No. 13-1014

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

REPLY BRIEF

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May 12, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

In this antidumping appeal, the Federal Circuit applied its unique, judicially created standard of appellate review that renders superfluous the expert analysis of the Court of International Trade ("Trade Court"). Although the statute by its terms directs the Trade Court to review agency determinations for "substantial evidence," 19 U.S.C. § 1516a(b)(1)(B)(i), the text is silent as to the standard of appellate review once the Trade Court has rendered its decision. In the face of this silence, the Federal Circuit crafted an anomalous standard out of whole cloth. Under that standard, the Trade Court's decision is sometimes reviewed *de novo* and at other times for abuse of discretion, depending on the scope of authority given to the International Trade Commission ("ITC") on remand. Pet. App. 21a.

This bifurcated standard is unmoored from the statute's text and lacks any historical tradition, which places on the Federal Circuit the burden to demonstrate that its approach is justified as a matter of prudent judicial administration. See, *e.g.*, *Pierce* v. *Underwood*, 487 U.S. 552, 558-61 (1988); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-04 (1990). It has never attempted to make that showing. Nor could it: As dissenting Federal Circuit judges have repeatedly noted, see Pet. 3-4, the current approach squanders judicial resources by forcing non-experts to duplicate complex, record-intensive work that Congress entrusted to the only specialized Article III trial court in existence.

Tellingly, respondents make no effort to defend the practical consequences of the Federal Circuit's approach. Instead, they argue that this approach is compelled by appellate review practices in other con-

texts. Timken Opp. 10-12; Federal Respondent Opp. 11-12 ("ITC Opp."). Respondents' arguments are implausible. There is no other context that utilizes the same bifurcated standard, and respondents' suggestion that Congress intended duplicative appellate review is belied not only by Congress's overarching intent to *streamline* judicial proceedings, Pet. 19-20, but also by features that make substantial evidence review in this context particularly ill-suited to duplication, *id.* at 29.

Review is warranted to repair a judicial review process that is obviously broken and that has long divided judges on the Federal Circuit. Pet. 3-4. Contrary to The Timken's Company's ("Timken's") suggestion that disputes involving standards of appellate review in the Federal Circuit do not merit this Court's attention, Timken Opp. 4, 8, this Court routinely grants review in such cases. *E.g.*, *Teva Pharmaceuticals USA* v. *Sandoz, Inc.*, 723 F.3d 1363 (Fed. Cir. 2013), *cert. granted* 82 U.S.L.W. 3566 (Mar. 31, 2014) (No. 13-854); *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 2014 U.S. LEXIS 3106 (U.S. Apr. 29, 2014); *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006). It should do the same here.

I. THE FEDERAL CIRCUIT'S *SUI GENERIS* STANDARD OF APPELLATE REVIEW HAS NO TEXTUAL OR HISTORICAL BASIS.

When congressional intent regarding the standard of appellate review cannot be ascertained from statutory text or historical tradition, a functional analysis is required. *Pierce*, 487 U.S. at 558-61; *Cooter*, 496 U.S. at 403-04. Respondents do not dispute that the text is silent as to the appellate review standard in actions under § 1516a. Timken Opp. 14, 16; ITC Opp. 7. Nor can they identify any historical practice that Congress "would have expected" to supply the

appellate review standard in this context. *Pierce*, 487 U.S. at 558 n.1.

1. Congress would not have expected historical practices in trade cases to supply the appellate review standard. In 1979, when Congress first directed the Trade Court (then the Customs Court) to review agency determinations on the record for substantial evidence, it sought to *abandon* prior review practices, not to codify them. Pet. 21. Respondents do not argue otherwise. Timken itself acknowledges that the Customs Court always conducted *de novo* fact-finding when reviewing administrative determinations in antidumping and countervailing duty determinations, which meant that judicial review was "'never'" on "'an administrative record'" prior to 1979. Timken Opp. 19 n.15 (quoting *AGS Indus., Inc.* v. *United States*, 467 F. Supp. 1200, 1231-32 (Cust. Ct. 1979)). Given this history, Congress could not have expected prior practices in this context to supply an appellate review standard in cases involving substantial evidence review on an administrative record. Pet. 20-22. And it certainly could not have anticipated the idiosyncratic, bifurcated review standard that the Federal Circuit has now contrived. *Id.* at 23.

Unsupported by history in the trade context, respondents instead point to developments concerning trade that *post-date* the statute's 1979 enactment, such as decisions by the Federal Circuit (and its predecessor court) reviewing substantial evidence determinations under § 1516a. Timken Opp. 26-27; ITC Opp. 13-14. But these post-enactment developments shed no light on what Congress "would have expected" when enacting the statute. *Pierce*, 487 U.S. at 558 n.1. Respondents suggest that Congress, by not affirmatively repudiating these decisions, somehow ratified them. Timken Opp. 17-18; ITC Opp. 14.

But it is well established that "congressional failure to act [does not] represent[ ] affirmative congressional approval." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (internal quotation marks omitted).

2. Congress likewise would not have expected that, by directing the Trade Court to review certain agency determinations for "substantial evidence," 19 U.S.C. § 1516a(b)(1)(B)(i), the Federal Circuit would import a *de novo* review standard from outside the trade context. And it certainly would not have imagined that the Federal Circuit would adopt its *sui generis*, bifurcated approach.

a. By directing the Trade Court to review agency determinations for "substantial evidence," Congress entrusted that court with the responsibility to "canvas[ ] the whole record in order to ascertain" whether "the evidence supporting [the agency's] decision is substantial, when viewed in the light that the record in its entirety furnishes." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951) (internal quotation marks omitted). Thus, when the Trade Court reviewed the ITC's injury determinations in this case, it undertook a fact-intensive review of the entire record to determine whether the supportive evidence, when weighed against detracting evidence, rose to the level of "substantiality." *Id.*; accord *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (court must assess whether "a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion" (internal quotation marks omitted)).

Respondents argue that Congress must have intended the Trade Court's substantiality assessment to be reviewed *de novo* on appeal because it is "essentially legal" in nature. ITC Opp. 8; accord Timken Opp. 22-23 n.17. But courts of appeals often use def-

erential standards to review fact-dependent legal questions. See, *e.g.*, *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991) (describing examples of "deferential review of mixed questions of law and fact"). This Court has explained that where, as here, Congress directs a trial court to make a fact-laden determination, the appellate review standard must be ascertained based on, *inter alia*, which court is "'better positioned'" to decide the issue and the degree to which "probing appellate scrutiny" might clarify the applicable legal doctrine. *Id.*; accord *Pierce*, 487 U.S. at 560. Thus, contrary to respondents' suggestion, the nature of the question on review does not foreclose a functional analysis; it triggers one.

b. Congress would not have expected a different result based on how courts of appeals review agency determinations in other contexts. Respondents argue that because Congress directed the Trade Court to review agency action using a standard similar to the one utilized under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, deferential appellate review would amount to an impermissible "'carve out'" from general administrative law practices. ITC Opp. 15; accord Timken Opp. 23. But it is the Federal Circuit's anomalous, bifurcated standard—not deferential appellate review—that is unmoored to any tradition, and respondents make no effort to explain how APA review practices could possibly justify the Federal Circuit's unique approach to appellate review. Instead, respondents limit their arguments to the portion of the Federal Circuit's standard that calls for *de novo* review. But substantial evidence review under § 1516a is unlike agency review in other contexts, and its features indicate that Congress intended the Trade Court's decisions to be reviewed deferentially on appeal.

First, had Congress intended APA review standards to apply in their entirety, it could have directed the Trade Court to apply § 706—as it did for other trade agency review actions. See 28 U.S.C. § 2640(e). It did not, and instead created a distinct review provision. Pet. 23-24. Timken's response—that this was the only way for Congress to apply the substantial evidence review standard to highly informal trade agency determinations, Opp. 21-22—ignores multiple ways in which Congress readily could have applied § 706. See, *e.g.*, 5 U.S.C. § 706(2)(E) (substantial evidence review for cases "otherwise reviewed on the record of an agency hearing provided by statute"); 28 U.S.C. § 2640(e) (directing Trade Court to "review the matter as provided" in § 706).

Second, substantial evidence review under § 1516a is significantly different from agency review in other contexts. Because of the complexity of trade cases and their exceptional importance to international commerce, Congress channeled review of agency action in this area—and none other—through a specialized Article III trial court. Pet. 2, 5-8. Respondents offer no explanation as to why agency review cases arising through the regional district courts would have informed Congress's view of cases arising through the specialized Trade Court.

Moreover, Trade Court review is distinguished by the judges' unusual degree of case- and record-specific knowledge. *Id.* at 24, 27-28. Because the same antidumping and countervailing duties must be sustained by repeated determinations by two different agencies, 19 U.S.C. §§ 1671d, 1673d, 1675, Trade Court judges hear numerous related cases involving the same underlying duties. JBIA Br. 15, 19. In addition, Trade Court review often involves multi-year, iterative remands that result in far more back-and-

forth with the agency than is typical in administrative review cases. Pet. 8, 27-28; Pet. App. 665a (Wallach, J. dissenting).[1] Respondents do not dispute that these features are unusual, but they contend that they are irrelevant because other administrative review cases involving iterative remands—those involving Social Security benefits—are subject to *de novo* appellate review. Timken Opp. 24 n.18; ITC Opp. 13. But the regional district judges who hear such cases lack the Trade Court's subject-matter expertise, and the cases do not remotely approach the complexity of antidumping and countervailing duty reviews. See *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 394 (1999).

Finally, contrary to respondents' suggestions, there is no iron-clad rule of administrative law that a trial court's review of an agency record is subject to *de novo* review on appeal. Pet. 25; *Sierra Club* v. *Marsh*, 769 F.2d 868, 871-72 (1st Cir. 1985) (Breyer, J.) (describing situations warranting deferential appellate review). Respondents' contention that deferential appellate review is reserved for cases involving independent judicial factfinding, Timken Opp. 19; ITC Opp. 9, is simply incorrect. See *Marsh*, 769 F.2d at 872 (explaining that deferential review may be warranted in additional circumstances based on the "particular features of the particular case").

This Court's decision in *Florida Power & Light Co.* v. *Lorion*, 470 US 729 (1985), is not to the contrary. That decision held that a decision by the Nuclear Regulatory Commission denying a citizen petition

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[1] Because these features are a direct outgrowth of statutory design, there is no merit to ITC's suggestion, Opp. 12-13, that the Trade Court's case-specific knowledge does not reflect congressional intent.

was reviewable exclusively in the courts of appeals, in part to avoid the "duplication of judicial review" that would result from initiating such review in the district courts. *Id.* at 742. Contrary to ITC's suggestion, Opp. 8, this Court announced no rule that layered judicial review of agency action *always* must be duplicative, but merely recognized that, under the APA, layered review "typically" presents reviewing courts with identical tasks, 470 U.S. at 744. If anything, this Court's admonition that duplicative judicial review departs from "sound policy" and should not be assumed from congressional silence, *id.* at 744-45, indicates that it is *inappropriate* to assume from silence that Congress intended duplicative review here, particularly given the clear congressional intent to "'streamline'" judicial review and to *avoid* duplication, Pet. 19-20.[2]

3. Respondents' suggestion that it is "'impossible'" for an appellate court to defer to a lower court's review of agency action, Timken Opp. 13; ITC Opp. 8, is belied by this Court's decision in *Universal Camera*, which held that this Court reviews substantial evidence determinations for whether the lower court "misapprehended or grossly misapplied" its own review standard, 340 U.S. at 491. Even if, as respondents suggest, this standard emerged as a prudential outgrowth of this Court's discretionary review authority, the Federal Circuit could apply a similarly deferential standard when reviewing fact-laden decisions by the Trade Court. See *Salve Regina*, 499 U.S. at 233 (acknowledging that a court may deferentially

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[2] Respondents note that Congress focused only on avoiding judicial duplication of agency factfinding. Timken Opp 18-21; ITC Opp. 16. But it is implausible that Congress silently intended to introduce duplication at one level of review while seeking to eliminate it at another.

review mixed questions of law and fact regardless of its obligation independently to review pure legal questions); see also *Pierce*, 487 U.S. at 559-60 (holding deferential appellate review standard applied to fact-laden legal question).

II. FUNCTIONAL CONSIDERATIONS WEIGH HEAVILY AGAINST THE WASTEFUL AND ERROR-PRONE APPELLATE REVIEW STANDARD APPLIED IN THIS CASE.

This is the paradigmatic case for deferential appellate review. Pet. 26-30. Indeed, the factors this Court considers when ascertaining appellate review standards cry out for deference. *Id.* Respondents make no attempt to defend the Federal Circuit's approach as a prudent use of judicial resources, nor do they suggest that *de novo* appellate review is more likely, as a practical matter, to yield correct results. See Timken Opp. 27-33; ITC Opp. 14-17. To the extent they address the relevant factors at all, their assertions are incorrect.

First, the "language and structure" of § 1516a are consistent with deferential appellate review; indeed, they mirror those analyzed in *Pierce*. Pet. 26-27. ITC fails to address this factor at all, and Timken *concedes* that, as in *Pierce*, deferential review is an "available inference," Opp. 29 (emphasis omitted). That similar language elsewhere has not been interpreted to support that inference, *id.* at 29-30, does not make the inference less available here.

Second, respondents do not dispute petitioners' showing that the Trade Court is "'better positioned'" than the Federal Circuit to review complex trade determinations, Pet. 27. ITC itself acknowledges that the Trade Court "is a more specialized court than . . . the Federal Circuit." ITC Opp. 16. Instead, respond-

ents try to avoid this factor altogether by claiming that it is limited to cases involving "judicial administration," Timken Opp. 31, or "'supervision of litigation,'" ITC Opp. 14-15. But this Court has never imposed this limitation and has in fact recognized that a trial court's relative competence is relevant in other contexts. See *Salve Regina*, 499 U.S. at 233; see also *United States* v. *Booker*, 543 U.S. 220, 260 (2005) (Breyer, J., delivering the opinion of the Court in part) (applying *Pierce* and *Cooter* to criminal sentencing).

Indeed, the pertinent inquiry in this context—whether a complex evidentiary record is substantial enough for a "'reasonable mind [to] accept'" ITC's conclusions, *Zurko*, 527 U.S. at 162—only highlights the Trade Court's significant institutional advantages. Assessing evidentiary conclusions for "'reasonable[ness]'" in an inherently complex antidumping review proceeding requires highly specialized knowledge, as reflected by Congress's decision to entrust this assessment of international importance to the only specialized Article III trial court in existence. Pet. 6, 24. As petitioners explained, the panel's cursory review in this case—which failed even to acknowledge many of the problems that the Trade Court identified in ITC's analysis—illustrates the impracticality of asking a panel of non-experts to duplicate on appeal the Trade Court's complex and painstaking work. *Id.* at 28-29 & n.11. In a footnote, ITC argues that the panel *did* address the deficiencies, ITC Opp. 17 n.6, but the panel merely acknowledged that "numerous record facts detract" from the ITC's conclusions and asserted that those facts did not detract enough to render ITC's conclusions unsupported by substantial evidence, Pet. App. 32a. The panel's reliance on such boilerplate—together

with its failure to confront the ITC's unsupported inferences—only confirms that the Federal Circuit lacks the resources or expertise to engage meaningfully with ITC's analysis.

Further, there is no merit to ITC's contention, Opp. 15-16, that *Zurko* precludes consideration of the Trade Court's expertise. *Zurko* held only that the Federal Circuit's patent expertise does not exempt it from according ordinary deference to agency decisionmaking, not that an appellate court should ignore a lower court's institutional advantages. 527 U.S. at 154, 163.

Third, review under § 1516a requires fact-intensive, specialized review that is unlikely to profit from broad appellate rules, but will instead benefit from "'the experience that [deferential review] will permit to develop'" at the Trade Court. Pet. 29 (alteration in original) (quoting *Pierce*, 487 U.S. at 562). Respondents do not attempt to argue that the law profits from *de novo* appellate review, but instead argue that such review is required because the question at issue involves the application of a legal standard to resolve the merits of the underlying case. Timken Opp. 32-33; ITC Opp. 15-16. But fact-laden legal issues may be reviewed deferentially, and such deference is not limited to ancillary matters of judicial administration. See *supra* pp. 4-5.

Finally, deferential appellate review advances the statutory purposes of streamlining judicial review and avoiding duplication. Pet. 29. ITC contends that avoiding duplication at the appellate level would somehow "subvert[ ]" Congress's intent to treat the agency as the "primary decision-maker." Opp. 17. But there is no danger of such a result, given that the Trade Court must in all events apply the deferential

"substantial evidence" standard when reviewing the agency record. 19 U.S.C. § 1516a(b)(1)(B)(i).

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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