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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents make the same three arguments that they have made from the outset: this case is controlled by *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, ("section 232") fits within this Court's recent nondelegation jurisprudence; and the references to "national security" in section 232 give Congress additional leeway in delegating authority to the President. As we demonstrate below, none of these reasons are correct, let alone a basis for denying certiorari.

More significantly, respondents' opposition once again fails to meet the heart of petitioners' argument: that section 232 has no boundaries. Although respondents agree that boundaries are a prerequisite to a constitutional delegation (Opp. 14), they have failed once again to give a single example of a presidential action that would be inconsistent with section 232. Indeed, they once again refuse to respond to the peanut butter hypothetical propounded by the Court of International Trade (Pet. 26, n.3) or the petition's assertion (Pet. 32) that section 232 is so broad that it would allow the President to deny federal income tax deductions for the tariffs paid on imported steel.

Nor do they come to grips with the teaching of *United States v. Lopez*, 514 U.S. 549 (1995), that the inability to identify limits is a fatal flaw when the Government seeks to defend a law that is alleged to have exceeded the constitutional

boundaries of legislative authority to which Congress is required to adhere. More than anything else, it is respondents' inability to specify any action that the President may not take regarding imports that demonstrates why this Court should grant review in this delegation challenge and hold that section 232 is an unconstitutional delegation of legislative authority.

Algonquin Is Not a Basis for Denying Review.

When this case was before this Court just a year ago on a petition for a writ of certiorari before judgment, respondents urged this Court to deny review so that the Federal Circuit could consider whether *Algonquin* controlled. Now that the Federal Circuit has agreed with respondents, in a detour that produced only a delay, respondents ask this Court to deny review because the Federal Circuit correctly applied *Algonquin.* That result makes no sense because, as both lower courts concluded, only this Court can decide whether *Algonquin* is distinguishable, can be limited, or should be overruled.

As our petition explained (Pet. 31-34), *Algonquin* was a very different case from this one. First, *Algonquin* dealt with the narrow question of whether licensing fees were a proper remedy under section 232, whereas this case seeks to prevent the enforcement of section 232 at all because Congress has exceeded its powers by assigning legislative authority to the President.

Respondents argue that because "[a] facial challenge is really just a claim that the law or

policy at issue is unconstitutional in all its applications," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019), this Court's holding that a particular reading of a statute would not render it unconstitutional must mean that *no* reading of the statute would render it unconstitutional. Such a rule would permit the Government to defend a narrow reading of a statute as constitutional in one case, and then later embrace an essentially limitless reading of the same statute while claiming that its later interpretation is insulated from constitutional review by the earlier decision.

The second difference with *Algonquin* is the record in this case, in which the breadth of what section 232 permits the President to do is both demonstrated and embraced by the respondents as consistent with the limits on delegations of legislative authority allowed by Article I. *Gundy v. United States*, 139 S. Ct. 2116, 2128 (2019), emphasized the importance of how the Government interprets and applies statutes, noting in that case that the Attorney General had not sought to apply the statute at issue there "in any more expansive way." Yet in this case, respondents have embraced just such an "expansive" reading of section 232, in contrast with the very limited interpretation of the available remedies that the plaintiffs challenged in *Algonquin*.

Moreover, whether the differences on which petitioners relied suffice to distinguish *Algonquin* is only part of the analysis. There is no doubt that this Court can limit the delegation discussion to the facts of that challenge or, if needed, overrule

Algonquin in light of the concurring and dissenting opinions in *Gundy* and Justice Kavanaugh's statement respecting denial of certiorari in *Paul v. United States*, 140 S. Ct. 342 (2019).

Respondents also fault petitioners for not fully briefing the impact of *stare decisis* on whether this Court should overrule *Algonquin* (Opp. 8, 15). If, as petitioners contend, *Algonquin* should be distinguished by this Court, there is no need for a *stare decisis* analysis. And if this Court grants review, petitioners will fully brief the *stare decisis* question in light of this Court's most recent and extensive discussion in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Finally, denying review in this case would elevate *Algonquin* as a standard for whether a statute meets the test for a proper delegation. *Algonquin's* statements describing the elements of its conclusion, as well as the adjectives proclaiming how readily section 232 satisfies them, would become the *de facto* test for an "intelligible principle," even when the challenge is a facial one such as this. If this Court concludes, contrary to our position, that *Algonquin*'s discussion of the law of delegation is correct, it should do so only after a full consideration of that decision on the merits.

Section 232 Is Far More Expansive than the Statutes that this Court Has Previously Upheld.

Much of the Opposition argues the merits question of whether section 232 violates the limits on delegation of legislative power. But even that discussion is misguided because it relies on cases with statutes very different from section 232.

Despite this Court's admonition to focus on the power a statute actually confers, *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 475 (2001), the Opposition mainly offers limited quotes from this Court's conclusions, without analyzing either the scope of the power granted or whether those other statutes provide significant limitations. For instance, as the petition showed (Pet. 14-15), the statute at issue in *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928) contained significant restrictions on the discretion of the President not found in section 232. Moreover, unlike *Hampton* and *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), which the petition also distinguished (Pet. 23), most of the cases cited in the Opposition are not trade cases, which makes comparisons much less meaningful.

Contrary to respondents' suggestion (Opp. 11), petitioners do not seek to impose "unreasonable or impracticable" requirements on Congress. The requirements found constitutionally sufficient in *Hampton* – that the President determine the duty changes were needed to equalize costs of production in a specific country and were subject to a maximum increase of 50% of an existing tariff – are illustrative of the kind of limits that Congress can reasonably impose on the President, without delegating to him the power to make the law, rather than execute it.

Nor would holding section 232 unconstitutional "prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), or render "most of Government . . . unconstitutional," *Gundy*, 139 S.

Ct. at 2130. Rather, petitioners contend only that Congress may not grant the President the power to regulate any import in any manner he sees fit. To constitute a lawful delegation, Congress must do more than allow the President to rely on conclusory assertions of national security and permit him to impose whatever tariffs or other import restrictions he "deems necessary" to pursue any economic objective of his choosing. Absent some congressionally-mandated restrictions, when and how to exercise those powers are the kinds of major policy choices that are reserved for Congress and may not be delegated wholesale to the Executive Branch. *Cf. Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certioriari).

Although claiming to find limitations in section 232, respondents do not deny that any import that may affect our economy, or any industry in it, can satisfy the national security trigger. Nor do they deny that the President may increase tariffs as much as he wants, across the board or selectively by country or by products within the broad category of steel imports, for as long as he wants, in lieu of, or in addition to, the unlimited quotas that he may also impose. Excluding *Algonquin*, no case that respondents cite upheld a statute with the breadth of section 232, even before *Gundy*.[1]

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[1] Respondents also rely on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (Opp. 9), but the President there did no more than issue an executive order in the identical language that Congress authorized in the bill that the President had just signed into law.

Last, every statute in the cases cited by respondents contained a provision for judicial review, and in almost every case that power had been exercised. Respondents argue (Opp. 14), and petitioners agree, that no case *holds* that judicial review is essential for a statute to withstand a delegation challenge, but no case holds the contrary. Moreover, respondents have no answer to the cases cited in the petition, in which the importance of judicial review in assessing delegation challenges has been repeated in majority opinions of this Court (Pet. 24-25), as well in as concurrences and opinions of esteemed lower court judges.

In addition, in at least one instance, the Solicitor General took a different position on the importance of judicial review in another delegation case. *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996). In the lower courts the Government had argued that the action in question was not subject to judicial review, but the agency defendant had implemented judicial review after the lower court had acted. In urging remand to allow judicial review to take place, the Solicitor General in his reply brief defended its proposed remand as follows: "As Judge Murphy explained, Pet. App. 16a-17a, the availability of judicial review can be an important factor in the non-delegation inquiry. *See* Pet. 23-24." Reply Brief for the Petitioners at 7-8, *Dep't. of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956), 1996 WL 33438671.[2] While the absence of judicial

[2] The dissenters from the grant of review and a remand in that case objected to reliance on the possibility of judicial

review is not dispositive in a delegation challenge, it is at least a factor to be considered as a means to assure that the will of Congress is obeyed.

The Powers of the President in Foreign Affairs Cannot Rescue Section 232.

Respondents also seek to support section 232 by pointing to the powers of the President over foreign affairs. That reliance is misplaced for several reasons.

First, and most significant, the President has no express or implied powers to do what he did here: impose $7 billion in tariffs on steel imports. That power belongs exclusively to Congress under Article I, section 8, clauses 1 and 3, which give it, not the President, the power to "lay and collect Taxes, Duties, Imposts and Excises," and to "regulate Commerce with foreign Nations." Respondents' contention that the regulation of foreign trade is "already within the scope of executive power" (Opp. 14) has no basis in the Constitution nor this Court's jurisprudence.

Second, the Court in *Algonquin* never mentioned, let alone relied on, any constitutional powers of the President in its decision. That is consistent with section 232's focus on the impact of imports on the domestic economy, rather than on diplomatic relations with foreign countries.

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review, largely because it was "accorded only at the discretion of the agency" and not included as a right under the statute. *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 922 (1996).

Third, the foreign affairs discussion from *Curtiss-Wright,* cited in the Opposition (Opp. 9-10), has been heavily discounted in *Zivotofsky v. Kerry*, 576 U.S. 1, 20-21 (2015), even though in *Zivotofsky* the President's power to recognize foreign nations was the basis on which the Court overturned the statute at issue there.

But even if, in a close case, the Constitution gives Congress some leeway in delegating authority to the President in the field of foreign affairs, this is not a close case. The unbounded authority given to the President in section 232 cannot be sustained because, as the concurring judge in the Court of International Trade observed, "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?" Pet. App. 59.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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