decisions, overcrowded dockets, and considerable delays. See *id.* at 232; Giles Rich, *A Brief History of the United States Court of Customs and Patent Appeals* 6 (1980).[1] In response to these problems, Congress in 1890 granted nationwide jurisdiction to handle customs disputes to a specialized Board of Appraisers, which was "specially suited to deal with the technical problems of classification of commodities and their valuation." Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 149 (Transaction Publishers 2007) (1928); see Lombardi, *supra*, at 21-22. Later,

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[1] *See also* Jed Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure*, 7 Okla. L. Rev. 393, 394 (1954) (describing congestion and inconsistency in prior district court actions); Joseph E. Lombardi, *The United States Customs Court: A History Of Its Origins and Evolution* 20 (1976) (published by the court and prepared by its clerk) (noting delays so significant that some cases "remained undecided [after] nearly twenty years" (internal quotation marks omitted)).

upon finding that foreign litigants failed to respect the Board's authority because it lacked the status of a court, Congress reorganized the Board as the United States Customs Court, see Lombardi, *supra*, at 52-58, and eventually conferred upon it full constitutional status under Article III, *id.* at 62-66; see generally *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Finally, in 1980, Congress converted the Customs Court into the modern Trade Court, with expanded jurisdiction and remedial powers. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727.

Under the current system, an interested party to an antidumping or countervailing duty proceeding before Commerce or the ITC may seek judicial review of the agency's determination by filing an action in the Trade Court. 19 U.S.C. § 1516a(a); 28 U.S.C. § 1581(c). When the determination for which review is sought was made on the administrative record—including, as relevant here, a final injury determination by the ITC—"[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). A parallel provision governing Trade Court procedures confirms that "[i]n any civil action commenced in the [Trade Court] under [§ 1516a], the court shall review the matter as specified in subsection (b) of such section." 28 U.S.C. § 2640(b).

This standard of review, which Congress adopted as part of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, was intended to "eliminate *de novo* review of determinations or assessments made pursuant to the antidumping and countervailing duty laws," which often required judicial fact-finding that Congress found "time consuming and duplicative."

H.R. Rep. No. 96-317, at 181 (1979); *accord* S. Rep. No. 96-249, at 248 (1979). The House in particular sought to "streamline and expedite" judicial review by "reduc[ing] . . . redundant proceedings," which, it worried, provided dissatisfied litigants with too many "opportunities to present their claim." H.R. Rep. No. 96-317, at 181.

Although the Trade Court bases its review on the administrative record, it nonetheless plays a significant role in the record-development process. Under 28 U.S.C. § 2643(b), the Trade Court is authorized to "order such further administrative . . . procedures as the court considers necessary to enable it to reach the correct decision," with the same judge generally retaining jurisdiction over the case through multiple successive remands. See *Jeannette Sheet Glass Corp.* v. *United States*, 803 F.2d 1576, 1579-80 (Fed. Cir. 1986); *Cabot Corp.* v. *United States*, 788 F.2d 1539, 1542-43 (Fed. Cir. 1986). Because the proceedings before the ITC and Commerce are informal and not subject to the requirements of the Administrative Procedure Act ("APA"), 19 U.S.C. § 1677c(b), 19 C.F.R. §§ 207.24(b), 351.310(d)(2), the need for such iterative record-development regularly arises. Thus, it is common for the Trade Court to engage in extensive, fact-intensive proceedings by the time it issues a final judgment. See Pet. App. 664a-667a (Wallach, J., dissenting) (citing cases).

C. Appellate Review

The mechanism for appellate review has likewise evolved over time. In 1909, Congress transferred appellate jurisdiction over cases from the Board of Appraisers from the regional courts of appeals to a new, specialized body: the United States Court of Customs Appeals. 36 Stat. 11, 105 (1909). Since that time, that body has been combined with other appellate

tribunals to form the modern Federal Circuit, which has jurisdiction over not only trade appeals, but also a wide variety of other cases including, *inter alia*, patent appeals and appeals from the Court of Federal Claims. 28 U.S.C. § 1295(a). In creating the Federal Circuit, Congress acknowledged that the varied nature of its jurisdiction meant that it would be "markedly less specialized" than its predecessor courts. H.R. Rep. No. 97-312, at 19 (1981); *accord* S. Rep. No. 97-275, at 6 (1981) ("[t]he Court of Appeals for the Federal Circuit will not be a 'specialized court'). As a result of this design, "trade cases comprise only about six percent of the Federal Circuit docket." *Nippon Steel*, 458 F.3d at 1350.

In contrast to the Trade Court's expressly defined standard, "Congress did not specify a standard of review for [the Federal Circuit] in reviewing judgments of the [Trade Court]." *Id.* Moreover, although Congress noted that the *Trade Court* would review ITC and Commerce determinations according to "traditional administrative law principles," S. Rep. No. 96-249, at 252, the legislative history is silent with respect to the standard of *appellate* review.

II. BACKGROUND OF THE CASE

1. This case involves antidumping duty orders on ball bearings from certain countries, including Japan and the United Kingdom. These orders, which were first published in 1989, were continued in 2000 after the ITC concluded in the first sunset review that revocation of the orders would cause a continuation or recurrence of material injury to the domestic industry. Pet. App. 4a-5a. In 2005, the ITC initiated the second sunset review—the review at issue in this case—and, after a year-long review, issued another affirmative injury determination on August 31, 2006. *Id.* at 5a-6a.

2. The proceedings that followed were, in the words of the Federal Circuit, "extensive," involving four remand determinations and six separate opinions by Judge Barzilay. Pet. App. 4a.

In September 2006, Petitioners, who manufacture, import, or export ball bearings from Japan or the United Kingdom, challenged the ITC's injury determination by initiating an action in the Trade Court under 19 U.S.C. § 1516a. On September 9, 2008, the Trade Court, applying the substantial evidence standard under § 1516(b), affirmed in part and remanded in part, holding that the ITC erred in several critical respects. *NSK I*, Pet. App. 409a-454a. Most significantly, the Trade Court found that the ITC had, contrary to law, failed to analyze the extent to which any material injury would be attributable to increased imports from countries *not subject* to the orders at issue, as opposed to imports from subject countries. *Id.* at 420a-425a. The Trade Court also found that the ITC insufficiently explained its decision to assess the impact of imports from the United Kingdom cumulatively with other subject imports. *Id.* at 425a-432a.[2]

On remand, the ITC entered a new affirmative injury determination after purporting to cure these deficiencies. Pet. App. 290a-378a. In August 2009, the Trade Court was compelled to remand again for further explanation because, *inter alia*, (1) it could not "reasonably discern how the ITC" had attributed injury to imports from subject rather than non-subject countries, and (2) the ITC's cumulation analysis

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[2] The Trade Court subsequently denied a motion for reconsideration based on intervening law. *NSK II*, Pet. App. 378a-408a.

failed to account for significant developments within the industry. *NSK III*, Pet. App. 266a-284a.

On the second remand, the ITC again entered an affirmative injury determination. Pet. App. 151a-255a. In April 2010, the Trade Court affirmed the determination in part but remanded for further explanation regarding the cumulation of imports, finding that the ITC's analysis contained numerous unsupported assumptions and inferences. *NSK IV*, Pet. App.142a-148a, 149a-150a. Because this decision affected the assessment of non-subject imports, the Trade Court instructed the ITC to reexamine that issue, as well. *Id.* at 148a-149a.

On the third remand, the ITC asserted that it was "constrained by the [Trade] Court's remand instructions" to issue a negative injury determination for subject imports from the United Kingdom, but again issued an affirmative determination for subject imports from Japan. Pet. App. 94a, 96a-109a. In December 2010, the Trade Court sustained the negative determination but remanded the affirmative determinations because, although the ITC purported to analyze the role non-subject imports, its analysis continued to rest upon conclusory assertions and unsupported inferences. *NSK V*, Pet. App. 70a-76a. On remand, the ITC asserted that it was "compelled" by the Trade Court to issue a negative injury determination; although the Trade Court disagreed with this characterization of its remand instructions, it nonetheless sustained the determination in April 2011. *NSK VI*, Pet. App. 35a-37a.

3. On May 16, 2013, a panel of the Federal Circuit reversed or vacated the Trade Court's decisions in *NSK IV*, *NSK V*, and *NSK VI*, and ordered the ITC's earlier affirmative injury determinations to be reinstated. Pet. App. 33a-34a.

The parties disputed the standard of appellate review. Pet. App. 20a-21a. Applying circuit precedent, the panel held that the standard "depends on the posture of the case," and explained that it would review for abuse of discretion if the Trade Court remanded for further explanation, but would "step[ ] into the shoes" of the Trade Court and duplicate its review if the remand effectively required the ITC either to reverse its determination or to reopen the record. Pet. App. 21a. The panel did not explain how the Federal Circuit derived this convoluted standard. Indeed, the court has *never* provided such an explanation, including when (1) it asserted in a footnote that it would "apply[] anew" the Trade Court's standard, *Atl. Sugar*, 744 F.2d at 1559 n.10, and (2) it asserted that abuse-of-discretion review applies when the remand does not require the ITC to reopen the record or change its determination, *Taiwan Semiconductor Indus. Ass'n* v. *ITC*, 266 F.3d 1339, 1344 (Fed. Cir. 2001).

Applying this standard that was snatched from thin air, the panel parsed both the Trade Court's decisions and the administrative record to conclude that, despite the Trade Court's numerous statements that its remands were for further explanation, *e.g.* Pet. App. 67a, 76a, 148a-149a, it *effectively* required the ITC to reopen the record or to reverse its determinations. *Id.* at 21a. Accordingly, the panel held that it was required to review the Trade Court's decision *de novo* and to duplicate that court's substantial evidence review. *Id.* at 22a. The panel did not mention that, under circuit precedent, it was also required to give the Trade Court's decisions "due respect," *Suramerica*, 44 F.3d at 983. See Pet. App. 20a-23a.

The panel purportedly went on to reassess *de novo* thousands of pages of record evidence in just a few

pages of analysis. Pet. App. 23a-33a. Although the panel acknowledged that "numerous record facts detract from" the ITC's affirmative injury determinations, it asserted that these facts "do not detract from the [ITC's] findings to such an extent that we can say the [ITC's] determinations were not supported by substantial evidence." *Id.* at 32a. In making this bald assertion, however, the panel entirely failed to address many of the specific deficiencies in the ITC's analysis that the Trade Court had identified. Compare Pet. App. 27a-33a, with *NSK V*, Pet. App. 70a-76a.[3]

4. Petitioners timely filed a petition for panel rehearing and rehearing en banc, which the Federal Circuit denied on October 25, 2013. Pet App. 644a. Although the court voted 7-3 against rehearing en banc, eight of the judges authored or joined opinions concurring in or dissenting from the denial.

Judge Lourie, joined by Judges Dyk, Prost, Moore, and O'Malley, authored a concurring opinion that defended the existing standard of review. Pet. App. 646a-655a. According to Judge Lourie, Congress without saying so must have intended for the Federal Circuit to duplicate the Trade Court's work because it modeled review on "traditional principles of administrative law," *id.* at 651a, and courts of appeals reviewing substantial evidence determinations by the regional district courts under 5 U.S.C. § 706 typically undertake *de novo* review, *id.* at 646a-654a. Based on this logic, Judge Lourie concluded that the stand-

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[3] Because the panel ordered the ITC's affirmative determinations to be reinstated, it held that the cross-appeals by the plaintiffs-intervenors—in which they argued that the ITC's negative determinations should be extended to additional countries—were moot. Pet. App. 33a.

ard applied in this case comported with congressional intent, and thus could not be changed without "legislative action." *Id.* at 654a. In reaching this conclusion, Judge Lourie expressly declined to consider whether this standard was "sound policy." *Id.*

In contrast, Judge Wallach, joined by Chief Judge Rader and Judge Reyna,[4] would have granted rehearing to replace the existing standard of appellate review with a deferential standard modeled after this Court's practice of reviewing substantial evidence determinations for whether the lower court "'misapprehended or grossly misapplied'" its own review standard. Pet. App. 656a-657a (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)). As Judge Wallach explained, the statutory text is silent on the standard of appellate review, *id.* at 658a-659a, and the legislative history, far from mandating the current approach, weighs against it because "[d]uplicative and burdensome review at the appellate level is inconsistent with Congress' professed goal of streamlining trade cases at the agency and trial court levels," *id.* at 659a. Judge Wallach found deferential review particularly appropriate in light of the unique features of § 1516a review—including a trial-level court with specialized subject-matter expertise and, in many cases, deep involvement in the record-building process—that distinguish it from review in typical APA cases. *Id.* at 662a-667a.

Judge Wallach catalogued many problems with the current approach to appellate review. First, he explained that it creates an "inefficient and wasteful

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[4] Judges Wallach and Reyna are the only active judges who were judges or practitioners of international trade law before joining the court of appeals. *See Judges—Biographies*, http://www.cafc.uscourts.gov/judges (accessed Feb. 12, 2014).

process" that "deprives litigants of the benefits of the [Trade Court's] subject-expertise, as well as its case-specific experience." Pet. App. 666a-667a. He also criticized the current system as "unworkable." *Id.* at 662a. He noted that although the Federal Circuit "*sub silentio* . . . modifi[ed]" its standard to acknowledge that the Trade Court's opinion is entitled to "'due respect'" or "'great weight,'" the amount of deference in a given case is "unpredictable." *Id.* at 659a-661a.

Judge Wallach also explained that by applying different review standards depending on how much flexibility the ITC was given on remand, the Federal Circuit forces itself to "wrestle" with difficult interpretive questions simply to ascertain the standard of appellate review. Pet. App. 662a. As Judge Wallach explained, there is "simply *no* principled difference between" a remand for "clarification" and a remand for "clarifying data," given that the Trade Court in both situations "finds that a determination was not supported by substantial evidence and sends it back to the agency." *Id.* at 661a-662a (emphasis in original).

REASONS FOR GRANTING THE PETITION

The Federal Circuit applies a standard of appellate review in § 1516a cases that has no basis in the statute and conflicts with the established legal framework for ascertaining standards of appellate review. This Court has made clear that when congressional intent regarding the appellate review standard is not clearly provided by the statutory text or an existing historical tradition, an appellate court should look to several factors—such as the courts' relative competencies and the statute's policy objectives—to ascertain the standard of review that Congress most likely

intended. See, *e.g.*, *Pierce*, 487 U.S. at 558-61; *Cooter & Gell*, 496 U.S. at 403-04. The Federal Circuit never undertook this analysis, and instead applies a judicially-crafted standard that is *not* supplied by text or history, and that has produced results *at odds* with congressional intent and the sound administration of justice. *Infra* Part I. Moreover, this standard increases costs and uncertainties within the international trade system by encouraging needless appeals, increasing the unpredictability of litigation, and prolonging periods of uncertain costs within complex international markets. *Infra* Part II.

The Federal Circuit's exclusive appellate jurisdiction over appeals from the Trade Court, 28 U.S.C. § 1295(a)(5), means that the issue raised in this case will not percolate within other circuits. Nor is the issue likely to ripen further in the Federal Circuit; despite repeated judicial calls to take up the issue en banc, the court has declined to do so. Pet. App. 645a-646a; *Nippon Steel*, 458 F.3d at 1351 n.3 (rehearing en banc denied). Accordingly, this Court is the only forum available to correct the fundamental error embodied in the holding below, and this case provides a perfect vehicle for resolving the question presented. See Pet. App. 666a (Wallach, J., dissenting).

I. THE FEDERAL CIRCUIT APPLIES A *SUI GENERIS* STANDARD OF APPELLATE REVIEW THAT CONFLICTS WITH THE STATUTE AND THE ESTABLISHED FRAMEWORK FOR ASCERTAINING APPELLATE REVIEW STANDARDS.

The decision below perpetuates a judicially-created standard of appellate review that lacks any statutory basis and conflicts with the well-established principles of statutory construction that this Court applies

to ascertain standards of appellate review from statutes that do not expressly specify them.

This Court has explained that when the determination on review "is one for which neither a clear statutory prescription nor a historical tradition exists," the appellate review standard should be determined by analyzing the statutory scheme to ascertain the degree of deference most consistent with congressional intent. *Pierce*, 487 U.S. at 558-59; accord *United States* v. *Booker*, 543 U.S. 220, 260 (2005) (Breyer, J., delivering the opinion of the Court in part) ("a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*"). Although the analysis cannot be reduced to a "comprehensive test," *Pierce,* 487 U.S. at 559, this Court has identified four relevant factors: (1) the "language and structure of the governing statute"; (2) whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"; (3) the degree to which the matters on review are amenable to generalized appellate rules; and (4) the relevant statutory purpose and policy goals, *id.* at 559-61 (internal quotation marks omitted); see *Cooter & Gell*, 496 U.S. at 404; *Booker*, 543 U.S. at 262 (Breyer, J.).

Rather than follow this sound approach, which would have favored deference to the Trade Court's determinations in this case, the Federal Circuit instead duplicated the Trade Court's review based on a standard that an earlier panel adopted, without explanation, in a footnote, *Atl. Sugar,* 744 F.2d at 1559 n.10. Moreover, this review standard has been modified over time to create a hopelessly complex approach to review that Congress could not have imagined. See Pet. App. 659a-662a (Wallach, J. dissenting). In contrast, under the approach outlined in

Pierce, deferential appellate review is implicit in the statutory scheme because (a) neither the statutory text nor historical practice delineates a clear standard, *infra* Part I.A., and (b) all of the relevant factors indicate that Congress *did not* intend for the Federal Circuit to duplicate the Trade Court's work, *infra* Part II.B. The Federal Circuit's departure from this Court's precedent, and the resulting application of an erroneous and burdensome review standard, warrant this Court's review.

A. The Standard Of Appellate Review For Substantial Evidence Determinations Under § 1516a Is Not Supplied By Clear Statutory Text Or Historical Tradition.

Neither the text of § 1516a nor historical tradition indicates that Congress intended the Federal Circuit to apply a particular standard of appellate review after the Trade Court reviews agency determinations for substantial evidence, and they certainly provide no support for the hybrid standard that the Federal Circuit created.

1. As the Federal Circuit has repeatedly acknowledged, § 1516a specifies only the standard of review to be applied by the Trade Court, without expressly providing a standard of appellate review. *Nippon Steel*, 458 F.3d at 1350; *Suramerica*, 44 F.3d at 982 n.1. Although the statute states that the "substantial evidence" review standard is to be applied by "[t]he court," 19 U.S.C. § 1516a(b)(1)(B)(i), it is clear from context that "the court" here refers to the Trade Court, not the Federal Circuit. See *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language . . . depends on context.") (citation omitted).

For example, § 1516a contains detailed provisions regarding the procedures to be followed in the Trade Court, *e.g.*, 19 U.S.C. § 1516a(a), and repeatedly refers to that court as simply "the court," see, *e.g.*, *id.* § 1516a(c)(1) (discussing injunctions issued by "the court"); *id.* § 1516a(d) (providing that a party joining an action in the Trade Court must do so in the manner "prescribed by rules of the court"). Likewise, a separate provision that identifies the Trade Court's standards of review repeatedly refers to that tribunal as "the court"—including when directing the Trade Court to apply the standards set forth in § 1516a(b). 28 U.S.C. § 2640(b). In contrast, not a single provision of § 1516a governs the procedures to be followed in the Federal Circuit, and there is no separate provision defining the standard of appellate review in cases under § 1516a.[5]

The legislative history reinforces this understanding. Whereas Congress, in adopting § 1516a(b), discussed at length the standard to be applied by the Trade Court, H.R. Rep. No. 96-317, at 179-84; S. Rep. No. 96-249, at 244-53, it never discussed the standard of appellate review.[6] Given that Congress intended

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[5] Indeed, the only references to the Federal Circuit appear in provisions related to publishing the final judicial disposition—which, depending on whether or not an appeal is taken, could be done by the Trade Court or the Federal Circuit. *See* 19 U.S.C. § 1516a(c), (e). Although these provisions do, in places, use the phrase "the court" to refer generally to either court, Congress did not refer to the Federal Circuit anywhere outside these two subsections. In any event, even if the meaning of "the court" in § 1516a(b) were ambiguous, the statute does not provide a "clear statutory prescription" that obviates the need to consider other factors. *Pierce*, 487 U.S. at 558-59.

[6] Nor did Congress address the relevant appellate review standard in the subsequent legislation establishing the Trade Court and the Federal Circuit, or in the reports accompanying

to "streamline and expedite" judicial review at the Trade Court, H.R. Rep. No. 96-317, at 181, it is implausible that Congress simultaneously intended § 1516a(b) to require duplicative appellate review without so much as mentioning that odd approach.

2. The standard of appellate review under § 1516a likewise is not supplied by "historical tradition." For "historical tradition" to supply a standard of appellate review, it must be clear that Congress "would have expected" the standard to apply based on that tradition. *Pierce*, 487 U.S. at 559 n.1 (finding past practices too inconsistent to provide insight into congressional expectations). But § 1516a was adopted to *repudiate* past practices in the trade context, not to codify them. And although Congress required the Trade Court to apply a review standard drawn from the administrative law context, Congress could not have expected the APA tradition to supply a particular standard of *appellate* review in light of, *inter alia*, the express inapplicability of the APA to the administrative actions under review under § 1516a, the significant differences between review under § 1516a and APA review, and the historically varied approaches to appellate review under the APA. In all events, the hybrid standard applied by the Federal

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either enactment. *See* Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; H.R. Rep. No. 96-1235 (1980); S. Rep. 96-466 (1979); H.R. Rep. No. 97-312 (1981); S. Rep. No. 97-275 (1981). Although Congress, in establishing the Trade Court, provided that its factual findings would be reviewed for clear error, this provision—which was among the many provisions deleted without explanation when the Federal Circuit was established—would not have applied when (as here) the Trade Court conducts no additional factfinding. *See* Pub. L. No. 96-417, § 403(d), 94 Stat. at 1741; Pub. L. No. 97-164, § 140, 96 Stat. at 44.

Circuit—under which the review standard varies depending on how the Trade Court's remand instructions are parsed—is completely unmoored to *any* historical tradition.

a. Historical practice in the trade context does not support the Federal Circuit's approach. To the contrary, Congress made clear in adopting § 1516a(b) that its goal was to abandon existing standards of judicial review, which it found "unclear and conflicting." S. Rep. No. 96-249, at 251.

Specifically, Congress sought to eliminate the Customs Court's "time consuming and duplicative" practice of *de novo* fact-finding, and to replace it with review based solely on the administrative record. *Id.*; *accord* H.R. Rep. No. 96-317, at 181. Congress recognized, however, that record-based review generally was not feasible under existing law because the administrative proceedings on review were too "informal" and "non-adversarial" to protect parties' rights without the safeguard of additional factfinding on judicial review. H.R. Rep. No. 96-317, at 181. As Congress explained, the system of record-based review established under § 1516a(b) was feasible only because Congress simultaneously expanded parties' rights at the administrative level, enabling greater participation and access to records. *Id.*; *accord* S. Rep. No. 96-249, at 251-52; see Pub. L. No. 96-39, 93 Stat. at 150, 186-88.[7] These innovations at the administrative level enabled the Trade Court to review determinations *differently* than it had in the past.

Although Congress expressed no view regarding how appellate review would proceed, it is unlikely that it expected the Court of Customs and Patent Ap-

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[7] These provisions, as amended, are codified at 19 U.S.C. §§ 1677c, 1677e, and 1677f.

peals ("CCPA")—the predecessor to the Federal Circuit—to review Trade Court decisions using standards held over from the old, abandoned system. Indeed, given the express congressional understanding that pure record-based review previously was not feasible in the Trade Court, Congress *could not* have expected the CCPA to have established a consistent or well-developed approach to appellate review in such cases.

In fact, the CCPA's historical approach was anything but consistent or well-developed. As described by the former chief judge of the Trade Court, appellate review in this area was "a morass of ill-defined statutory guidelines and inconsistent judicial practice."[8] The CCPA construed the scope of its review as exceedingly narrow and limited to review for legal errors.[9] Even when the CCPA occasionally purported to review agency determinations for "substantial evidence," it declined to "question the correctness of findings drawn" from the evidence. *Imbert Imports, Inc.* v. *United States*, 475 F.2d 1189, 1191-92 (C.C.P.A. 1973) (internal quotation marks omitted). Cf. *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (explaining that "substantial evidence" review "re-

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[8] Gregory W. Carman, *A Critical Analysis of the Standard of Review Applied by the Court of Appeals for the Federal Circuit in Antidumping and Countervailing Duty Cases*, 17 J. C.R. & Econ. Dev. 177, 180 (2003).

[9] *See, e.g.*, *City Lumber Co.* v. *United States*, 457 F.2d 991, 994 (C.C.P.A. 1972) ("[review was limited to] determining whether the [agency] has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law"); *Kleberg & Co.* v. *United States*, 71 F.2d 332, 335 (C.C.P.A. 1933) ("[W]e are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of.").

quir[es] a court to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion" (internal quotation marks omitted)). And, although the CCPA ostensibly applied the same standard as the Customs Court, it "as a practical matter . . . accorded some deference to the prior review by the Customs Court." *Zenith*, 99 F.3d at 1581 (Rader, J., concurring). See, *e.g.*, *City Lumber Co.* v. *United States*, 457 F.2d at 991, 994 (C.C.P.A. 1972) (discussing and relying on Customs Court analysis).

There is no indication that Congress, in creating a new framework for review, expected that any particular element of these practices would continue. And Congress could not have expected the CCPA (or its successor court) to apply the hybrid standard that was cobbled together over time and employed in this case, given that the CCPA *never* used that standard before Congress enacted § 1516a(b).

b. The Federal Circuit's standard is likewise unsupported by any tradition outside the trade context. Although Congress directed the Customs Court (and later the Trade Court) to apply a standard of review based on "traditional administrative law principles," S. Rep. No. 96-249, at 252, the available evidence indicates that Congress did not expect that tradition to supply a particular standard of *appellate* review—and certainly not the convoluted standard the Federal Circuit has developed.

First, Congress took affirmative steps to ensure that actions under § 1516a would *not* be reviewed under the APA's judicial review provision, 5 U.S.C. § 706. In contrast to actions brought pursuant to the Trade Court's residual jurisdiction under 28 U.S.C. § 1581(i)—for which Congress affirmatively provided that § 706 *would* govern judicial review, 28 U.S.C.

§ 2640(e); see *Shinyei Corp. of Am.* v. *United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004), Congress provided that actions under § 1516a would be reviewed pursuant to a *separate* provision. 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b); 28 U.S.C. § 1581(c). Given that Congress knew how to require review under § 706 when it wanted to do so, its decision not to do so for actions under § 1516a—but instead to provide affirmatively for different review—indicates that Congress did not intend to import the entire tradition of APA review. Cf. *Elgin* v. *Dep't of the Treasury*, 132 S. Ct. 2126, 2134-35 (2012) (explaining that when "Congress decline[s] to include an exemption" after demonstrating that it "kn[ows] how to provide" for one, it "indicates that Congress intended no such exception").

Second, Congress designed judicial review under § 1516a to be materially different from judicial review under the APA. Not only did it exempt the relevant agency hearings from the APA's requirements, 19 U.S.C. § 1677c(b), but it established a review structure unheard of outside the trade context, with exclusive jurisdiction granted to the only Article III trial court that hears cases solely within its area of subject-matter expertise. See *id.* § 1516a(a)(1)(D). In addition, it enabled the Trade Court to play a significantly greater role in developing the administrative record—and to engage in far more back-and-forth with the agency—than is typical in an APA case. See *supra* p.8; Pet. App. 664a-667a (Wallach, J., dissenting); cf. *Sullivan* v. *Hudson*, 490 U.S. 877, 885 (1989) (describing "direct interaction between a federal court and an administrative agency" in the record-building process as "unusual" and "alien to traditional review of agency action under the [APA]").

Third, contrary to Judge Lourie's suggestion, Pet. App. 646a-647a, the historical approaches to appellate review under the APA were too diverse to supply Congress with a clear expectation of how appellate review would proceed under § 1516a. As then-Judge Breyer observed, courts had produced "a luxuriant jungle of differing review descriptions" to address an appellate court's review of a trial-level court's review of an agency record. *Sierra Club* v. *Marsh*, 769 F.2d 868, 871 (1st Cir. 1985) (comparing cases applying standards of appellate review that ranged from clear error to *de novo*) (internal quotation marks omitted).

In *Marsh*, for example, then-Judge Breyer took a "practical" approach under which the degree of deference on appeal to the trial court's review of the record "depend[s] upon the particular features of the particular case that seem to make a more independent, or a less independent, appellate court scrutiny of the administrative record appropriate." *Id.* at 871-72 (noting that deferential review might be warranted when, for example, the district court conducts "lengthy . . . proceedings in which knowledgeable counsel explain the agency's decisionmaking process in detail").[10] Were a court to take this practical approach, it easily could conclude that the unique features of § 1516a review, including the Trade Court's subject-matter and case-specific expertise, counsel in favor of deferential review. As such, Congress could not have expected that, by providing for trial-level review of an administrative record, the record necessarily would be reviewed *de novo* on appeal.

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[10] The First Circuit continues to adhere to this approach. *See, e.g.*, *Airport Impact Relief, Inc.* v. *Wykle*, 192 F.3d 197, 203 (1st Cir. 1999).

Finally, and in all events, the standard applied in this case is not grounded in *any* administrative law tradition. Thus, even if Congress had unstated assumptions about the appellate review standard based on historical practice under the APA, it could not have anticipated the Federal Circuit's novel approach.

B. The Factors Traditionally Used To Infer Standards Of Appellate Review Weigh Against The Federal Circuit's Standard.

Absent a clear statutory command or historical tradition, the Federal Circuit should have looked to the traditional factors that this Court has examined to determine what standard of appellate review is most consistent with congressional intent. See *Pierce*, 487 U.S. at 558-62; *Cooter & Gell*, 496 U.S. at 404; *Booker*, 543 U.S. at 262 (Breyer, J.). The Federal Circuit, however, never undertook this analysis, and Judge Lourie, writing for five members of the court, incorrectly suggested that the practical and policy implications of the Federal Circuit's review standard are irrelevant to ascertaining congressional intent. Pet. App. 654a.

In contrast, the judges who have considered these factors (even if not as part of a *Pierce* analysis) uniformly have concluded that duplicative appellate review is inconsistent with congressional intent. *Zenith*, 99 F.3d at 1579 (Plager, J., concurring); *id.* at 1579-83 (Rader, J., concurring); Pet. App. 655a-667a (Wallach, J., dissenting). Indeed, each of the relevant factors indicates that a deferential standard—such as whether the Trade Court misapprehended or grossly misapplied its own review standard—is appropriate.

First, although the statute is silent as to the appellate review standard, its language and structure are

consistent with deferential review. In *Pierce*, this Court explained that a provision authorizing the district court to award attorney's fees "'unless *the court finds* that the position of the United States was substantially justified,'" supports deferential appellate review by indicating that "the determination is for the district court to make." 487 U.S. at 559 (emphasis in original) (quoting 28 U.S.C. § 2412(d)(1)(A)). Similarly, § 1516a(b)(1)(B)(i) requires "[t]he court [to] hold unlawful any determination" "*found* . . . to be unsupported by substantial evidence," indicating that the "determination" is for "[t]he court" to make. Although, as this Court noted, this phrasing does not "compel[ ]" deferential appellate review, 487 U.S. at 559, it is certainly consistent with it.

Second, deferential appellate review is appropriate because, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. at 559-60 (internal quotation marks omitted). The Trade Court possesses at least two institutional advantages over the Federal Circuit. First, whereas "[t]he expertise of the [Trade Court] . . . guides it in making complex determinations in a specialized area of the law," *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 394 (1999), the Federal Circuit lacks similar expertise. Although the Federal Circuit has exclusive jurisdiction to hear appeals from the Trade Court, trade cases comprise a relatively small portion of its varied docket, and only two of its active judges were judges or practitioners of international trade law before joining the court of appeals, see *supra* pp.9, 14 & n.4.

In addition, Trade Court review is "typically [a] multi-year, iterative process, [whereby] the case is repeatedly remanded" and cannot be appealed "until

the [Trade Court] ultimately sustains the agency's decision." Pet. App. 665a (Wallach, J. dissenting); see *supra* p.8. As a result, Trade Court judges often develop deep, case-specific expertise that not only is atypical of traditional agency review, *Sullivan*, 490 U.S. at 885-86, but also is difficult for an appellate panel to acquire without "unusual expense." *Pierce*, 487 U.S. at 560.

This case illustrates vividly that the Federal Circuit lacks the expertise and resources to duplicate the Trade Court's work. After the Trade Court engaged in an "extensive" process involving multiple targeted remands and thousands of pages of record evidence, Pet App. 4a-20a, the Federal Circuit reversed with an opinion that, in its few pages of cursory analysis, wholly failed to acknowledge—much less to address—many of the flaws that the Trade Court identified in the ITC's reasoning.[11] Instead, the panel relied on the administrative deference inherent in "substantial evidence" review—which affords agencies significant discretion to weigh the evidence, provided they do so "'reasonabl[y],'" *Zurko*, 527 U.S. at 162—to avoid undertaking the complex analysis that true *de novo* review would have required. See Pet. App. 32a (assert-

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[11] These unacknowledged flaws include the ITC's failure to explain (1) how importers from countries subject to the antidumping duty orders could resume past strategies of underselling the domestic industry in light of the large increase in non-subject imports' market share; (2) how a decrease in the price of subject imports could materially injure the domestic industry given that the already low-priced non-subject imports would almost certainly reduce their prices, preventing subject imports from achieving the requisite impact; and (3) why the analysis of likely volumes of subject imports was limited to certain segments of the domestic market. *Compare NSK V*, Pet. App. 73a-76a (describing these and other gaps in ITC's explanation), *with* Pet. App. 27a-33a (failing even to acknowledge these problems).

ing, without explanation, that record facts acknowledged to weigh against the ITC's initial findings "do not detract from [them] to such an extent that [they] were not supported by substantial evidence").

Third, substantial evidence review under § 1516a presents issues that are "little susceptible" to resolution through broad appellate rules, but instead are "likely to profit from the experience that [deferential review] will permit to develop" at the Trade Court. *Pierce*, 487 U.S. at 562. In contrast to pure questions of law,[12] substantial evidence review under § 1516a requires fact-intensive inquiry involving large records in a highly specialized area. As this case demonstrates, problems with the agency's evidentiary analysis are most likely to be identified—and to be addressed—through careful review by the Trade Court. Whereas deferential appellate review "will permit [the Trade Court] to develop" useful precedent and experience, *id.*, *de novo* appellate review tends to impede such development by entrusting fact-intensive inquiries to an appellate body that lacks the expertise or resources to resolve them. See *supra* pp.9, 28.

Finally, deferential appellate review advances the statutory purpose and policy goals that motivated Congress to adopt the § 1516a(b) review standards. Cf. *Cooter & Gell*, 496 U.S. at 404; *Booker*, 543 U.S. at 262 (Breyer, J.). As explained *supra*, Congress sought to "streamline and expedite" judicial review by "reduc[ing] . . . redundant proceedings," which, it worried, provided dissatisfied litigants with too many "opportunities to present their claim." H.R. Rep. No. 96-317, at 181; accord S. Rep. No. 96-249, at 251 (crit-

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[12] Petitioners do not suggest that the Federal Circuit should abandon *de novo* review of purely legal questions in cases under § 1516a.

icizing *de novo* review as "time consuming and duplicative"). Although Congress focused on eliminating unnecessary duplication by the Trade Court, duplication at the appellate level is equally at odds with these goals. Indeed, as Judge Plager has noted, the Federal Circuit's duplicative standard not only "waste[s] scarce judicial resources," but "encourages disappointed litigants with deep pockets to seek a second bite at the apple, often with no visible benefits except to the litigators." *Zenith*, 99 F.3d at 1579 (Plager, J., concurring). In so doing, it accomplishes exactly what Congress intended to *avoid*.

II. PROPER INTERPRETATION OF 19 U.S.C. § 1516a IS A QUESTION OF EXCEPTIONAL IMPORTANCE TO INTERNATIONAL TRADE AND THE NATION'S ECONOMY.

The Federal Circuit's erroneous standard of appellate review affects broad segments of the nation's economy, foreign trading partners and governments, and the role of the United States in the international trading system. There are nearly 300 antidumping or countervailing duty orders currently in place, which apply to goods imported from 40 different countries in industries as diverse as food and agriculture, chemicals and pharmaceuticals, iron and steel, equipment and machinery, and manufactured goods. Int'l Trade Comm'n, *AD/CVD Orders in Place*, http://www.usitc.gov/trade_remedy/documents/orders.xls (accessed Feb. 12, 2014). These orders—which affect billions of dollars in imports, Int'l Trade Comm'n, *Import Injury Investigations Case Statistics (FY 1980-2008)* tbl.5 (2010), http://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf—generate enormous amounts of complex litigation, including § 1516a actions to review administrative determinations in the annual and sunset reviews to which every

order is subject. In 2013 alone, the Trade Court issued over 100 determinations in such cases. U.S. Court of Int'l Trade, *Slip Opinions*, http://www.cit.uscourts.gov/SlipOpinions/index.html (last modified Feb. 4, 2014).

The current appellate review standard increases the expense of litigating in this system, resulting in "unnecessary costs to the parties as well as a drag on national and international commercial intercourse." Carman, *supra*, at 184. By offering parties the opportunity to relitigate their disputes under the same standard applied by the Trade Court, the Federal Circuit encourages appeals that otherwise might not be taken and broadens the scope of issues on appeal. Cf. *Zenith*, 99 F.3d at 1579 (Plager, J., concurring). Moreover, the Federal Circuit's standard increases the uncertainty of such litigation in several critical respects.

First, it is unclear how much practical deference the court will give the Trade Court's decision in a particular case. Although panels frequently assert that the Trade Court's decision is entitled to "'due respect,'" or even "'great weight,'" Pet. App. 655a (Lourie, J., concurring), the respect actually given varies significantly. Whereas some panels closely examine the Trade Court's analysis, *e.g.*, *Suramerica*, 44 F.3d at 985-87; *Nippon Steel*, 458 F.3d at 1353-59, others clearly do not, *e.g.*, *Cleo Inc.* v. *United States*, 501 F.3d 1291, 1296, 1297-1303 (Fed. Cir. 2007) (calling Trade Court's decision "'the starting point of our analysis'" but failing to discuss it further); *Matsushita Elec. Indus. Co.* v. *United States*, 750 F.2d 927, 932-33 (Fed. Cir. 1984) (purporting to "determine whether the [Trade Court] correctly applied the statutory standard" but basing its decision on its own "review [of] the Commission's decision"). And in the

current case, the panel dispensed with any pretense that it was giving "due respect" to the Trade Court's decision, failing either to acknowledge the "due respect" requirement or to engage meaningfully with the Trade Court's analysis. Pet. App. 20a-34a.

Second, there is often considerable uncertainty regarding what standard of appellate review the court will apply in a given case. To determine the applicable standard, the Federal Circuit purports to perform a functional analysis of the Trade Court's decision, under which the language of the order is "not dispositive of the issue." *Diamond Sawblades Mfrs. Coal.* v. *United States*, 612 F.3d 1348, 1356 (Fed. Cir. 2010). Under this approach, the standard of review itself becomes a litigable issue, with the Court forced to engage in "lengthy," "labored," and "extensive" analysis. Pet. App. 662a (Wallach, J. dissenting); see, *e.g.*, *Diamond Sawblades*, 612 F.3d at 1356-58; *Altx, Inc.* v. *United States*, 370 F.3d 1108, 1117 (Fed. Cir. 2004); Pet. App. 20a-23a.

Third, the Federal Circuit's relative inexperience, compared with the Trade Court, generates unpredictability as to how the court will address a given merits issue. In this case, for example, the panel failed even to acknowledge many of the problems the Trade Court identified with the ITC's analysis when it baldly asserted that the ITC's remand determination was supported by substantive evidence. See *supra* pp.12-13.

The result—a system in which parties can, as in this case, litigate for years before the Trade Court and the agency, only to roll the dice in an appeal in which even the standard of review is unclear—undermines that "predictability and stability [that] are of prime importance" to commercial regulation. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 271

(1994). Moreover, uncertainty regarding the amount or applicability of import duties can ripple throughout the economy, affecting not only foreign manufacturers and importers, but also the domestic consumers for whom increased duties mean higher prices and the domestic competitors whose prices and market shares likewise may vary depending the price of imports. See generally *Sioux Honey Ass'n* v. *Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046-47 (Fed. Cir. 2012); N. Gregory Mankiw, *Principles of Economics* 181 (1998). Moreover, these ripple effects are often magnified through injunctions that prevent the final assessment of duties on past imports until the conclusion of litigation—which, as in this case, can take years to arrive. See 19 U.S.C. § 1516a(c), (e); *Yancheng Baolong Biochem. Prods. Co.* v. *United States*, 406 F. 3d 1377, 1380-82 (Fed. Cir. 2005).

Review is warranted to ensure that the Federal Circuit does not employ a standard of appellate review that simultaneously increases the number of appeals, undermines the predictability of their outcomes, and extends and exacerbates periods of uncertainty in international markets.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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