No. 18-1317

IN THE

Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, AND KURT ORBAN PARTNERS, LLC,
Petitioners,

v.

UNITED STATES AND KEVIN K. MCALEENAN, COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION,
Respondents.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

This case presents a facial challenge to Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, and its use to impose more than $4.5 billion of tariffs on steel products, on the ground that Section 232 unconstitutionally delegates legislative power to the president in violation of Article I, Section 1 of the U.S. Constitution and the principle of separation of powers. A three-judge panel of the Court of International Trade held that it was bound by this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which rejected a statutory challenge to the president's order under Section 232 and an undue delegation argument offered to bolster that challenge.

Petitioners present two questions in their petition before judgment (which they file because an appeal to the Federal Circuit would not advance the development of the law): (1) whether the C.I.T. erroneously found *Algonquin* to be controlling; and (2) whether Section 232 is facially unconstitutionally because its congressional delegation lacks an intelligible principle. *Amicus* speaks to both of these issues by addressing the following question:

Whether the Court of International Trade erroneously concluded that rationality review is not a necessary complement to a permissible delegation of Congress's power to regulate foreign commerce under Section 232 of the Trade Expansion Act.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the separation of powers preserves liberty by ensuring that too much power doesn't reside in a single constitutional actor.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Trump v. Hawaii*, this Court applied a highly constrained review of the president's statutory powers, out of due respect for "the deference traditionally accorded" the office. *See* 138 S. Ct. 2392, 2409 (2018). To assess the reasonableness of the president's action, this Court looked merely to whether his decision making was generally in-line with past exercises of presidential power under the statute. *See, e.g.*, *id.* ("The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under [the statute]."). To ensure the action

[1] Rule 37 statement: All parties received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief. No party's counsel authored this brief in any part and no person or entity other than *amicus* funded its preparation or submission.

comported with applicable law, the *Hawaii* Court simply looked to whether the president's action conflicted with the statute. *See, e.g.*, *id.* at 2412 ("Because plaintiffs do not point to any contradiction with another provision of the [statute], the President has not exceeded his authority under [the statute].").

Even under that limited review, the president's steel tariffs would not survive judicial scrutiny.

For example, the president and secretary of commerce departed without explanation from prior administrations' uniform practice of accounting for the "reliability" of the importing countries. *See* U.S. Dep't of Commerce, *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*, at 27 (Oct. 2001) (finding no national security threat "even if the United States were dependent on imports" because products "are imported from reliable foreign sources"); U.S. Dep't of Commerce, *The Effect of Imports of Gears and Gearing Products on the National Security*, at VII - 17 (1992) (reasoning that "stable, reliable allies of the United States . . . can be expected to trade with the United States . . . in periods in which our country is engaged in military conflict"); U.S. Dep't of Commerce, *The Effect of Crude Oil and Refined Petroleum Product Imports on the National Security*, III - 11 (Jan. 1989) (concluding that the "the growth of non-OPEC [oil] production" enhances U.S. national security); U.S. Dep't of Commerce, *The Effect of Imports of Plastic Injection Molding Machines on the National Security*, at VII - 5 (Jan. 1989) ("A conservative approach is to assume that Canada could provide at least [as many machines imported the prior year] in an emergency.").

Similarly, it is apparent that the president and secretary of commerce relied on factors forbidden by

Congress. Section 232 regulation is not meant to provide an alternative to other statutory forms of relief from import injuries. *See*, *e.g.*, H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958) ("[T]he national security amendment is not an alternative to the means afforded by [statute] for providing industries which believe themselves injured a second court in which to seek relief."). Yet the Department of Commerce cited as a justification for its recommendation—with which the president must concur before he can regulate—the fact that other statutory mechanisms for import relief are time-consuming and unwieldy relative to Section 232 regulations. *See* U.S. Dep't of Commerce, *The Effect of Imports of Steel on the National Security,* at 28 (Jan. 2018) ("[G]iven the large number of countries and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel, or attempts to transship or evade remedial duties."). And the president, in promulgating the steel tariffs, observed that he agreed with the secretary's assessment of "previous U.S. Government measures and actions on steel articles imports and excess capacity," all of which were measures Congress did not intend for consideration. President Donald J. Trump, Proclamation 9705, ¶ 3 (Mar. 8, 2018).

Notwithstanding these and other telltale signs of unreasonable and *ultra vires* decision making, three Article III judges on the Court of International Trade ("CIT") declined to exercise *any* oversight of Section 232 regulation while disposing of relieving the government of a nondelegation challenge. See *Am. Inst. for Int'l Steel, Inc. v. United States*, No. 18-00152, 2019 WL 1354084, at *5 (Ct. Int'l Trade Mar. 25, 2019) (precluding an "inquiry for rationality"). In so holding, the CIT ignored this Court's long-maintained symbiosis

between judicial review and the nondelegation framework. *See, e.g.*, *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–19 (1989) (affirming "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred") (cleaned up).

In analyzing the nondelegation doctrine claim, the CIT's key mistake was its failure to distinguish the circumstances where this Court rightfully demurs from reviewing a president's statutory power from those instances, such as this one, where review is demanded by the nondelegation doctrine to ensure the president keeps within the "prescribed standards" set by Congress. *See United States v. Chicago, Mil., St. P. & P.R.R.*, 282 U.S. 311, 324 (1931) ("Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard[.]") (citation omitted). Specifically, the CIT mistakenly read this Court's precedents as precluding rationality review of a president's statutory authority whenever the delegation includes an element of discretion, which is far too broad.

In the normal course, petitioners would pursue an appeal to the Federal Circuit, despite three Article III judges on the CIT already having adjudicated the constitutional question at controversy. This case, however, presents extraordinary circumstances that justify cert. before judgment. After all, only this Court can clarify the meaning of its own precedents, especially those relating directly to separation of powers. Further, the usual appellate process would unduly waste judicial resources because an earlier *en banc* panel of

the Federal Circuit made the same mistake as the CIT: expansively interpreting this Court's precedents to preclude judicial review of the president's statutory powers whenever the statute includes an element of discretion. *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) (en banc) (denying review even though the statute imposed unequivocal limits on the president's decision making). It would be a waste of resources for another panel of Article III judges to hear a constitutional question previously answered by the full court and since affirmed. The Federal Circuit, moreover, is part of a lower-court split over how to conduct judicial review of the president's statutory authority in light of this Court's precedents. *Id.* at 1363-64 (Gajarsa, J. concurring) (observing circuit split).

In sum, an attenuated judicial review, properly accounting for the president's unique constitutional status and requiring no national security expertise, would demonstrate that the Section 232 steel regulation is irrational and *ultra vires*. Such oversight is demanded in this circumstance because otherwise there can be no "boundaries" on the president's power to regulate foreign commerce, which is the *sine qua non* of the nondelegation doctrine. *See Yakus v. United States*, 321 U.S. 414, 423 (1944). The CIT, however, felt powerless to review the president's decision making in upholding the steel tariffs from a nondelegation challenge. In turn, the CIT based its helplessness on an incorrect reading of this Court's precedent, one that is shared by the *en banc* Federal Circuit. Those cases, moreover, are part of a wider circuit split on this crucial constitutional question. There is, accordingly, an urgent need for the Court to provide guidance by affirming that Section 232 is a permissible legislative delegation only if complemented by calibrated judicial review.

ARGUMENT

I. Article III Oversight, a Key Part of the Nondelegation Framework, Is Readily Tailored to the President's Statutory Powers, So Judicial Review Does Not Implicate Judicial Involvement in National Security Decisions

Although "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial," *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Framers "understood that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," *Loving v. United States*, 517 U.S. 748, 756 (1996) (cleaned up). Accordingly, the nondelegation doctrine is a flexible check against the dangerous concentration of power, which is, of course, the purpose of the separation of powers principle. *See The Federalist*, No. 47 (Madison) ("There can be no liberty where the legislative and executive powers are united in the same person.").

At a minimum, the nondelegation principle requires that Congress delineate the boundaries of its delegated authority with an "intelligible principle." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Yet courts historically have linked nondelegation analysis to some sort of mechanism—typically judicial review or robust administrative procedures—to police the delegee. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 379 (1989) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would

we be justified in overriding its choice of means for effecting its declared purpose.") (quoting *Yakus*, 321 U.S. at 426); *see also Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 744 (D.D.C. 1971) (three-judge panel) ("The claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive and thus naturally involves consideration of the interrelated questions of the availability of appropriate restraints through provisions for administrative procedure and judicial review.").

An analysis of Section 232 confirms the obvious and essential relationship between the nondelegation principle and the availability of meaningful judicial review. In *Fed. Energy Admin. v. Algonquin SNG, Inc.*, this Court located Section 232's "intelligible principles" in the requirements that the president regulate for "national security" purposes, and that the regulation pertain to "imports." 426 U.S. 548, 559 (1976). Although these are capacious concepts, Congress did not intend for courts to allow the president to simply cite "national security" and "imports" as pretenses for unfettered regulatory power. To the contrary, if a regulation promulgated under Section 232 is not confined within the standards prescribed by Congress, then the tariffs lie outside the president's delegation and are, therefore, *ultra vires*. In *Algonquin*, the Court implicitly acknowledged that the statute's intelligible principles amount to judicially testable standards when observing that the "broad" phrase "'national interest' . . . stands in stark contrast with [Section 232's] narrower criterion of 'national security.'" *Id.* at 569.

Of course, the president is a unique delegee of regulatory authority. "Out of respect for the separation of

powers and the unique constitutional position of the President," the Court declined to subject the president's statutory decision making to review under the Administrative Procedure Act. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). But the APA did nothing to alter the basic availability and scope of the traditional "non-statutory" remedies of mandamus, injunction, and declaratory judgment. *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1613–14 (1997) (discussing non-statutory review).

To be sure, this Court is rightfully reluctant to exercise non-statutory review when the president's statutory authority implicates political questions. *See, e.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (denying review of president's exercise of statutory authority to regulate the commissioning of Army officers); *Dakota Cent. Telephone Co. v. S.D. ex rel. Payne*, 250 U. S. 163, 184 (1919) (denying review of president's assessment of state of war as a statutory condition for regulation).

Section 232 of the Trade Expansion Act, by contrast, results from the operation of Congress's "exclusive and plenary" authority to regulate international commerce. *See Board of Trustees of Univ. of Ill. v. United States*, 289 US 48, 56 (1933); *see also Am. Inst. for Int'l Steel, Inc.*, 2019 WL 1354084, at *7 (Katzman, J., *dubitante*) (explaining that "the power to impose duties is a core legislative function"). Indeed, the laying of duties is one of the very few broad regulatory tasks that was once performed directly by lawmakers via a long series of detailed and specific tariff acts passed up through the early 20th century. *See* George Bronz, *The Tariff Commission as a Regulatory Agency*, 61 Colum. L. Rev. 463, 464 (1961) (listing tariff acts).

Although the president has a constitutional role in foreign commerce during peacetime, that function is limited to the negotiation of international agreements. *See, e.g.*, *Pub. Citizen v. U.S. Trade Rep.*, 5 F. 3d 549, 552 (D.C. Cir. 1993) (refusing to review the president's decision making in the exercise of statutory authority to negotiate a multilateral trade agreement).

Yet even where, as here, the president's statutory powers do not implicate political questions, the Court nevertheless might be reluctant to review presidential decision making, out of concern over comparative institutional competencies. As observed in *Boumediene v. Bush*, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." 553 U.S. 723, 797 (2008). Such concerns about relative expertise, would be misplaced in this case, however, because a properly attenuated reasonableness review doesn't require subject-matter familiarity.

In *Franklin v. Massachusetts*, this Court foreclosed so-called "hard look" review of the president's statutory powers. *See* 505 U.S. at 800–01. Therefore, something less than a "searching and careful" review—the "hard look" standard—is required. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). These background principles suggest that a properly attenuated review of presidential regulation is confined to the subset of "hard look" factors that are independent of subject-matter familiarity.

The first is the "simple but fundamental rule of administrative law" that the delegee of congressional power must set forth the grounds on which it acted. *See SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947). The second is a corollary of the first and entails the

"duty to explain [a] departure from prior norms." *Atchinson, T. & SFR Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (citations omitted). The third factor on this non-exhaustive list serves to ensure that the delegee does not "rel[y] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

None of these "not so hard look" factors require courts to possess any expertise beyond common sense. And all of them are offended by the president's Section 232 steel tariffs. To cite an obvious example, the president offered no explanation for his choice of 25 percent tariffs on imported steel. This is a plain violation of the "fundamental rule" that a delegee of congressional authority must at least explain its regulation.

The Section 232 regulations on steel imports also departed radically from prior practice without explanation. For example, where the president's Section 232 regulations might have macroeconomic effects, the Department of Commerce weighed the costs against the benefits. *See* U.S. Dep't of Commerce, *The Effect on the National Security of Imports of Crude Oil and Refined Petroleum Products*, at ES-9 (Nov. 1999) ("The Department concurs with the conclusions of the 1994 and 1988 studies that, on balance, the costs to the national security of an oil import adjustment outweigh the potential benefits."). Despite this consistent prior practice, neither the department's recommendation nor the president's proclamation acknowledged the costs of the Section 232 regulation.

As noted above, the president departed from his predecessors' uniform practice of accounting for the regulated countries' relationships with the United

States. Also noted already, the president and the secretary of commerce impermissibly relied on extraneous factors by basing the Section 232 regulation on the inefficiency of other forms of statutory import relief, which was precisely what Congress intended to avoid.

The Section 232 steel regulation bears other conspicuous signs of irrational decision making. The point here, however, is to show that judicial review can be tailored to the president such that it requires no subject-matter expertise. Under this limited oversight, the regulation does not withstand scrutiny.

II. The Court Below Failed To Perform Any Oversight of the Section 232 Regulation on Steel Imports, Due to a Mistaken Reading of This Court's Precedents Regarding Judicial Review of the President's Statutory Powers

The CIT's nondelegation analysis was fundamentally flawed by its conclusion that "at the time of *Algonquin*, there was no judicial review of matters that Congress had committed to presidential discretion—such as those the President makes under section 232—for rationality, findings of fact, or abuse of discretion." *See Am. Inst. for Int'l Steel, Inc.*, 2019 WL 1354084, at *4. Contrary to the CIT's holding otherwise, this Court never has shied from meaningful oversight of a president's statutory actions merely because the law allows for an element of discretion. *See Cole v Young*, 351 U.S. 536, 543 (1956) (denying president's extension of "national security" personnel authority to "general welfare" agencies); *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 431–33 (1935) (holding, in the alternative, that the president impermissibly abused his

statutory discretion by failing to provide a finding grounding his regulation in the statute).

Moreover, lower courts routinely reviewed the reasonableness of the president's statutory powers "at the time of *Algonquin*." On this point, *Indep. Gasoline Marketers Council v. Duncan* is particularly illustrative, as that controversy also pertained to Section 232 of the Trade Expansion Act. *See* 492 F. Supp. 614 (D.D.C. 1980). In *Duncan*, the district court didn't simply take the president at his word that petroleum regulation under Section 232 addressed "imports." Instead, it was cognizant that the statute "does not authorize the President to impose general controls on domestically produced goods." *Id.* at 618. Thus aware, the court felt it "must look to the design of the program as a whole" to ensure the president wasn't acting beyond his delegated authority. *Id.* Ultimately, the court struck down the regulation, because it "does not fall within the inherent powers of the President, is not sanctioned by the statutes cited by Defendants, and is contrary to manifest Congressional intent." *Id.* at 620–21. *See also AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979) (surveying "[the statute], its legislative history, and Executive Practice" to ensure a "sufficiently close nexus" between the president's regulation and the statutory standards); *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) (holding that mandamus may issue against the president for performance of ministerial statutory duties, although the court ultimately limited itself to a declaratory ruling); *Wyoming v. Franke*, 58 F. Supp. 890, 895–96 (D. Wyo. 1945) (subjecting president's exercise of statutory discretion to the substantial evidence test).

In mistakenly claiming that "the legal landscape" has never allowed for reasonableness review of Section 232 regulations, the CIT purported to align with this Court's decisions in *Dalton v. Specter* and *United States v. George S. Bush & Co.*, which supposedly reflect the Court's supposed longstanding custom of refusing to perform reasonableness review of a president's decision making under statutory grants of authority from Congress, even where political questions are not present. See *Am. Inst. for Int'l Steel, Inc.*, 2019 WL 1354084, at *4. (referring to *Dalton v. Specter*, 511 U.S. 462 (1994) and citing *George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940)).

These cases are inapposite, however, because both pertain to identical regulatory regimes, whereby an independent body—the Defense Base Closure and Realignment Commission in *Dalton* and the Tariff Commission in *George S. Bush & Co.*—rendered an expert recommendation to the president, who then could either agree or disagree. *Compare Dalton*, 511 U.S. at 465 ("Within two weeks of receiving the Commission's report, the President must decide whether to approve or disapprove, in their entirety, the Commission's recommendations.") *with George S. Bush & Co.*, 310 U.S. at 376–77 (outlining statutory provision that restricts president to accepting or rejecting the Tariff Commission's recommendations). In rare circumstances such as these, the regulatory design *per se* serves as a guard against unreasonable decision making. In both *Dalton* and *George S. Bush & Co.*, therefore, the president's authority to alter the *status quo* was confined to the acceptance of recommendations from an independent body insulated from direct presidential management. By thus limiting presidential discretion, these statutory designs filled the essential role normally played

by judicial review regarding the nondelegation doctrine—that is, to ensure the president operates within standards prescribed by Congress.

In regulating under Section 232, by contrast, the president is advised by an executive branch department and, if he agrees with his subordinate's determination that regulation is warranted, he can depart from the recommended remedy. *See* 19 U.S.C. § 1862(c)(1)(A)((ii). Because Section 232 lacks the structural protections of the statutes at issue in *Dalton* and *George S. Bush & Co.*, those two cases cannot reflect the "legal landscape" at the time of *Algonquin*, nor do they inform the present controversy. In expansively interpreting *Dalton* and *George S. Bush & Co.*, the CIT committed a legal error that undermined its application of the nondelegation doctrine. Only this Court can definitively clarify the meaning of its own precedents.

III. The Full Federal Circuit Shares the Court of International Trade's Erroneous Interpretation of This Court's Precedents Regarding Judicial Review of Presidential Statutory Power

The present controversy raises important questions about the Court's constitutional precedents, resolving which is necessarily the exclusive province of this Court. Moreover, three Article III judges already passed on the constitutionality of Section 232. By themselves, these factors suggest that having a second three-judge panel hear this case is a waste of judicial resources. Yet this suggestion takes on greater urgency on recognizing that the full Federal Circuit already interpreted *Dalton* and *George S. Bush & Co.*—in a manner even more expansive than that of the CIT.

In *Motions Systems Corp. v. Bush*, the Federal Circuit sitting *en banc* heard a controversy over the president's authority to regulate trade with China. *See* 437 F.3d 1356 (Fed. Cir. 2006) (en banc). Under the U.S.-China Relations Act of 2000, the president became empowered to regulate imports if he agreed with an advisory body that Chinese imports were causing domestic "market disruption." *Id.* 1357–58 (describing statutory scheme). If, however, the president disagreed with the expert recommendation, he could refrain from imposing relief only if such regulation would have an adverse domestic economic impact that is "clearly greater" than the benefits of relief. *Id.* at 1359.

Domestic industries sought judicial review of the president's determination that regulating Chinese imports would have an adverse effect "clearly greater" than the regulation's benefits. Before the Federal Circuit, the challengers argued that the administrative record did not support the president's finding, and, as a result, the president had acted "beyond the scope of authority delegated to him under the statute." *Id.* at 1359–60. Despite the seemingly plain statutory limits of the U.S.-China Relations Act, the full Federal Circuit held that *Dalton* and *George S. Bush & Co.* left the appellants "with no right to judicial review here." *Id.* at 1359; *see also Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1342 (Fed. Cir. 2010) (affirming *en banc* panel's analysis in *Motions Systems Corp.*).

The statute at issue in *Motions Systems* included limits that were far more definite than any of the language in Section 232. Nevertheless, the Federal Circuit refused to exercise judicial review of the president's decision making, and the court based its order on a reading of *Dalton* and *George S. Bush & Co.* that

conferred greater deference to the president than accorded by the CIT's construal of those cases.

In sum, the Federal Circuit already has interpreted *Dalton* and *George S. Bush*, in an *en banc* decision subsequently affirmed. It would be a waste of judicial resources to undertake briefing and oral arguments merely to confirm the Federal Circuit's established position on these weighty issues, especially since only this Court can definitively interpret its own decisions.

IV. Lower Courts Are Split Over How To Interpret This Court's Precedents Regarding Judicial Review of Presidential Statutory Power

In addition to the need for conservation of judicial resources, certiorari before judgment is further warranted by the pressing need to resolve a circuit split over how to interpret *Dalton* and *George S. Bush & Co.*

Relative to courts in the Federal Circuit's domain, the D.C. Circuit has adopted a much narrower take on these cases. For example, *Mountain States Legal Foundation v. Bush* involved a challenge to the president's authority under the Antiquities Act, which authorizes the president regulate "the smallest area compatible" with the proper care for "landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on public lands. 306 F.3d 1132, 1135 (D.C. Cir. 2002) (setting forth statutory text). Appellants argued that courts have a responsibility to review whether the president had complied with the statute's limits—that is, whether the president regulated the "smallest area" necessary to protect "objects"—or else "the Act constitutes an unconstitutional delegation of congressional authority." *Id.* at 1133.

Unlike the Federal Circuit, the D.C. Circuit distinguished *Dalton* and *George S. Bush & Co.* To the D.C. Circuit, those cases are "inapposite" when the enabling act "places discernable limits on the President's discretion." *Id.* at 1136. In these circumstances, "[c]ourts remain obligated to determine whether statutory restrictions have been violated." *Id.* Out of "separation of powers concerns," however, the panel adopted heightened pleading requirements for factual allegations. *Id.* at 1137. *See also Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) ("Insofar as [plaintiff] alleges that the Monument includes too much land, *i.e.*, that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest, [plaintiff] does not make the factual allegations sufficient to support its claims."); *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 55 (D.D.C. 2018) ("[R]eview would be available only if the plaintiff were to offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set.").

At least two non-controlling opinions by Federal Circuit judges have acknowledged the split between their court and the D.C. Circuit over how to handle challenges to a president's statutory powers. *See Motions Sys.*, 437 F.3d at 1363-64 (Gajarsa, J. concurring) (arguing that the court should follow D.C. Circuit in distinguishing *Dalton* and allow for review of the range of statutory discretion assigned to the president by Congress); *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1366–67 (Fed. Cir. 2003) (Newman, J., dissenting in part) (objecting to the majority's reliance on *Dalton* and pointing to the D.C. Circuit's opinion in *Mountain States Legal Foundation* for the proposition that sister courts "found no jurisdictional infirmity in

permitting the plaintiff to challenge the President's actions and seek relief directly from the President").

A district court in the Tenth Circuit has adopted a third interpretation of *Dalton* and *George S. Bush & Co*. In *Utah Ass'n of Ctys. v. Bush*, the court heard another challenge to presidential regulation of public lands as "national monuments" under the Antiquities Act. *See* 316 F. Supp. 2d 1172 (D. Utah 2004). As in *Mountain States Legal Foundation* before the D.C. Circuit, the plaintiffs in *Utah Ass'n of Ctys.* alleged both that the president's monument designation exceeded statutory limits and that it violated the nondelegation doctrine. Like the D.C. Circuit, this court disagreed with the Federal Circuit and read *Dalton* and *George S. Bush & Co.* to "leave open one avenue of judicial inquiry . . . [to] ensure that a president was in fact exercising the authority conferred by the act at issue." *Id.* at 1186. However, the court diverged from the D.C. Circuit on the appropriate scope of review. Whereas the D.C. Circuit read *Dalton* to permit review of sufficiently pled facts, the Utah district court held that *Dalton* permitted "facial" review of the president's decision making, while disallowing judicial inquiry into presidential fact-finding. See *Id.* at 1183–84.

Finally, a district court in the Ninth Circuit went in the opposite extreme. In a recent suit about presidential authority under the Outer Continental Shelf Lands Act, a federal court in Alaska cited *Dalton* as support for the availability of judicial review, which is the opposite of how the CIT and Federal Circuit construe the case. *See League of Conservation Voters v. Trump*, 303 F. Supp.3d 985, 993 n.44 (D. Alaska 2018) (reading *Dalton* to mean that "sovereign immunity does not apply" where the president acted either

"unconstitutionally or beyond his statutory powers"). At the pleading stage, this district court believed it was "required" to treat as true all alleged facts, which contrasts sharply with the D.C Circuit's requirement for heightened pleading out of respect for the president's unique office. *Compare id.* at 992 & 997 *with Mountain States Legal Foundation*, 306 F.3d at 1137.

There are costs to lower-court uncertainty over how to review a president's regulatory authority. The absence of an overarching review framework invites presidential adventurism. And in this time of congressional gridlock, these controversies increasingly will spill into the judiciary, as presidents push policy agendas without legislative assistance. Yet the lower courts are utterly confused. Only this Court can resolve the split and provide guidance for judicial review of a president's statutory powers to regulate commerce.

CONCLUSION

For the aforementioned reasons, and those stated by the Petitioners, the Court should grant the petition.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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