No. 13-811

In the Supreme Court of the United States

ALMOND BROS. LUMBER CO., ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When a foreign country has violated the rights of the United States by engaging in an unfair trade practice, the United States Trade Representative (USTR) is authorized, *inter alia*, to enter into an agreement that commits the foreign country to "provide the United States with compensatory trade benefits that * * * are satisfactory to the [USTR]" and that "benefit the economic sector which includes the domestic industry" harmed by the unfair trade measures or, in the USTR's discretion, another economic sector. 19 U.S.C. 2411(c)(1)(D)(iii) and (4). The question presented is as follows:

Whether the USTR exceeded its authority under Section 2411(c) by entering into an agreement that required the government of Canada to distribute $500 million to members of the Coalition for Fair Lumber Imports, an industry coalition of United States softwood lumber producers that had participated in the proceedings to end Canada's unfair trade practices, without requiring payment to all other United States producers harmed by the practices.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 721 F.3d 1320. The opinion of the Court of International Trade (Pet. App. 19-60) is not published in the Federal Supplement, but is available at 2012 WL 1372173. A prior opinion of the court of appeals is reported at 651 F.3d 1343. A prior opinion of the Court of International Trade is not published in the Federal Supplement, but is available at 2009 WL 1397182.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2013. A petition for rehearing was denied on October 7, 2013 (Pet. App. 208-210). The petition for a writ of certiorari was filed on January 6, 2014 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Trade Representative (USTR) is responsible for formulating the United States' international trade policy and representing the United States in international trade negotiations. 19 U.S.C. 2171(c)(1)(A) and (C). In particular, the USTR is broadly empowered to enter into agreements with foreign governments in order to redress unfair trade practices that violate United States trade agreements or are otherwise unreasonable or discriminatory. 19 U.S.C. 2411(a) and (b). Section 2411(c)(1)(D) thus authorizes the USTR to "enter into binding agreements with such foreign country" in which the foreign government agrees to take one of several actions enumerated in the statute. 19 U.S.C. 2411(c)(1)(D). The foreign government may agree to eliminate the unfair trade practice at issue; to eliminate any burden on United States commerce resulting from that practice; or to provide the United States with "compensatory trade benefits." 19 U.S.C. 2411(c)(1)(D)(i)-(iii). The question presented in this case concerns the statutory provisions that govern agreements for "compensatory trade benefits."

Section 2411(c)(1)(D)(iii) authorizes the USTR to enter into a trade agreement that commits the foreign country to "provide the United States with compensatory trade benefits" that "(I) are satisfactory to the Trade Representative, and (II) meet the requirements of [19 U.S.C. 2411(c)(4)]." 19 U.S.C. 2411(c)(1)(D)(iii). Section 2411(c)(4) in turn provides that, with certain exceptions, any trade agreement entered into by the USTR under Section 2411(c)(1)(D) "shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that

would benefit from the elimination" of the trade practice at issue, "or benefit the economic sector as closely related as possible to such economic sector." 19 U.S.C. 2411(c)(4). The compensatory trade benefits need not benefit the affected economic sector or a closely related sector, however, if "the provision of such trade benefits is not feasible," or if "trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits." 19 U.S.C. 2411(c)(4)(A) and (B).

2. Members of the United States softwood lumber industry have long asserted that Canada has unfairly subsidized its softwood lumber exports. Pet. App. 3-4. In 1986, the Coalition for Fair Lumber Imports (Coalition), a trade association made up of some but not all domestic softwood lumber producers, petitioned the Department of Commerce and the International Trade Commission to investigate Canada's alleged subsidization of softwood lumber exports. *Id.* at 4. Those agencies determined that Canadian softwood lumber imports were being subsidized and sold at less than fair value. To redress those unfair trade practices, the United States and Canada entered into a memorandum of understanding that remained in effect until 1991, when Canada terminated it. *Ibid.* Over the next several years, Canada and the United States engaged in several rounds of litigation and entered into additional agreements. See 651 F.3d 1343, 1344-1346 (2011).

In 2006, the governments of the United States and Canada entered into the Softwood Lumber Agreement (SLA), which is at issue in this case. Pet. App. 5. In the SLA, the United States agreed to stop collecting antidumping and countervailing duty cash deposits on

imports of softwood lumber from Canada and to refund the approximately $5 billion that had already been collected. *Ibid.* In exchange, Canada agreed to impose certain export taxes upon softwood lumber exported to the United States. *Ibid.* Canada also agreed to "distribute $1 billion to various groups in the United States," including (1) the Coalition, (2) a "binational industry council" described in the SLA, and (3) certain other "meritorious initiatives." *Id.* at 5-6. The SLA specified that the Coalition was to receive $500 million. *Id.* at 6. The SLA did not require Canada to make disbursements to softwood lumber producers in the United States that were not members of the Coalition. 651 F.3d at 1347; see Pet. App. 166-167.

3. a. Petitioners are softwood lumber producers in the United States that are not members of the Coalition, and thus do not stand to receive any of the $500 million that Canada agreed to pay to the Coalition. Pet. App. 6. Petitioners brought suit against the United States and the USTR in the Court of International Trade (CIT) under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* They alleged, *inter alia*, that the USTR had exceeded its statutory authority by agreeing to Canada's distribution of $500 million in duties to the Coalition and its members rather than to all United States softwood lumber producers adversely affected by Canadian producers' trade practices. Pet. App. 6-7.[1] The CIT initially held that it lacked subject matter jurisdiction over peti-

[1] Petitioners also asserted equal-protection and unconstitutional-delegation claims. The court of appeals rejected those claims, Pet. App. 14-17, and petitioners do not press them before this Court. See Pet. i, 11-26.

tioners' claims, but the Federal Circuit reversed. See 651 F.3d at 1351, 1355.

b. On remand, the CIT dismissed petitioners' claims. Pet. App. 19-59. As relevant here, the court rejected petitioners' contention that the USTR had exceeded its statutory authority by agreeing to SLA terms that did not provide for distribution of the $500 million payment on a pro rata basis to all softwood lumber producers affected by the unfair trade practices. The court concluded that Section 2411(c) did not prohibit the USTR from negotiating the terms at issue because Section 2411(c) "does not require that all members of an affected domestic industry profit proportionately from each compensatory trade benefit bargained for in an international agreement." *Id.* at 34. Rather, the court explained, the USTR has broad statutory authority to direct the compensatory trade benefits either to the affected economic sector, or to an unaffected sector. *Id.* at 36.

Having determined that the USTR did not violate Section 2411(c), the CIT concluded that petitioners' claim challenged the USTR's exercise of discretion in negotiating the SLA's terms. That claim, the court held, raised a nonjusticiable political question. Pet. App. 40-42. The court held in the alternative that Section 2411 "commits the negotiation of the manner in which the benefits were to be distributed under the SLA to the discretion of the USTR," and that judicial review was therefore precluded under 5 U.S.C. 701(a)(2). Pet. App. 46.

4. The court of appeals affirmed. Pet. App. 1-18. As relevant here, the court held that the USTR had not exceeded its authority by failing to ensure that the

$500 million would be distributed to all affected members of the softwood lumber industry. *Id.* at 10-14.

The court of appeals explained that Section 2411(c) imposes two limitations on the terms that the USTR may negotiate in a trade agreement that, like the SLA, commits a foreign government to "provide the United States with compensatory trade benefits." 19 U.S.C. 2411(c)(1)(D)(iii). First, the compensatory trade benefits must be "satisfactory to the [USTR]." 19 U.S.C. 2411(c)(1)(D)(iii)(I). Under that provision, the court explained, the "USTR has discretion to craft whatever relief it deems necessary to resolve the dispute." Pet. App. 11. That discretion, the court concluded, is "drawn in such broad terms that . . . there is no law to apply." *Id.* at 12 (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)). The USTR's determination that particular benefits are "satisfactory" is therefore not subject to judicial review. *Id.* at 11-12.

Second, under Section 2411(c)(4), the compensatory trade benefits must benefit "the economic sector which includes the domestic industry harmed by the unfair trade practice the USTR is seeking to curb," "the economic sector as closely related as possible to such economic sector," or, in the USTR's discretion, another economic sector. 19 U.S.C. 2411(c)(4). The court of appeals rejected petitioners' argument that Section 2411(c)(4) requires the agreed-upon trade benefits to "benefit every member of the affected domestic industry." Pet. App. 12. The court explained that the statutory language requires only that the benefits inure to the "economic sector which *includes* the domestic industry." *Ibid.* (quoting 19 U.S.C. 2411(c)(4)). The court also rejected petitioners'

argument that the statute's description of the benefits at issue as "*compensatory* trade benefits," 19 U.S.C. 2411(c)(1)(D) (emphasis added), requires that "compensation be distributed in proportion to the harm experienced by each individual member of the domestic industry." Pet. App. 12-13. The court explained that "such a restriction would be contrary to the remainder of the statute," which permits the USTR broad discretion to distribute benefits to an economic sector *other* than the one adversely affected by the unfair trade practice, if doing so is "more satisfactory" to the USTR. *Id.* at 13. The court of appeals therefore concluded that the USTR had not exceeded its authority under Section 2411(c).

ARGUMENT

Petitioners contend (Pet. 11-23) that Section 2411(c) requires "compensatory trade benefits" to be distributed to all affected parties within an economic sector in proportion to the identified harm suffered by each party. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that Section 2411(c) does not require the USTR to provide in its trade agreements that "compensatory trade benefits" paid by the foreign country are to be distributed on a pro rata basis to affected members of the economic sector that includes the domestic industry that was harmed by the foreign country's unfair practice. The court first held that the USTR's determination under Section 2411(c)(1)(D)(I) that particular benefits are "satisfactory" is not subject to judicial review because Congress has committed that question to agency dis-

cretion. Pet. App. 11-12; see 5 U.S.C. 702(a)(2). Petitioners do not challenge that conclusion. The court next held that Section 2411(c)(1)(D)(iii)'s use of the phrase "*compensatory* trade benefits" (emphasis added) does not impose a pro rata distribution requirement. Pet. App. 12-13. Petitioners' challenges to that holding lack merit.

a. Section 2411(c)(1)(D) confers broad authority on the USTR to enter into "binding agreements" with a foreign country to address that country's engagement in unfair trade practices. 19 U.S.C. 2411(c)(1)(D). Such an agreement may include a commitment by the foreign country to "provide the United States with compensatory trade benefits." 19 U.S.C. 2411(c)(1)(D)(iii). Section 2411(c) imposes only two limitations on the form those benefits should take. First, the compensatory trade benefits must be "satisfactory to the [USTR]." 19 U.S.C. 2411(c)(1)(D)(iii)(I). Second, the compensatory benefits must "benefit the economic sector which includes the domestic industry that would benefit from the elimination of the [unfair trade practice] * * * or * * * the economic sector as closely related as possible to such economic sector," unless the provision of such trade benefits is "not feasible" or "trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits." 19 U.S.C. 2411(c)(4).

Section 2411(c) thus does not require that the compensatory trade benefits be directed to particular members of an economic sector or apportioned in any particular way. Rather, the only requirement that Section 2411(c) imposes on the provision of compensatory trade benefits concerns the "economic sector" to which the benefits must be directed: the benefits

must "benefit" the "economic sector which includes the domestic industry" adversely affected by the trade practice, a "closely related" "economic sector," or, if "more satisfactory" to the USTR, "any other economic sector." Here, the SLA stated that Canada would provide "compensatory trade benefits" to the United States lumber industry, including the Coalition, certain educational and public-interest initiatives related to forestry and timber-reliant communities, and the North American Initiative on Lumber. See Pet. App. 82, 166-167, 205. The USTR thus obtained an agreement for compensatory trade benefits that "benefit" the "economic sector that includes the domestic industry" adversely affected by Canada's unfair trade practices. 19 U.S.C. 2411(c)(4). Section 2411(c) requires nothing more.

b. Petitioners contend that, because Section 2411(c) describes the benefits in question as "*compensatory* trade benefits," 19 U.S.C. 2411(c)(1)(D) (emphasis added), the USTR was required to obtain Canada's agreement to distribute trade benefits "on the basis of the harm that each sector member seeking a distribution had suffered as a result of Canada's subsidization of its softwood lumber industry." Pet. 16-17. The term "compensatory," petitioners assert, implies that the trade benefits must be used to "offset" (Pet. 18) the harm suffered by individual members of the affected industry.

The term "compensatory," however, must be construed in light of the surrounding statutory context. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). The context in which Section 2411(c)(1)(D) appears establishes that "compensatory trade benefits" need not offset identified injuries suffered by individual

parties. As the court of appeals observed, Section 2411(c)(4) permits the USTR "to distribute benefits not only to members of the domestic industry, but also to other economic sectors if, in the USTR's judgment, this would be more satisfactory." Pet. App. 13. Section 2411(c) thus contemplates that the USTR may provide "compensatory trade benefits" to an economic sector that was unaffected by the unfair trade practice at issue.

By definition, benefits provided to an unaffected economic sector would not "offset" any specific "undesired effect[s]" (Pet. 18) felt by members of that economic sector. Read in its larger statutory context, the term "compensatory trade benefits" cannot reasonably be understood as limited to benefits that redress identified harm to individual members of an affected economic sector. The proper construction of that term is confirmed by Section 2411(c)(1)(D)(iii), which states that the foreign country may agree to "provide *the United States* with compensatory trade benefits." 19 U.S.C. 2411(c)(1)(D)(iii) (emphasis added). Accordingly, "compensatory" benefits are those that compensate the United States as a whole—as opposed to specific members of United States industries—for the unfair trade practice. See 19 U.S.C. 2411(a)(1) and (b)(1) (describing unfair trade practices as those that burden "United States commerce").

Petitioners contend, however, that Section 2411(c) requires that the trade benefits be "compensatory" only if the USTR has determined that the benefits should be directed to the economic sector that was affected by the unfair trade practice. Pet. 19-22. Thus, they assert, Section 2411(c)(4)'s provision that trade benefits may be provided to an unaffected eco-

nomic sector sheds no light on the meaning of the term "compensatory." That argument ignores the structure of the statute. Section 2411(c)(1)(D)(iii) states that the USTR may address a foreign country's unfair trade practice by entering into a binding agreement in which the foreign country agrees to provide "compensatory trade benefits." Subsections (I) and (II) of that Section delineate the requirements that "compensatory trade benefits" must fulfill. Under Subsection (II), compensatory trade benefits must be allocated in accord with Section 2411(c)(4), which in turn provides that the benefits may be directed, in appropriate circumstances, to either an affected or an unaffected economic sector. Congress thus contemplated that "compensatory trade benefits" may be distributed to an economic sector that was not affected by the unfair trade practice.

Other aspects of the statutory scheme further refute petitioners' contention that "compensatory trade benefits" must compensate individual members of the affected economic sector in proportion to the harm that each suffered. Section 2411(c) gives the USTR "considerable latitude" (Pet. App. 13) to decide whether a trade agreement should include *any* compensatory trade benefits, or instead should simply provide for the elimination of the unfair practice, 19 U.S.C. 2411(c)(1)(D)(i)-(iii). Section 2411(c) gives the USTR comparable discretion to decide what amount of compensatory trade benefits should be paid, 19 U.S.C. 2411(c)(1)(D)(iii)(I); to which economic sector any such benefits should be directed, 19 U.S.C. 2411(c)(4); and which entities within the relevant sector should receive the compensatory trade benefits, *ibid.* An inflexible requirement of pro rata distribution would be

incompatible with that broad grant of discretion. In addition, Congress is unlikely to have imposed such a significant requirement as pro rata payment—one that would presumably require extensive factfinding about the existence and extent of harm to multitudinous actors in an economic sector—without providing some direction as to how that requirement should be implemented.

Finally, petitioners contend (Pet. 15-16) that Section 2411(c) should be construed expansively because its purpose is "highly remedial." Pet. 15. That canon of construction, however, does not permit a court to interpret "a specific provision more broadly than its language and the statutory scheme reasonably permit." *Pinter* v. *Dahl*, 486 U.S. 622, 653 (1988) (citation omitted). Here, Section 2411(c)'s text and structure foreclose petitioner's construction of "compensatory trade benefits." Section 2411, moreover, is directed to remedying harm to the United States and United States commerce as a whole. See 19 U.S.C. 2411(a) and (b). Congress chose to effectuate that purpose by conferring broad discretion on the USTR to negotiate agreements with countries that have engaged in unfair trade practices, rather than by establishing an inflexible requirement of pro rata distribution to particular industry actors.[2]

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[2] Petitioners also contend (Pet. 16) that their construction of "compensatory trade benefits" is necessary to avoid the "absurd result" that Coalition members receive portions of Canada's payments while non-Coalition softwood lumber producers do not. That some but not all affected members of the relevant economic sector may benefit from the payments is hardly "absurd," however, in light of the USTR's authority to direct the benefits to members of an *unaffected* economic sector or to initiatives that inure to the benefit of the economic sector as a whole. Indeed, petitioners

2. Petitioners assert (Pet. 19) that the court of appeals' decision conflicts with the Court's precedents. The only decisions of this Court on which petitioners rely, however, set forth general principles of statutory construction. See Pet. 19 (citing, *inter alia*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987), and *University of Tex. S.W. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2529 (2013)). For the reasons stated above, the court of appeals correctly construed Section 2411(c), and its decision does not (as petitioners suggest, Pet. 19) conflict with the principle that "Congress expresses its intent through the language it chooses." *Ibid.* (quoting *Cardoza-Fonseca*, 480 U.S. at 433 n.12).

Petitioners also argue (Pet. 25-26) that review is warranted because the Federal Circuit has "exclusive jurisdiction over matters of international trade" and therefore is the "only court to which an aggrieved member of an economic sector can appeal." Pet. 25. Petitioners identify no other cases, however, and the government is aware of none, in which members of an economic sector have challenged the USTR's disposition of compensatory trade benefits. The court of appeals correctly resolved that question of first impression. Further review is not warranted.

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do not challenge the USTR's decision to direct some of the compensatory trade benefits at issue here to public-interest initiatives that broadly benefit the lumber industry. In addition, the Coalition's receipt of a portion of the compensatory trade benefits reflects its role in challenging Canada's softwood-lumber trade practices. Pet. App. 4. Petitioners did not contribute to the Coalition's efforts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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