No. 19-1177

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

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

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QUESTIONS PRESENTED

In challenging certain steel tariffs under Section 232 of the Trade Expansion Act, petitioners present the following question:

1. 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?

Amicus Cato Institute agrees that this question requires resolution, but suggests that the Court, in granting the petition, add the following question for briefing:

2. Is judicial review of the exercise of a president's statutory authority a necessary complement to any permissible delegation of Congress's power to regulate foreign commerce?

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INTEREST OF *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 ensures that no constitutional actor accumulates too much power. Under our Constitution, Congress can't simply give away its legislative powers—to the president or otherwise—and make the exercise of those powers judicially unreviewable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Courts routinely review agency action for reasonableness. *See* 5 U.S.C. § 706(a)(2). But when Congress delegates the same type of regulatory authority to the president, lower courts generally refrain from reasonableness review, out of a mistaken understanding of this Court's precedent. As a practical result, the president is thus permitted to do almost anything when exercising statutory powers.

This perverse incentive animates the "national security" tariffs on steel imports at issue here. Under

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Nobody other than *amicus* authored this brief in any part or funded its preparation or filing.

black letter law, any court would have set aside these measures as arbitrary and capricious. Still, in the face of tell-tale signs of irrational decision-making, the courts below struggled to apply the Court's precedent, which they understood—incorrectly—to forbid judicial oversight.

A three-judge panel of the Court of International Trade ("CIT") conceded the dangers of unbound authority, but felt helpless to investigate. According to the CIT, Section 232 falls into "a gray area where 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." *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1345 (Ct. Intl. Trade 2019). But this cannot be right: The rule of law doesn't allow for "gray areas" where the president may act *within the statute but outside the Constitution*.

The Federal Circuit's unpublished disposition is similarly perplexing. On the one hand, the court denied the "availability of judicial review of the factual or discretionary presidential determinations"; on the other hand, the court allowed that review remains for "questions about the scope of statutory authority." *Compare* Pet. App. at 20–21 *with* Pet. App. at 21–22. The problem with the court's reasoning is that an irrational "determination" cannot be distinguished

from action that exceeds "the scope of statutory authority." Instead, these are two descriptions of the same *ultra vires* conduct.

The absence of meaningful judicial review, in turn, raises serious concerns about the nondelegation doctrine. At a minimum, the nondelegation principle requires that Congress delineate limits on its delegated authority with an "intelligible principle." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). If, however, the president is permitted to take unreasonable action under Section 232, then plainly there can be no "boundaries" on the president's power to regulate foreign commerce. *See Yakus v. United States*, 321 U.S. 414, 423 (1944).

In *Fed. Energy Admin. v. Algonquin SNG, Inc.*, this Court identified two intelligible principles in Section 232: The president must regulate for "national security" purposes, and the regulation must pertain to "imports." 426 U.S. 548, 559 (1976). In observing that the "broad" phrase "'national interest' . . . stands in stark contrast with [Section 232's] narrower criterion of 'national security,'" the *Algonquin* court implicitly acknowledged that these limits amount to judicially testable standards. *Id.* at 569.

Congress did not intend for courts to allow the president to simply cite "national security" as a pretense for unfettered regulatory power. There must be *some* limits on the president's power.

Of course, the president is not normally a direct delegee of statutory authority, and his office must be respected as the head of a coequal branch of government. Nevertheless, an attenuated judicial review,

properly accounting for the president's unique constitutional status—and requiring no national security expertise—would satisfy the constitutional minimum of judicial oversight. Otherwise, there are no limits on presidential power to regulate foreign commerce, which eviscerates the nondelegation principle.

By abandoning judicial review of the president's statutory powers, the CIT and Federal Circuit ducked their duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Those cases, moreover, are part of a wider circuit split on this important 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. This controversy is an ideal vehicle for the Court to clarify that its precedents do not preclude reasonableness review when presidents exercise a congressional delegation of authority.

ARGUMENT

I. THE COURTS BELOW IMPROPERLY ABANDONED JUDICIAL REVIEW

The section 232 tariffs demonstrate quintessentially unreasonable decision-making. For example, the Commerce Department's investigation failed to account for the "reliability" of importing countries. The last time it investigated steel imports under Section 232, the department determined there would be no national security threat "even if the United States were dependent on imports" because these products "are imported from reliable foreign sources." U.S. Dep't of Commerce, *The Effect of Imports of Iron Ore*

and Semi-Finished Steel on the National Security, 27 (Oct. 2001). The department did not explain why it broke with the past here by refusing to consider the allied status of our trading partners in assessing the "national security" of steel imports.

Similarly, the Commerce Department unreasonably relied on flimsy evidence to support its contention that tariffs should be set at a level that allows steel mills to operate at least an 80 percent "utilization rate." To justify this crucial metric, the department provided, without explanation, a footnote to a short online article—fewer than 300 words and more than three years old—that offers no support for such a conclusion. *See* U.S. Dep't of Commerce, *The Effect of Imports of Steel on the National Security*, 47 (Jan. 2018) (linking to Mohit Oberoi, "Why Steel Investors Are Mindful of Capacity Utilization Rates," *Market Realist* (Oct. 2, 2014)).

There are many more obvious examples of unreasoned decision-making associated with the Section 232 tariffs on steel imports, but those specific instances are immaterial to this facial challenge. Instead, the point here is to demonstrate the doctrinal misunderstanding that prevented the courts below from performing any meaningful oversight of executive authority.

A. Section 232 Is a Congressional Delegation That Implicates Neither Executive Power Nor Political Questions

Although its precise reasoning is unclear, the Federal Circuit seems to believe that Section 232

"strengthens authority within the President's independent constitutional power." Pet. App. at 19.

But this Court has described Congress's constitutional power to pass a tariff statute as being "exclusive and plenary." *See Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933). Section 232 tariffs thus emanate from "a core legislative function." *See Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. at 1346 (Katzman, J., dubitante). Indeed, the laying of duties is one of the 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). Section 232, by contrast, authorizes the president to negotiate international agreements only after an affirmative finding that imports threaten national security. *See* 19 U.S.C. § 1862(c)(3)(A).

To be sure, this Court is rightly reluctant to perform judicial review when the president's statutory authority implicates political questions of executive power. *See*, *e.g.*, *Dakota Cent. Tel. 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). But Section 232 does not entail a political question. Instead, it involves a congressional delegation that is quite similar to the authorities exercised by any regulatory agency.

B. This Court's Precedents Do Not Bar Judicial Review of the President's Statutory Powers

Both the CIT and Federal Circuit denied that judicial review has ever been available for the president's decision-making under Section 232. In so holding, their opinions purported to align with two of this Court's rulings—*Dalton v. Spector*, 511 U.S. 562 (1994), and *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940)—that supposedly reflect a longstanding custom of refusing to review the president's decision-making under statutory grants of authority from Congress, even where political questions are not present. *See* Pet. App. at 20–21; *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1341–42.

These cases are inapposite, however, because they pertain to 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 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

the president to accepting or rejecting the Tariff Commission's recommendations).

In such rare circumstances, the regulatory design *per se* guards against unreasonable decision making. In both *Dalton* and *George S. Bush & Co.*, the president's authority to alter the status quo was thereby confined to the acceptance of recommendations from an independent body insulated from direct presidential control. By thus limiting presidential discretion, these statutory designs filled the essential role normally played by judicial review regarding the nondelegation doctrine—that is, ensuring that the president operates within congressional standards.

Section 232 is different. Here, the president is advised by a cabinet department whose head he can remove at-will. If, moreover, the president agrees with his subordinate's determination, 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 cases neither reflect the legal landscape at the time of *Algonquin* nor inform the present controversy.

II. LOWER COURTS ARE SPLIT OVER JUDICIAL REVIEW OF THE PRESIDENT'S STATUTORY POWERS

Relative to the Federal Circuit, the D.C. Circuit has adopted a broader standard of review. For example, *Mt. States Legal Found. 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 Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 540 (D.C. Cir. 2019) ("[A]lthough the precise 'scope of judicial review' remains an open question, at a minimum, plaintiffs' pleadings must contain plausible factual allegations identifying an aspect of the designation that exceeds the President's statutory authority.") (citations omitted); *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.").

At least two 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. Corp. v. Bush*, 437 F.3d 1356, 1363-64 (Fed. Cir. 2006) (Gajarsa, J., concurring) (arguing that his court should follow the D.C. Circuit in distinguishing *Dalton* and allow for review of the range of the president's statutory discretion); *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 *Mt. States Legal Found.* 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").

The Ninth Circuit recently adopted an altogether different framework for reviewing the president's statutory powers. In *East Bay Sanctuary Covenant v. Trump*, the court determined that presidential decisions are subject to "hard look" review under certain circumstances—namely, when the president's determination is combined with an agency action that together creates an "operative rule of decision." 950 F.3d 1242, 1271 (9th Cir. 2019). The Ninth Circuit's novel standard would arguably apply to Section 232 tariffs, because the president is permitted to regulate

imports only if the Commerce Department finds a national security threat. *See* 19 U.S.C. § 1862(c)(1)(A).

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

III. "NONSTATUTORY REVIEW" ALLOWS FOR JUDICIAL REVIEW OF THE REASONABLENESS OF THE PRESIDENT'S EXERCISE OF HIS STATUTORY POWERS

Section 232 does not explicitly provide for judicial review of presidential orders. In *Franklin v. Massachusetts*, moreover, this Court held that the president is not an agency under 5 U.S.C. § 551(1), so judicial review is not available under the Administrative Procedure Act. 505 U.S. 788, 800–01 (1992).

But the APA did nothing to alter the basic availability and scope of the traditional "nonstatutory" remedies of mandamus, injunction, and declaratory judgment. *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997). Within this flexible framework,

the Court is free to establish parameters to guide meaningful judicial review.

Yet even where, as here, the president's statutory powers do not implicate political questions, courts nevertheless might be reluctant to review presidential decision making, out of concern over comparative institutional competencies. As the Court 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 reviewing a typical exercise of delegated authority, this Court would conduct a wide-ranging inquiry into the reasonableness of the delegee's decision making, known as "hard look" review. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Where it applies, "hard look" review extends even to whether the delegee acted on a "pretextual basis," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019), which would prove a high bar for the government to overcome here. *See*, *e.g.*, Adam Behsudi, "Mattis Departure Leaves Space for More 232 Tariffs," *Politico*, Dec. 21 2018, https://politi.co/2Z0whcV (reporting that the defense secretary's resignation removed internal opposition to Section 232 tariffs); Michelle Fox, "Commerce Secretary Ross: Tariffs Are 'Motivation' for Canada, Mexico to Make a 'Fair' NAFTA Deal," *CNBC*, Mar. 8, 2018, https://cnb.cx/2G5D2SF (report-

ing on non-security reasoning behind tariffs); President Donald J. Trump, Remarks at Signing of the Memorandum Regarding the Investigation Pursuant to Section 232(B) of the Trade Expansion Act (Apr. 20, 2017) ("We've [Commerce Secretary Wilbur Ross and the president] been working on it since I came to office, *and long before I came to office*.") (emphasis added).

Again, however, this Court foreclosed "hard look" review of the president's statutory powers in *Franklin v Massachusetts*, 505 U.S. at 800–01. Accordingly, something less searching is required for review of Section 232 actions. These background principles suggest that a properly attenuated nonstatutory review of presidential regulation is confined to the subset of "hard look" factors that are independent of subject-matter familiarity.

The first factor for a court to consider 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 marker is a corollary of the first and entails the "duty to explain [a] departure from prior norms." *Atchison v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (citations omitted). The third guideline 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. Ass'n 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, as merits briefing here would show.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and add a further question about the necessity of judicial reasonableness review for any permissible delegation of Congress's power to regulate foreign commerce.

Respectfully submitted,

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