No. 19-

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 MARK A. MORGAN, ACTING COMMISSIONER, UNITED STATES CUSTOMS and BORDER PROTECTION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a facial challenge to section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, which the President has used to impose to date more than $6.6 billion of tariffs on imported steel products. Petitioners contend 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. Both a three-judge panel of the Court of International Trade and a similar panel of the Federal Circuit held that petitioners' nondelegation challenge is foreclosed by this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which rejected a statutory challenge to a presidential action under section 232 and, in that context, ruled that section 232 did not present a delegation problem.

Accordingly, this petition presents the following question:

Is section 232 facially unconstitutional on the ground that it lacks any boundaries that confine the President's discretion to impose tariffs on imported goods and, therefore, constitutes an improper delegation of legislative authority and a violation of the principle of separation of powers established by the Constitution?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners, who were the plaintiffs below, are the American Institute for International Steel, Inc. ("AIIS"), a non-profit membership corporation that brought this action on behalf of its 120 members that includes petitioners Kurt Orban Partners, LLC, and Sim-Tex, LP. None of the petitioners has a parent corporation, no publicly held company owns 10% or more of stock of any of the petitioners, and none of the members of AIIS has any ownership interest in AIIS.

Respondents, who were defendants below, are the United States and Mark A. Morgan, Acting Commissioner of U.S. Customs and Border Protection, who was sued in his official capacity.

RELATED CASES

American Institute for International Steel v. United States, No 18-00152, United States Court of International Trade. Judgment entered March 25, 2019.

American Institute for International Steel v. United States, No. 18-1317, United States Supreme Court. Judgment entered June 24, 2019.

American Institute for International Steel v. United States, No. 2019-1727, United State Court of Appeals for the Federal Circuit. Judgment entered February 28, 2020.

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The opinion of the United State Court of Appeals for the Federal Circuit was issued on February 28, 2020, Pet. App. 1-23. It is not officially reported, but is located at 2020 WL 967925. The opinions of the United States Court of International Trade ("CIT") were issued on March 25, 2019. Pet. App. 24-42 & 42-59. They are reported at 376 F. Supp. 3d 1335.

STATEMENT OF JURISDICTION

Petitioners filed this case in the CIT, which has exclusive jurisdiction under 28 U.S.C. § 1581(i)(2) & (4). Pursuant to 28 U.S.C. § 255, a panel of three judges was convened to hear this constitutional challenge. On March 25, 2019, the court entered a final judgment granting the motion of respondents for judgment on the pleadings. Pet. App. 60-61. That same day, petitioners filed their notice of appeal to the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(5). The judgment of the Federal Circuit was entered on February 28, 2020, and no petition for rehearing was filed. This petition is filed pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Article I, Section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 8 of the Constitution provides in relevant part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . [and] To regulate Commerce with foreign Nations . . . ."

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, ("section 232") is set forth in full at Pet. App. 62-69. Section 232(c), which grants the President the power to impose the tariffs giving rise to the injury in this case, provides that, if the President determines that the importation of an article of commerce may threaten to impair the national security, as defined in section 232(d), the President may

> determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security.

STATEMENT OF THE CASE

On March 8, 2018, relying on section 232, the President imposed a 25% tariff on all imported steel products. Pet. App. 70-78. Petitioners are an association of importers and users of imported steel products, and other entities and individuals that are adversely affected by that tariff. They argued below that section 232 unconstitutionally delegates legislative power to the President and that therefore the tariffs are invalid. Their complaint seeks only declaratory and injunctive relief. If they prevail, some of the members of petitioner American Institute for International Steel, Inc.

("AIIS") will have claims for refunds, but many of the members of AIIS (such as longshoremen, railroads, ports, logistics suppliers, and other participants in the supply chain) have been and continue to be injured by the reduction in imports caused by the tariffs and have no claim for refunds or other damages.[1]

At the CIT, the parties agreed that there were no material facts in dispute, and defendants raised no standing or other procedural objections. Two judges noted that section 232 "seem[s] to invite the President to regulate commerce by way of means reserved for Congress," Pet. App. 41, and the third wrote separately that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers." Pet. App. 58 (Katzmann, J., dubitante). Nonetheless, the court concluded that it was bound by this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) ("*Algonquin*"). The plaintiffs in *Algonquin* had argued that the import license fees at issue there were not authorized by section 232 and that to construe section 232 to permit them would raise a delegation problem. It was in that context that this Court concluded that section 232 did not present a delegation problem and therefore declined to interpret section 232's remedies narrowly as the plaintiffs had sought. Based solely

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[1] On January 16, 2020, a class action complaint was filed in the CIT seeking refunds of the steel tariffs paid under section 232. *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, No. 20-00010. The CIT has stayed all proceedings in that case pending the outcome of this case.

on *Algonquin,* the CIT granted judgment on the pleadings for respondents.

After filing their notice of appeal, petitioners filed a petition for a writ of certiorari before judgment. *American Institute for International Steel v. United States,* No. 18-1317. Respondents opposed on two principal grounds: the Federal Circuit should be heard first, even though respondents argued that all courts are bound by *Algonquin*, and second that the Federal Circuit might be informed by the then yet-to-issue decision from this Court in *Gundy v. United States,* No. 17-6086. On June 24, 2019, four days after this Court decided *Gundy v. United States*, 139 S. Ct. 2116 (2019), this Court denied the petition before judgment in this case. 139 S. Ct. 2748.

This case is an ideal vehicle for the Court to make clear that the nondelegation doctrine has continued vitality where the statute has no boundaries and Congress has delegated to the President unbridled discretion to tax imports and to impose other limitations as he sees fit. And, because the CIT has exclusive jurisdiction over cases involving tariffs, no circuit split can emerge over the relevance of *Algonquin* to the constitutionality of section 232. Moreover, unlike the courts below, this Court is free to distinguish *Algonquin*, to limit it, or, if needed, overrule it, and should do so because the statutory claim raised in *Algonquin* bears no resemblance to the delegation challenge here.

Operation of Section 232

Section 232 was enacted pursuant to the power granted exclusively to Congress in Article I, Section 8 of the Constitution "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as its authority "[t]o regulate [c]ommerce with foreign [n]ations." Section 232(b) directs the Secretary of Commerce (the "Secretary") on the application of any department or agency, the request of an interested party, or on his own initiative, to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security. Pet. App. 62. Within 270 days of initiating the investigation, the Secretary is required to submit a report to the President, which includes his findings on whether that article is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and his recommendations for action by the President. Pet. App. 64. Under section 232(c), the President has 90 days to determine whether to concur with the findings of the Secretary, and if he concurs, to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security." Pet. App. 64.

Although the determination by the Secretary under section 232(b) and the President's action under section 232(c) are tied to "national security," section 232(d) includes an essentially unlimited definition of national security that goes far beyond

national defense and foreign relations to encompass purely economic considerations:

> the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, *without excluding other factors*, in determining whether such weakening of our internal economy may impair the national security.

Pet. App. 67 (emphasis added). As a result, in practice, section 232(d) allows the President to "adjust" imports under section 232(c) for virtually any reason whatsoever.

Moreover, section 232 provides no limit or guidance on the type and scope of import adjustments the President may impose. The President may tax imports by increasing existing tariffs by any amount and may impose unlimited new tariffs on goods that Congress has not previously subjected to import duties. The President may also impose quotas—whether or not there are existing quotas—with no limit on the extent of the reduction from any existing quota or import levels. In addition, the President could

impose licensing fees for the subject article, either in lieu of, or in addition to, any tariff or quota already in place. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice—or make the adjustment indefinite—and he may make changes with no advance notice or delay in implementation.

Under section 232(c) the President has a legislative-like range of choices in determining what adjustments to imports he wishes to make, with no guidance from Congress as to how to make them. For example, there is no guidance in section 232 as to whether or when the President should exempt imports from some segments of an industry, but not others, from an otherwise applicable tariff or quota. The statute does not offer any guidance on whether or when to treat imports from various foreign countries on a nondiscriminatory basis, nor on whether or when to exempt some countries. Similarly, although the imported articles subject to a section 232 adjustment may vary widely in their uses, quality, specifications, availability in the United States, and thus in their relation to national security—as they do for imported steel, *see infra* at 22—the President is permitted to disregard those differences, or take them into account, in his unfettered discretion.

There is also no guidance as to whether or how the President should take into account adverse consequences on downstream industries and U.S. consumers from a proposed tariff or other adjustment. Those consequences could include: (1)

raising the prices of domestic products made from the imported article; (2) causing American workers to lose their jobs or work fewer hours; (3) favoring imported finished products that contain or are produced from the imported article and that can be sold at lower prices in the United States because the tariff does not apply to them; or (4) reducing foreign markets for U.S. exports as a result of higher domestic input prices or retaliatory foreign tariffs, as foreign countries have imposed here. The President is, in effect, empowered to decide exactly the kinds of major questions regarding distributional and policy issues that the Constitution assigns to Congress in Article 1, Section 8.

Section 232 also lacks procedural protections, other than time limits within which the Secretary and the President must act, that might restrain the unbridled discretion that it confers on the President. Thus, although the President may order a remedy under section 232 only if he concurs with a finding by the Secretary that imports of the subject article may threaten to impair the national security, the President is not bound in any way by other recommendations of the Secretary. Nor is he required to base his decision on the Secretary's report or on the information provided to the Secretary through any public hearing or submission of public comments.

Section 232 does not provide for judicial review of orders by the President under it, and because the President is not an agency under 5 U.S.C. § 551(1), judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706.

Furthermore, the Department of Justice, on behalf of the United States, has taken the position, with which petitioners agree, that once

> the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports that was appropriate "in the judgment of the President[,]" 19 U.S.C. § 1862(c), . . . his exercise of discretion is not subject to challenge [in court].

Defs.' Mot. to Dismiss at 16–17, *Severstal Export GMBH, et al. v. United States*, No. 18-00057 (Ct. Int'l Trade Apr. 13, 2018), 2018 WL 1779351; *id.* at 19 ("[T]he President's exercise of discretion pursuant to Section 232 is nonjusticiable.").

The President's 25% Tariff

On April 19, 2017, the Secretary opened an investigation into the impact of steel imports under section 232. As part of that investigation, the Secretary held a public hearing on May 24, 2017, and provided for the submission of written statements by interested persons. On January 11, 2018, the Secretary sent the President a report entitled, "The Effect of Imports of Steel on the National Security" (hereinafter, the "Steel Report"). Pls.' Statement of Undisputed Facts at Ex. 5, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 20. The Steel Report recommended a range of alternative actions, including global tariffs, each of which had the stated objective of maintaining 80% capacity utilization for the U.S. steel industry, but

with no explanation as to how a particular trade barrier would accomplish that result. Steel Report at 58–61. At the same time, the Secretary issued a report with similar conclusions regarding imports of aluminum.

As a statute ostensibly based on national security concerns, section 232(b) requires the Secretary to consult with the Secretary of Defense, but the President is not bound by what the Defense Department recommends. In this case, the Secretary of Defense sent a memorandum to the Secretary stating that his Department "does not believe that the findings in the reports [on steel and aluminum] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Pet. App. 154.

On March 8, 2018, the President issued Proclamation No. 9705, Pet. App. 70-78, which imposed the 25% tariff at issue in this action, applicable to all imported steel articles from all countries except Canada and Mexico, effective March 23, 2018. On the same date, the President imposed a 10% tariff on aluminum imports, also based on section 232. Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018). With the amendments noted below, both of these tariffs are now entering their third year, with no projected end date.

The President subsequently amended the order based on Proclamation No. 9705 in a series of proclamations to provide for country-based exclusions, some for limited durations and others indefinite. *See* Proclamation No. 9711, 83 Fed.

Reg. 13,361 (Mar. 28, 2018), Pet. App. 79-88; Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018), Pet. App. 89-97; and Proclamation No. 9759, 83 Fed. Reg. 25,857 (June 5, 2018), Pet. App. 98-104. As a result, Argentina, Brazil, and South Korea are exempt from the 25% tariff without an end date, but are subject to absolute quotas on steel imports. Pet. App. 132 ¶ 9; Pet. App. 100-104. Australian imports are not subject to either the 25% tariff or quotas. As of June 2018, the imports from all other countries, including Canada, Mexico, and the members of the European Union, were subject to the 25% tariff. However, on August 10, 2018, President Trump issued Proclamation No. 9772, Pet. App. 105-111, which doubled the tariff on steel imported from Turkey—and no other country—from 25% to 50%. 83 Fed. Reg. 40,429 (Aug. 15, 2018). Eventually, the President rescinded the doubled tariffs on Turkish steel imports and also set aside the tariffs for Mexico and Canada. Proclamation No. 9886, 84 Fed. Reg. 23,421 (May 21, 2019), Pet. App. 112-118; Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 23, 2019), Pet. App. 119-125.

The 25% tariff imposed under section 232 is not based on any showing of prohibited trade practices by steel exporters or foreign governments in the covered countries. Those practices are already the basis of separate remedial tariffs issued under the antidumping and countervailing duty laws of the United States. According to the Steel Report, as of January 11, 2018, for the steel industry alone, there were 164 such orders in effect, and there were an additional 20 publicly announced investigations

underway. Steel Report at App. K, pp.1–4. Thus, the tariffs at issue here are in addition to any duties already imposed on imports of particular steel articles under these trade remedy statutes.

This Litigation

The complaint was filed on June 27, 2018, along with a motion under 28 U.S.C. § 255 to designate a three-judge panel of the CIT to hear and determine the constitutional issues presented by petitioners. The defendants-respondents are the United States and the Acting Commissioner of U.S. Customs and Border Protection, who is responsible for collecting the payments made on account of the tariffs imposed by the President under section 232.

Petitioner AIIS is a non-profit membership corporation that brought this action on behalf of its 120 members. AIIS's members, which include petitioners Sim-Tex, LP ("Sim-Tex") and Kurt Orban Partners, LLC ("Orban"), have various business connections with the imported steel products that are subject to the 25% tariff challenged in this action. They include companies that use imported steel in the manufacture of their own products, traders in steel, importers, exporters, freight forwarders, stevedores, shippers, railroads, port authorities, unions, and other logistics companies, all of which have been and will continue to be adversely affected by the 25% tariff on imported steel products. Together, AIIS's members handle, import, ship, transport, or store approximately 80% of all imported basic steel products in the United States. Pet. App. 164.

Petitioner Sim-Tex is a Texas importer of steel products. It is also the leading wholesaler in the United States of oil country tubular goods (OCTG) casing and tubing, which are carbon and alloy steel pipe and tube products used in the production and distribution of oil and gas. Sim-Tex imports directly, as the importer of record, and indirectly, through traders, approximately 40–45,000 tons per month from South Korea, Taiwan, Brazil, Germany, Italy and other sources. Pet. App. 169-171.

Petitioner Orban is a specialized steel trader that purchases globally from leading carbon, alloy, and stainless and high nickel alloy manufacturers and sells to manufacturers in the United States. It purchases between 200,000 and 250,000 tons of imported steel per year, all of which is subject to the 25% tariff. As the importer of record on most of these purchases, it is directly responsible for paying all tariffs, including the 25% tariff. Pet. App. 172-175.

Proceedings Below

Three weeks after their complaint was filed, petitioners submitted a motion for summary judgment, with a Statement of Undisputed Facts. Pet. App. 157. Respondents filed their cross-motion for judgment on the pleadings, agreeing that there were no disputed issues of fact and that at least one petitioner had standing. After further briefing, the three-judge panel heard oral argument on December 19, 2018, and issued its decision on March 25, 2019.

Both in the CIT and the Federal Circuit, respondents' principal defense was that this Court's decision in *Algonquin* is controlling on the delegation question. Petitioners argued that *Algonquin* was distinguishable on two grounds.

First, the constitutionality of section 232 as a whole was not before this Court in *Algonquin*, as it is here. Rather, the D.C. Circuit in *Algonquin* had held that section 232 did not authorize the use of the license fees to which plaintiffs objected. *Algonquin SNG, Inc. v. Fed. Energy. Admin.*, 518 F.2d 1051, 1052 (D.C. Cir. 1975), and the government sought certiorari on this question of statutory interpretation. To support their position that section 232 did not authorize the use of license fees, the *Algonquin* plaintiffs argued that, if section 232 were read to give the President the option to use license fees, it would be an unconstitutional delegation of legislative authority. Therefore, the plaintiffs argued, the Court should construe the statute narrowly to avoid the constitutional problem.

It was in that context that this Court made the following statements on which respondents and both courts below relied in concluding that *Algonquin* foreclosed petitioners' challenge. "Even if 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Algonquin*, 426 U.S. at 559.[2] After briefly

[2] As the CIT noted, Pet. App. 31 n.4, what was section 232(b) in 1976, is now section 232(c), but the substance of the

reviewing this Court's decision in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), which established the "intelligible principle" test, the Court concluded that section 232(b) "easily fulfills that test." *Algonquin*, 426 U.S. at 559 That was because, the Court observed, "the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded." *Id.* Based on its reading of section 232 as requiring that the President must consider the factors set forth in the statute, this Court stated that "we see no looming problem of improper delegation that should affect our reading of section 232(b)." *Id.* at 560 (footnote omitted). Although both courts here recognized that petitioners' challenge is to the validity of section 232 as a whole, whereas *Algonquin* was confined to the legality of a particular remedy, they concluded that they did not have the leeway to disregard this Court's broad language in *Algonquin.*

The second basis on which petitioners sought to distinguish *Algonquin* is that any substantive challenge to a President's exercise of discretion or choice of remedies under section 232 is now clearly precluded by the post-*Algonquin* decisions in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994). They argued that the absence of any meaningful judicial review, on top of the President's unbounded powers to pick whatever remedy he decides is appropriate,

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law remains unchanged. In addition, the duties now performed by the Secretary of Commerce were performed by the Treasury Secretary then.

removed the final check to guard against this unlimited delegation by Congress.

On the merits, petitioners pointed to the fact that section 232(d) defines the trigger for invoking section 232(c) to include any significant impact on the national economy or any segment thereof. Moreover, section 232(c) provides the President with an unlimited choice of remedies if the requisite injury from imports is found. The heart of petitioners' claim was that section 232 contained no "boundaries," as required by *Yakus v. United States*, 321 U.S. 414, 423, 426 (1944). This lack of congressionally imposed boundaries is evidenced by the fact that respondents have been unable to identify any action regarding imports that the President could *not* take under section 232. In that respect, petitioners argued, section 232 is like the law at issue in *United States v. Lopez*, 514 U.S. 549 (1995), where this Court rejected the Government's Commerce Clause argument because the Government could not identify any actual or hypothetical federal law that could not be upheld on the theory that it offered.

Although the CIT concluded that it was "bound by *Algonquin*," Pet. App. 32, 36 n. 6, 59, it agreed that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *Id.* at 39-41. Moreover, the court agreed that the scope of judicial review under section 232 is constitutionally problematic: "the President could invoke the statute to act in a manner

constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." *Id.* at 42. Nevertheless, the court held that "such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*." *Id.*

Judge Katzmann filed an opinion dubitante. Pet. App. 42-59. Although he concluded that the court was bound by *Algonquin*, he expressed grave concerns about the breadth of the delegation at issue: "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?" *Id.* at 59.

The Federal Circuit agreed that *Algonquin* foreclosed this challenge and therefore affirmed "without deciding what ruling on the constitutional challenge would be proper in the absence of *Algonquin*.," Pet. App. 14. In doing so, it quoted this Court's reminder in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), that "the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." Pet. App. 18 (alterations in opinion).

REASONS FOR GRANTING THE WRIT

Until this Court's recent decision in *Gundy v. United States*, 139 S. Ct. 2116 (2019), the law of nondelegation, with its intelligible principle test, appeared to be a dead letter as a basis for a

constitutional challenge to a statute. However, both the plurality opinion and the dissent there reaffirmed that a statute that does not set boundaries on the scope of the executive's discretion presents a constitutional delegation problem. As a result, the opinions in *Gundy* (including Justice Alito's concurrence), followed by the statement respecting denial of certiorari of Justice Kavanaugh in *Paul v. United States,* 140 S. Ct. 342 (2019), signal that the application of the doctrine is ripe for re-evaluation. This petition invites the Court to do that.

There are no jurisdictional barriers here, and the relevant facts are few and all admitted. The case has been fully litigated in both lower courts, and *Algonquin* is the only reason that those courts did not independently analyze this delegation challenge. Because of the broad language in *Algonquin*, only this Court can decide whether section 232 violates the nondelegation doctrine. Moreover, although *Algonquin* dealt with delegation only under section 232, unless this Court intervenes, that opinion—as well as lower court opinions like those in this case—will be used by the Executive Branch to argue that delegation challenges to other statutes are similarly foreclosed.

On the merits, as petitioners demonstrate below, section 232 is astonishing in the breadth of discretion, both in the finding that triggers its application and in the completely unbounded

choice of remedies afforded the President, including the amount of any tariffs or quotas. With respect to imports, section 232 transfers to the President the full scope of Congress's power to tax and regulate foreign commerce. This includes the power to tax (*i.e.*, impose tariffs) or set quotas at any level, the ability to treat dissimilar products the same (and similar products differently) for any reason, and the ability to ignore or take into account, however the President sees fit, the inevitable adverse consequences on broad segments of the country from the imposition of tariffs on imports. So expansive are the powers of the President under section 232 that, despite numerous requests from petitioners, respondents have been unable to identify a single action that the President could take regarding imports under section 232 that would exceed his authority, as long as he followed its procedural rules.

This lack of any substantive boundaries presents the question: if section 232 does not violate the nondelegation doctrine, is there any legislative authority that cannot be delegated by Congress to the President? *Gundy* establishes that the delegation doctrine is alive and essential to maintain the proper separation of powers. As we now show, this case is the right one to confirm its vitality and to set its proper limits.

A. Petitioners Present an Unusually Strong Delegation Claim.

Even prior to *Gundy*, this challenge to section 232 presented an excellent opportunity to answer the question of whether the delegation doctrine retains any vitality. After *Gundy*, there is even more reason for the Court to grant review, in part because, unlike *Gundy*, there is no possibility of construing section 232 to avoid the constitutional question.

Section 232 contains a uniquely broad delegation of power from Congress in three respects. First, although the President may invoke section 232 based on a finding that imports of a particular article of commerce may threaten to impair the national security, Congress has expanded the definition of the term "national security" in section 232(d) to sweep within it any and all adverse economic impacts of an imported product on the domestic economy or any segment thereof. In this sense, section 232 is equivalent to the statute at issue in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) which contained "literally no guidance for the exercise of discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). As a result, the factors the President may consider are so expansive that there is nothing that limits his ability to make a "national security" finding under section 232.

By contrast, in *Hampton*, which enunciated the "intelligible principle" test and has become the touchstone of subsequent delegation decisions, duties could be imposed only in order to "equalize

the . . . differences in costs of production in the United States and the principal competing country" for the product at issue. *Hampton*, 276 U.S. at 401 (quoting section 315 of title 3 of the Tariff Act of September 21, 1922). Production costs are an objectively verifiable fact, which provide a concrete limit on when duties can be increased, unlike section 232 with its highly expansive "may threaten to impair" the national (economic) security of the United States standard. Similarly, the air quality standards in *Whitman*, 531 U.S. at 462, could only be issued for air pollutants on a public list promulgated by the agency under 42 U.S.C. § 7408. And the sentencing guidelines at issue in *Mistretta v. United States*, 488 U.S. 361 (1989), only applied to persons first found guilty of a federal offense. Thus, the intelligible principle that the Court identified in each of these statutes was one that placed some substantive limits on the finding that had to be made before any action could be taken, in contrast to the conclusion here that "national security," as capaciously defined in section 232, may be impaired.

Second, section 232 also does not limit the means by which the President may adjust imports. He may choose among imposing tariffs, quotas, embargoes or the licensing fees permitted in *Algonquin*—or any combination thereof, and there are no limits on the scope, duration, or amount of any remedy he chooses. Nor is there a requirement that the president's choices be tied to any factual finding. Thus, here, the choice of a 25% tariff for most countries, combined with quotas and exemptions for other countries, was entirely the

product of presidential fiat, untethered to any statutory factor, or any upper or lower boundaries. The unlimited scope of the President's discretion is confirmed by his decision, five months into the program, to double the tariff on steel imports from Turkey alone (and then reduce the tariff to its previous level nine months later). According to respondents, the President was free to raise and lower the tariffs on a single country without warning because section 232 leaves him completely unconstrained in deciding what tariffs rates to set and how to apply them.

In addition, the President was permitted to choose whether to treat all steel imports, which range from flat-rolled steel coils, to steel plate, to pipes and tubes, to structural beams, to rebar, as a single "imported article" subject to the same tariff, or as 177 distinct articles, as Commerce recognized in the Steel Report. Steel Report at 21-22. His decision in favor of uniform treatment is particularly significant because the Secretary received comments that many steel products have no defense use, that domestic producers already supply all defense needs, and that some imported products are not available domestically in needed specifications. *See generally* Pls.' Statement of Undisputed Facts at Exs. 6 & 7, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 20.

Moreover, section 232 offers the President no guidance on whether or how to consider the impact that these tariffs have on users of imported products such as the steel products at issue here, consumers of those products, workers in industries

that will be adversely affected by the tariffs, or domestic producers of other exported products that are likely to be subject to foreign retaliation in response to section 232 tariffs. Congress left it entirely up to the President to decide what to do about any or all of these factors and how to balance among them. Article I, however, assigns that job to Congress, not the President. By contrast, again in *Hampton*, the remedy there was limited to increasing existing duties to offset the production cost advantages of the other country. Even then, the increase, which was mandatory and not discretionary if the costs were unequal, could not exceed 50% of the existing duty, and duties could not be imposed on duty-free products. *Hampton*, 276 U.S. at 401.

The statute at issue in another trade case, *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), further illustrates how Congress can provide meaningful limits on the President's powers without having to write a law that eliminates his discretion entirely. The statute at issue there was limited to countries that produced any of five enumerated duty-free products. *Clark*, 143 U.S. at 680. If that country imposed "duties or other exactions upon the agricultural or other products of the United States," and the President concluded those duties were "reciprocally unequal and unreasonable," his only remedy was to suspend the duty-free status of those imported products. Moreover, the statute kept the ultimate policy decision with Congress, not the President: if he made the requisite findings, he was required to re-impose the suspended duties. *Id.* at 693.

Third, there is no judicial review of the President's compliance with even those nearly standardless provisions in section 232. To be sure, no decision of this Court has held that the availability of judicial review is a requirement of a constitutionally valid delegation, perhaps because it has been available, and in most cases been exercised, in all of the delegation cases in this Court since *Hampton*. *See Whitman*, 531 U.S. at 479–80. However, this Court has suggested that the absence of judicial review and other procedural protections heightens nondelegation concerns. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–219 (1989) (reaffirming "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") (quoting *Mistretta*, 488 U.S. at 379).

Similarly, as then-Justice Rehnquist observed in his concurring opinion in *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980), the intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *See also Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 759–60 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (emphasizing importance of judicial review in context of nondelegation claims as providing "some measure against which to judge

the official action that has been challenged") (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963)); *Yakus*, 321 U.S. at 425–26 (noting the importance of judicial review as a means to enable Congress, the courts, and the public "to ascertain whether the will of Congress has been obeyed"); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) ("Private rights are protected by access to the courts to test the application of the policy in light of these legislative declarations").

The absence of a judicial review provision applicable to section 232 is relevant for another reason. A provision for judicial review strongly implies that Congress has included standards or limits, which it expects the courts to enforce. Conversely, when Congress does not provide for judicial review, it suggests that there will be no role for the courts because there are no standards or limits to enforce, which is the case here. In short, instead of Congress providing a judicial check, section 232 is "a blank check for the President" which this Court has been understandably reluctant to uphold. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *cf. Lopez*, 514 U.S. at 602 (Commerce Clause is not a "blank check" for Congress) (Thomas, J., concurring). As Justice Gorsuch stated in his dissent in *Gundy*: "If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people." 139 S. Ct. at 2144.

Petitioners acknowledge that this Court has not set aside a federal statute on delegation grounds

since *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). On the other hand, the conclusion that a statute meets the intelligible principle test is based on the specifics of each statute, and none of the cases from this Court cited by respondents below, even tariff cases like *Hampton*, had completely unbounded choices of remedies or open-ended triggers like the "national security" provision in section 232.[3]

In the courts below, petitioners challenged the Government to explain how section 232 met the *Yakus* requirement that a constitutional delegation must have some "boundaries," which requires that there must be *something* that section 232 precludes the President from doing regarding imported articles of commerce. Yet, at no time in briefing or at oral argument did respondents point to any limitation in section 232 (other than the requirement that the Secretary make a finding and that the President concur within 90 days), that restricted the President in any way in deciding how to reduce the perceived threat to the economy.

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[3] During oral argument in the CIT, Judge Kelly asked whether the President could impose an embargo on the importation of peanut butter under section 232 and whether that could be challenged in court. In a series of exchanges with both counsel, Tr. of Oral Argument at 24, 33–34, 44, 51, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 46, counsel for the Government did not answer the question of whether such an order would be lawful, but was firm in the position that "in terms of can the Court look behind the President's national security determination, that's not subject to judicial review, and it has never been that case." *Id.* at 34.

Under *Yakus*, if there are no such boundaries, then the President is acting just the way that Congress would if faced with this situation, which means he is exercising legislative, not executive, power, in violation of Article I, Section 1 and the principle of separation of powers.

The absence of boundaries here is comparable to the absence of limits on the reach of the Commerce Clause that was fatal to the statute at issue in *Lopez*. This Court made the connection there between the limits under federalism at issue there and those under separation of powers at issue here:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Lopez, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Like this case, prior to *Lopez*, this Court had not sustained a Commerce Clause challenge to a federal law in almost 60 years. Like this case, *Lopez* was about boundaries: are there any limits on what Congress can sweep within its Commerce Clause powers? In concluding that the statute at issue in *Lopez* exceeded Congress's admittedly extensive power under the Commerce Clause, the Court repeatedly emphasized the failure by the dissent and the United States to identify an

argument for upholding the statute that would still result in limits:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 564.

Two other cases that were not decided on delegation grounds point up related constitutional concerns that support petitioners' claim here. The first of these, *Clinton v. City of New York*, 524 U.S. 417 (1998), involved a situation similar to this in many respects. There, the Line Item Veto Act, which delegated broad powers to the President, was struck down, albeit not on delegation grounds. Everyone agreed that under Article I, Section 7 of the Constitution an explicit line item veto would be unconstitutional, and the Act was an effort to accomplish the same end by alternative means. Formal doctrines aside, the Line Item Veto was held unconstitutional for the same basic reason that petitioners urge this Court to strike down section 232: both statutes attempt to transfer to the President the authority to make law and not just implement it because, in both cases, Congress surrendered essential policymaking functions to the President without any provisions to reign in his unbridled discretion.

Another decision of this Court relevant to nondelegation is *Sessions v. Dimaya*, 138 S. Ct.

1204 (2018). In a series of recent opinions, this Court has found the residual clauses in a number of criminal sentencing statutes unconstitutional on the ground that they were void for vagueness. *Dimaya* involved a similar residual clause in an immigration statute which the Court struck down for that reason. In doing so, the Court noted that the vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.* at 1212.

In his concurring opinion, Justice Gorsuch made an additional connection between the void for vagueness and the separation of powers flaws: in both, Congress has abdicated its responsibility to make the law, in the vagueness cases by asking the courts to cure the deficiency, and in the delegation cases, by transferring to the President or others in the Executive Branch the power to do what Congress failed to do.

> It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. . .. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events.

Dimaya, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Justice Thomas's dissent made the same connection between the two legal doctrines: "perhaps the vagueness doctrine is really a way to

enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1806 (2012) ('Vague statutes have the effect of delegating lawmaking authority to the executive')." 138 S. Ct. at 1248 (Thomas, J., dissenting).

Gundy confirms the need to grant review. There, the Court unanimously reaffirmed the importance of limits in delegations and—especially Justice Gorsuch's dissent and Justice Alito's concurrence—expressed a willingness to re-examine the manner in which the intelligible principle formulation has led to the unquestioning finding of limits when none existed. Petitioners do not ask or need this Court to overturn *Hampton* or to abandon the concept of an intelligible principle. This Court can set aside section 232 based on the holding of *Hampton,* which is a tariff case like this. Petitioners only ask that this Court require courts to examine the front-end triggers on the use of the delegated power and the breadth of the choices of remedies given to the executive. Seen in that light, section 232 cannot be sustained because it has no boundaries, in contrast to most other post-*Schechter* regulatory programs that have significant limits built into them.

Finally, striking down section 232 as an unconstitutional delegation of legislative power would remind Congress that it cannot turn over the legislative function to the executive and that this

Court will be watching to be sure that does not happen.

B. *Algonquin* Is a Reason for, Not Against, Granting the Petition.

In opposing certiorari before judgment, respondents argued that *Algonquin* was controlling, but they also urged that the Federal Circuit be heard on that question. Now that both lower courts have agreed with respondents on the relevance of *Algonquin*, respondents are in no position to oppose review in this Court on the basis that they relied on before.

Moreover, *Algonquin* is not controlling here. This case is a facial delegation challenge to section 232. If petitioners succeed, it would preclude the President from relying on section 232 at all. By contrast, the only objection made by the plaintiffs in *Algonquin* was that the type of remedy that the President imposed was not authorized by section 232. It was in that limited context that the *Algonquin* plaintiffs raised a constitutional avoidance argument and it was in that context that this Court made the statements on which the lower courts in this case relied. The plaintiffs in *Algonquin* did not urge this Court to strike down the statute as a whole, but only to narrow the remedial power of the President to imposing quotas, which they preferred, rather than the licensing fees that the President had employed.

In addition, the *Algonquin* Court's final paragraph warned that its conclusion that "the imposition of a license fee is authorized by § 232(b)

in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized." 426 U.S. at 571. That warning is based on the assumption that the Court can step in if the President exceeds his section 232 authority. But without any limits in the statute, the promise of judicial review rings hollow.

For example, suppose that, as an additional "adjustment" of imports under section 232(c), the President made the section 232 tariffs non-deductible for federal income tax purposes. Doing so would surely "adjust" the imports of steel products by further increasing the costs of importing such products. Would respondents agree that the courts could review the legality of such an adjustment? And even if they could, on what basis could the courts decide whether that change to the federal tax laws was or was not authorized by section 232?

There are three ways that this Court can respond to *Algonquin* and reach the merits of this case. Two of them are quite modest for this Court: it can conclude that *Algonquin* is distinguishable, for some or all of the reasons given above, or it can limit *Algonquin's* delegation discussion to the facts of that case. Or, under a third option, it can overrule the delegation portion of the opinion, or treat it as *dicta*. Neither approach would require overruling the actual holding of *Algonquin*, which is only that licensing fees are a permitted remedy.

As for *stare decisis*, *Algonquin* was decided in 1976, but it has been cited by this Court only a

dozen times and only once in a case challenging a congressional delegation. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989). Even then, the Court only relied on a footnote "for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." *Id.* at 224 (citing *Algonquin* 426 U.S. at 560 n. 10).

This Court's decision in *Gundy* provides an additional reason why this Court would be unlikely to follow *Algonquin* today. As in *Algonquin,* there were both statutory and delegation issues in *Gundy*, and the plurality was quite clear (and the dissent did not disagree) as to the order in which the issues should be decided:

> a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

139 S. Ct. at 2123. Once the *Gundy* plurality decided that the discretion of the Attorney General was limited to excusing compliance with the statutory requirements only for reasons of

"feasibility," the plurality concluded that the delegation "easily passes muster." *Id.* at 2129; *id.* at 2121 (limiting discretion to feasibility, "easily passes constitutional muster"); *id.* at 2129 (answer to delegation question is "easy"). On the other hand, the plurality observed, if the statute were read in the open-ended way that the dissenters said it did (which is how both petitioners and the Government read section 232), "we would face a nondelegation question." *Id.* at 2123.

The dissent, while differing markedly on how to read that statute, did not suggest that it was proper to conduct the delegation analysis before deciding what the statute said. That is because, as the plurality observed, "once a court interprets the statute, it may find that the constitutional question all but answers itself." *Id.* at 2123. Thus, if the Court in *Algonquin* had first decided that Congress had authorized both licensing fees and quotas, the delegation issue would have more clearly been limited to the question whether a statute that authorized both violated the nondelegation doctrine. That narrow question is a far cry from the facial challenge presented here. But because the *Algonquin* Court, contra to *Gundy*, addressed the constitutional issue first, that provides a further reason why this Court should not follow the delegation discussion in *Algonquin.*

Unlike the lower courts, for which *Algonquin* was seen as an absolute barrier to reaching the merits, this Court will examine *Algonquin* as part of its merits determination, giving it such weight as the reasoning behind the decision justifies. Seen in that light, *Algonquin* is by no means a reason to

deny review, and, properly considered, its continued validity is actually a further basis for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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