NO. 22-565

In the Supreme Court of the United States

USP HOLDINGS, INC., ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioner restates the corporate disclosure statement, as recited in the Petition at ii.

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REPLY BRIEF OF PETITIONERS

This case presents two fundamental questions: (1) whether the Commerce decision under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862), that imports "threaten to impair" national security is final agency action within the meaning of the Administrative Procedure Act ("APA"); and (2) whether that decision, if it is final agency action, is nevertheless immune from judicial review under Section 706(2) of the APA (5 U.S.C. § 706(2)).

The federal courts of appeals, until this case, have uniformly followed the key principal that, if a final administrative decision that itself has legal consequences (*i.e.,* constitutes "final agency action"), the decision is subject to judicial review and the action shall be "set aside" if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (APA § 706(2)(A) (the "arbitrary or capricious" standard of review).

The Federal Circuit created a conflict in the circuits by holding that the "arbitrary or capricious" standard of review is not available despite final agency action. No other appellate court has so held. The circuits have uniformly followed the holding of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971), which holds that the "arbitrary or capricious" standard of review is mandated in all cases subject to the APA.

Petitioners have properly raised the "nature and duration" of the President's determination to adjust imports and the limitations on that determination.

Moreover, the President is bound to comply with the conditions on Congress' delegation of tariff-setting authority to the President. Yet, according to Respondents, these matters must be left to the discretion of the President without any role for the judiciary. This is not the law.

Respondents maintain that the Secretary's decision under Section 232(b) that imports "threaten to impair the national security" is not subject to judicial review under the arbitrary or capricious standard. The base this assertion, however, on the connection of Section 232 with national security. In fact, the delegation of authority to the Secretary of Commerce suggests that the statute has at least as much to do with the power to regulate trade.

The Federal Circuit correctly held that the Commerce decision constitutes "final agency action" under the APA precisely because it provides the President with new authority to adjust imports. Thus, it is not "purely advisory." If, as Petitioners believe, the Commerce decision was arbitrary and irrational under the APA, it is within the power of the judiciary to set that decision aside. The courts must review the decision and the APA is the vehicle for doing so.

Cases cited by Respondents are not on point. *See Chicago & Southern Airlines, Inc. v. Waterman SS Corp.*, 333 U.S. 103 (1948) (Civil Aeronautics Board report not reviewable because not final agency action) and *Haig v. Agee*, 453 U.S. 280 (1981) (State Department revocation of passport not reviewable), were clearly issues of national security. Under Section 232, by contrast, a statute delegates congressional authority to limit imports on the Secretary of Commerce. Without an affirmative decision by the Secretary, the Pres-

ident lacked authority to do so. This case does not deal with second-guessing the President's actions; rather, it deals the rationality of the Secretary's decision to confer authority on the President, a delegation that Congress clearly has the power to make. Petitioners do not argue that the President's decisions regarding what steps to take are subject to judicial review under the APA.

The Court of International Trade did not reach the standard of review issue because it erroneously determined that the Commerce decision did not constitute final agency action. The Federal Circuit erred in ignoring the APA's requirements. This is not the law: judicial review of final agency action is required, and the arbitrary or capricious standard is the basic standard of review.

1. The Commerce Decision Constitutes Final Agency Action Under the APA.

Respondents argue that the Commerce decision did not constitute final agency action because it was "purely advisory" (Opp. at 4). The Federal Circuit properly rejected that argument. It noted correctly that Commerce decision granted new authority to the President to adjust imports, and therefore the decision was not "purely advisory" and had "direct and appreciable legal consequences." *USP Holdings, Inc. v. United States*, 36 F.4th 1359, 1367 n. 4 (Fed. Cir. 2022) (App. 19-20), *quoting Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Thus, the Commerce decision is final agency action subject to judicial review.

Respondents' opposition to the Petition fails to address the critical point that Congress delegated the authority to determine whether imports "threaten

to impair" the national security to Commerce, not the President. Congress was guarding its constitutional power to regulate international commerce through this delegation of authority. The President has the authority to "adjust imports" under Section 232 only if the Secretary makes an affirmative decision. The President may accept or reject the Secretary's decision, but only if Commerce gives the President the power to decide.

Petitioners agree that Respondents may defend a judgment in their favor on any basis properly raised below. *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 476 n. 20 (1979). However, their arguments against the Federal Circuit's holding on the final agency action holding must fail. If the Petition is granted, the Court should rule that the Federal Circuit correctly decided the final agency action issue.

2. The APA Requires, at a Minimum, Judicial Review Under the Arbitrary or Capricious Standard.

The Federal Circuit committed error by deciding that the Secretary's decision is not subject to arbitrary or capricious standard of review, citing only *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940). The Federal Circuit did not discuss appellate cases (Petitioners cited examples in the Petition) that are inconsistent with the Federal Circuit ruling. Among those cases we commend to the Court's attention *Overton Park, supra,* and the seminal Section 232 decision of this Court in *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976). Respondents' Opposition similarly failed to examine other relevant authorities on the standard of review question.

Thus, the question of the proper standard of review under the APA is properly presented in this case. Once an administrative decision is ruled to be subject to judicial review under the APA, it naturally follows "in every case" that court review follows the standards set forth in Section 706. *Overton Park*, 401 U.S. at 413-14. At a minimum, this means that a court should review the administrative decision and set it aside if it fails to meet the tests under the arbitrary or capricious standard (APA, § 706(2)(A)).

Respondents argue that *George S. Bush & Co.* rather than the APA controls this case. However, Respondents ignore directly applicable precedent and the language of the APA.

A key precedent is *Algonquin, supra,* which provides clear guidance on this issue. In *Algonquin*, this Court turned aside a claim that a previous version of Section 232 was an unconstitutional delegation of legislative power. The Court noted a single precondition limiting the exercise of executive power and found it dispositive in refuting a claim of unconstitutional delegation: "a finding by the Secretary . . . [must be made] that an 'article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.'" 426 U.S. at 559. This holding is at the center of this case.

Algonquin's specific reference to the Secretary's decision as a "clear precondition[]" to presidential action the notion that an arbitrary and irrational administrative decision granting legislative power to the President is immune from judicial review.

Congress did not go that far. No statute or court precedent, including *George S. Bush & Co.*, permits such an illogical conclusion to be inferred.

George S. Bush & Co. involved a statute that differs markedly from Section 232. The structure of that statute, Section 336 of the Tariff Act of 1930, 19 U.S.C. § 1336, unlike Section 232, does not require an administrative determination giving the President new legal authority to restrict imports. This a key distinction.

Nor does *Dalton v. Specter*, 511 U.S. 462 (1994), support Respondents' arguments. In *Dalton*, this Court noted that the President already possessed power regarding decisions whether to close military bases without the Base Closure Commission's report. The Commission's report was advisory and did not give new legal authority to the President. Indeed, this Court distinguished *Dalton* on this very ground in *Bennett v. Spear*, 520 U.S. at 177.

Here, Section 232 confers no authority on the President to limit imports without an affirmative Commerce decision. Commerce acts as a gatekeeper, providing authority not previously possessed by the President, unlike *George S. Bush & Co.* and *Dalton*. The difference is critical, because that new legal authority provides the final agency action under the Section 704 of the APA. In every case where agencies make final decisions that affect people, Congress that courts may review those decisions.

The congressional delegation of legislative authority to the Secretary is far from unconditional, as this Court noted in *Algonquin*. The 1988 amendments to the statute added other conditions, such as the timing and the content of presidential determinations under

Section 232. Yet Respondents ask this Court to confer legislative authority to restrict imports without a rational determination. If the writ is granted, Petitioners ask this Court to address those additional preconditions.

3. This Case Presents Important Questions of Administrative Law.

Dormant for 30 years after the 1988 amendments to the statute, at least nine investigations under Section 232 have been initiated since 2017. Commerce investigations has made affirmative decisions in most of those investigations.

Lower court decisions have given the President enormous leeway to allow endless modifications to findings that essentially turn the Executive Branch into a legislature. *See, e.g., Transpacific Steel v. United States*, 4 F. 4th 1306 (Fed. Cir. 2021), *cert. denied*, 531 U.S. 1026 (2022); *PrimeSource Bldg. Prods. v. United States*, ___ F. 4th ___, Nos. 21-2066, 21-2252 (Fed. Cir., February 7, 2023).

If Commerce decisions are immune from judicial review, the existing congressional preconditions for presidential action could become complete.

Congress has delegated to the Secretary of Commerce the authority to empower the President to exercise this quintessential authority to regulate international commerce. If a Commerce decision becomes unreviewable, it could become an empty ritual. Failure to adhere to the requirements of the APA would allow the President to instruct the Secretary to issue a decision exempt from judicial review.

Section 232 imposes responsibility on the Secretary, both directly and under the APA, to conduct a rational investigation and render a rational decision based on the evidence in the record. *See FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.").

Because the Secretary's decision is not "purely advisory," *see Bennett v. Spear, supra*, 520 U.S. at 178, it is and must be subject to judicial review, and the standard of review under the APA must be adhered to.

The arbitrary or capricious standard of review is admittedly "deferential." *FCC v. Prometheus Radio Project, supra.* But when agencies make an arbitrary and irrational decision, which Petitioners assert happened in this case, the courts should examine the administrative record and, if the decision is arbitrary, set aside the Secretary's decision.

In conclusion, the Respondents' opposition brief fails entirely to justify an implicit repeal of the arbitrary or capricious standard of review in this case. It also fails to support its claim that the Secretary's decision, which alters the legal landscape by conferring new tariff authority on the President, is not "final agency action."

Petitioners respectfully ask this Court to grant the requested writ.

Respectfully submitted,

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