No. 21-721

In the Supreme Court of the United States

TRANSPACIFIC STEEL LLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877 (19 U.S.C. 1862), empowers the President to take action to adjust imports that threaten to impair the national security. In issuing Proclamation No. 9772, 83 Fed. Reg. 40,429 (Aug. 15, 2018) the President exercised his authority under Section 232 to increase tariffs on steel imports from Turkey. The questions presented are as follows:

1. Whether Proclamation No. 9772 was issued in violation of Section 232's procedural requirements.

2. Whether Section 232 impermissibly delegates legislative power to the President.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-81) is reported at 4 F.4th 1306. A prior order of the court of appeals is not published in the Federal Reporter but is reprinted at 840 Fed. Appx. 517. The opinion of the Court of International Trade (Pet. App. 87-113) is reported at 466 F. Supp. 3d 1246. Subsequent opinions and orders of the Court of International Trade are reported at 474 F. Supp. 3d 1332 and 481 F. Supp. 3d 1326. An additional opinion and order (Pet. App. 116-136) and judgment (Pet. App. 114-115) of the Court of International Trade are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82-83) was entered on July 13, 2021. A petition for rehearing was denied on September 24, 2021 (Pet. App. 84-86). The petition for a writ of certiorari was filed on

November 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to Section 232 of the Trade Expansion Act of 1962 (Act), Pub. L. No. 87-794, 76 Stat. 877 (19 U.S.C. 1862), the President established tariffs on certain imports of steel articles. Petitioners filed suit in the Court of International Trade (CIT) to challenge the tariffs on various grounds. The court ruled in favor of petitioners. Pet. App. 87-113. The Federal Circuit reversed and remanded. *Id.* at 1-65.

1. Section 232 establishes a procedure through which the President may "adjust the imports" of an article in order to protect "national security." 19 U.S.C. 1862(c)(1)(A)(ii). Under that procedure, the Secretary of Commerce (Secretary) first investigates the effects on national security of imports of the article. 19 U.S.C. 1862(b)(1)(A). During the investigation, the Secretary must consult with the Secretary of Defense and other federal officers and must, if "appropriate," hold public hearings or otherwise give interested parties an opportunity to present information. 19 U.S.C. 1862(b)(2)(A). After the investigation, the Secretary must submit to the President a report containing his findings and recommendations. 19 U.S.C. 1862(b)(3).

If the Secretary finds that imports of the article "threaten to impair the national security," the President must, within 90 days, "determine whether [he] concurs with the finding." 19 U.S.C. 1862(c)(1)(A)(i). If the President concurs, he must, within the same 90-day period, "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national

security." 19 U.S.C. 1862(c)(1)(A)(ii). If the President "determines * * * to take action," he must "implement" that action within 15 days of the determination. 19 U.S.C. 1862(c)(1)(B).

Congress has identified several factors that the President and Secretary must consider when acting under Section 232. Those factors include: (1) the "domestic production needed for projected national defense requirements," (2) "the capacity of domestic industries to meet such requirements," (3) "existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense," (4) "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth," and (5) "the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements." 19 U.S.C. 1862(d). Congress also has directed the President and Secretary to "recognize the close relation of the economic welfare of the Nation to our national security." *Ibid.* More specifically, the President and Secretary must consider "the impact of foreign competition on the economic welfare of individual domestic industries," as well as "any substantial unemployment, decrease in revenues of government, loss of skills or investments, or other serious effects resulting from the displacement of any domestic products by excessive imports." *Ibid.*

Before the investigation that is at issue in this case, Presidents had invoked their Section 232 authority to adjust imports on five occasions. See Proclamation No. 4210, 3 C.F.R. 31 (1974) (license fee for petroleum

imports); Proclamation No. 4341, 3A C.F.R. 2 (1975 comp.) (license fee for petroleum imports); Proclamation No. 4702, 3 C.F.R. 82 (1979 comp.) (embargo on petroleum imports from Iran); Proclamation No. 4744, 3 C.F.R. 38 (1980 comp.) (license fee for petroleum imports); Proclamation No. 4907, 3 C.F.R. 21 (1982 comp.) (embargo on petroleum imports from Libya).

2. In April 2017, the Secretary initiated an investigation to determine the effect of imports of steel on the national security. Pet. App. 11. In a report submitted to the President on January 11, 2018, the Secretary found that the then-present quantities and circumstances of steel imports "threaten to impair the national security" of the United States. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 85 Fed. Reg. 40,202, 40,224 (July 6, 2020). The Secretary explained that steel imports were "'weakening our internal economy'" and undermining the country's "ability to meet national security production requirements in a national emergency." *Id.* at 40,222, 40,224. He recommended that the President address this threat by imposing a tariff on all steel articles imported into the United States or, alternatively, by imposing a tariff on steel articles imported from certain countries (including, as relevant here, Turkey). *Id.* at 40,205.

On March 8, 2018, the President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." Pet. App. 148. To address that threat, the President issued Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018), instituting a global 25%

tariff on most imports of steel articles. Pet. App. 149-151. In implementing the tariff, the President explained that he could "remove or modify" his actions "and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require." *Id.* at 152.

The President later issued several additional proclamations adjusting the tariffs set forth in Proclamation No. 9705. Pet. App. 15. One such proclamation, Proclamation No. 9772, 83 Fed. Reg. 40,429 (Aug. 15, 2018), issued on August 10, 2018, increased the tariff rate for Turkish steel imports from 25% to 50%. Pet. App. 157-163. The President explained that the Secretary had been monitoring steel imports since the introduction of the tariffs; that the imports had not yet fallen to the target levels; that Turkey was a major exporter of steel to the United States; and that imposing a higher tariff on Turkish steel imports was necessary to "further reduce imports of steel articles." *Id.* at 158; see *id.* at 157-158.

On May 16, 2019, the President rescinded the higher 50% tariff for Turkish steel imports, returning the tariff on those imports to 25%. Pet. App. 164-170. The President explained that imports had fallen to target levels and that the higher tariff rate was no longer necessary to address the threat posed by steel imports to national security. *Id.* at 166.

3. Petitioners, domestic importers of Turkish steel, filed suit in the CIT to challenge Proclamation No. 9772. Pet. App. 4-5. The CIT entered judgment for petitioners. *Id.* at 87-113.

The CIT first held that Proclamation No. 9772 had been issued in violation of Section 232's procedural requirements. Pet. App. 94-95. The court observed that Section 232 requires the President to make a deter-

mination within 90 days of the Secretary's report and to implement whatever action he concludes is appropriate within 15 days after the determination. *Id.* at 95. The court construed Section 232 to foreclose the President from modifying his previous actions after those deadlines had passed. *Id.* at 95-99. The court concluded that Proclamation No. 9772 was unlawful because it had been issued after the 90-day and 15-day deadlines had passed. *Id.* at 99.

The CIT held in the alternative that Proclamation No. 9772 violated the equal-protection component of the Due Process Clause of the Fifth Amendment. Pet. App. 103-110. The court concluded that it was irrational for the President to treat steel imports from Turkey differently from steel imports from other parts of the world. *Id.* at 107-108.

4. The court of appeals reversed and remanded. Pet. App. 1-65.

The court of appeals concluded that Section 232 does not preclude the President from modifying his initial action after the expiration of the statute's 90-day and 15-day deadlines. Pet. App. 24-58. The court explained that Section 232 imposes a duty to adjust imports to protect national security, and that a court should not "readily infer congressional intent to limit [the government's] power to get a mandatory job done merely from a specification to act by a certain time." *Id.* at 30 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003)). The court further explained that Section 232's time requirements apply to "the adoption and initiation of a plan of action or course of action," not "to each individual discrete imposition on imports." *Ibid.*

The court of appeals also concluded that Proclamation No. 9772 did not violate the Fifth Amendment's

equal-protection guarantee. Pet. App. 58-65. The court determined that differences between the United States' relationship with Turkey and its relationships with other countries could rationally justify the imposition of higher tariffs on Turkey. *Id.* at 60-61. The court perceived "no authority or sound basis for treating equal-protection analysis under the rational-basis standard as requiring judicial inquiry into differences among particular countries' relations with the United States." *Id.* at 62.

Finally, the court of appeals observed that petitioners had "briefly assert[ed] a nondelegation challenge" to Section 232 "simply to preserve it." Pet. App. 23; see Pet. C.A. Br. 55-56. The court explained, however, that it had recently rejected a similar constitutional challenge in *American Institute for International Steel, Inc.* v. *United States*, 806 Fed. Appx. 982 (Fed. Cir.), cert. denied, 141 S. Ct. 133 (2020). Pet. App. 23.

Judge Reyna dissented. Pet. App. 67-81. He would have held that Proclamation No. 9772 violated Section 232's procedural requirements. *Id.* at 81. He concluded that "[t]he plain language and legislative history of § 232 demonstrate that the President must act within the specified time limits or else forfeits the right to do so until the Secretary of Commerce provides a new report." *Id.* at 73.

ARGUMENT

Petitioners contend (Pet. 21-36) that Proclamation No. 9772 was issued in violation of Section 232's procedural requirements and that Section 232 itself violates the non-delegation doctrine. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another

court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioners argue (Pet. 24-29) that the President issued Proclamation No. 9772 in violation of Section 232's procedural requirements. That is incorrect.

Section 232 empowers the President to take "action" to adjust imports. 19 U.S.C. 1862(c). "*[A]ction* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 18 (3d ed. 2011). Section 232 thus empowers the President to perform a course of acts, not just a single act, to adjust imports.

Section 232 also empowers the President to modify that course of acts as necessary in light of changed circumstances or new information. In general, the power to take regulatory action carries with it the power to amend that action. See, *e.g.*, *North American Fund Management Corp.* v. *FDIC*, 991 F.2d 873, 875 (D.C. Cir.) ("[T]he agency is the source of the regulations and also has the power to amend them."), cert. denied, 510 U.S. 959 (1993); *Case & Co.* v. *Board of Trade*, 523 F.2d 355, 363 (7th Cir. 1975) ("The power to adopt regulations includes the power to amend them."). It would have been especially odd in the present statutory context for Congress to foreclose the President from responding to changed circumstances or new information. Section 232 deals with foreign policy and national security, settings in which flexibility to address changed circumstances and new information is especially vital.

Longstanding executive practice reflects that reading of Section 232. In 1959, President Eisenhower took action to adjust crude oil imports after receiving a report from the Secretary; over the next 16 years, different Presidents modified that initial action at least 26

times, without receiving any new reports from the Secretary. Pet. App. 45. On several occasions during the 1970s and 1980s, Presidents modified other Section 232 actions without receiving new reports. See *PrimeSource Building Products, Inc.* v. *United States*, 497 F. Supp. 3d 1333, 1387-1388 (Ct. Int'l Trade 2021) (Baker, J., concurring in part and dissenting in part) (collecting examples). The Attorney General has explained that Section 232 "contemplates a continuing process of monitoring, and modifying the import restrictions, as their limitations become apparent and their effects change." *Restriction of Oil Imports*, 43 Op. Att'y Gen. 20, 21 (1975). And the Office of Legal Counsel has explained that Section 232 "contemplate[s] a continuing course of action, with the possibility of future modifications." *Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962*, 6 Op. O.L.C. 557, 562 (1982).

Section 232's deadlines do not restrict the President's power to adopt such amendments. The relevant provisions set deadlines for "the adoption and initiation of a plan of action or course of action," not for "each individual discrete imposition on imports." Pet. App. 30. The first provision on which petitioners rely (Pet. 24) states that, within 90 days after receiving the Secretary's report, the President must "determine the nature and duration of the action" that must be taken. 19 U.S.C. 1862(c)(1)(A)(ii). The phrase "nature and duration" indicates that, within the initial 90-day interval, the President need only determine the general character of his plan; he need not identify, in advance, each measure that he will undertake. The other provision on which petitioners rely (Pet. 25) states that the President must "implement that action" within 15 days after

making the determination. 19 U.S.C. 1862(c)(1)(B). But the phrase "implement that action" means only that within 15 days the President must put his plan into effect, not that each step in the plan must be completed within that period.

The statutory history of the time limits confirms that point. The current time limits were not part of Section 232 as originally enacted in 1958. Rather, those limits were added to the statute in 1988. See Pet. App. 38-43; Telecommunications Trade Act of 1988, Pub. L. No. 100-418, Tit. I, Subtit. E, § 1501, 102 Stat. 1257-1260. By the time of that amendment, Presidents had for three decades been exercising the power to modify initial actions under Section 232. See pp. 8-9, *supra*. A court should not infer that Congress disturbed that long-settled understanding absent a "clear indication from Congress of a change in policy." *United States* v. *O'Brien*, 560 U.S. 218, 231 (2010) (citation omitted). Neither the text nor the history of the 1988 amendment to Section 232 provides any clear indication that Congress intended to deprive the President of his longstanding authority to modify initial actions in response to changed circumstances and new information.

Finally, even if the President misses the deadlines set forth in Section 232, his power to take the steps set forth in that provision does not evaporate. See Pet. App. 27-30. This Court's precedents recognize that "duties are better carried out late than never," and that "a statutory rule that officials '"shall" act within a specified time' does not by itself 'preclude action later.'" *Nielsen* v. *Preap*, 139 S. Ct. 954, 967 (2019) (opinion of Alito, J.) (brackets and citation omitted); see, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003) ("[W]e do not readily infer congressional intent to limit

an agency's power to get a mandatory job done merely from a specification to act by a certain time."); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718 (1990) ("[T]he sanction for breach [of a time limit] is not loss of all later powers to act."). Section 232 imposes duties on the President: the President "shall" determine the nature and duration of the action within the 90-day deadline, 19 U.S.C. 1862(c)(1)(A)(ii), and "shall" implement the action within the 15-day deadline, 19 U.S.C. 1862(c)(1)(B). A failure to comply with those time limits would not preclude the President from fulfilling those duties at a later time.

2. Petitioners argue (Pet. 29-36) that Section 232 violates the non-delegation doctrine. That is incorrect. In *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), this Court held that Section 232 complies with the non-delegation doctrine. The Court recently denied two petitions for writs of certiorari asking it to overrule that decision. See *American Institute for International Steel, Inc.* v. *United States*, 141 S. Ct. 133 (2020) (No. 19-1177); *American Institute for International Steel, Inc.* v. *United States*, 139 S. Ct. 2748 (2019) (No. 18-1317). The same result is warranted here.

Although Congress may not delegate legislative power to the executive, it may seek the "assistance" of the executive "by vesting discretion in [executive] officers to make public regulations interpreting a statute and directing the details of its execution." *J. W.*

Hampton, Jr., & Co. v. *United States*, 276 U.S. 394, 406 (1928). Under this Court's precedents, if a statute sets forth an "intelligible principle to which the person or body authorized to [act] is directed to conform," the statute amounts to a permissible grant of discretion, not a "forbidden delegation of legislative power." *Id.* at 409. "Only twice in this country's history" has the Court "found a delegation excessive," and the Court has "over and over upheld even very broad delegations." *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion).

In *Algonquin*, this Court held that Section 232 sets forth an intelligible principle and thus complies with the Constitution. 426 U.S. at 558-560. That case arose after the President invoked Section 232 to establish license fees for certain imports of petroleum. *Id.* at 556. In the course of upholding the license fees, the Court rejected the contention that Section 232 raised "'a serious question of unconstitutional delegation of legislative power,'" holding instead that the statute "easily fulfills" the intelligible-principle requirement. *Id.* at 559 (citation omitted). The Court observed that Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary that an "'article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.'" *Ibid.* The Court also emphasized that "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," since "[t]he President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.'" *Ibid.* Finally, the Court

noted that Section 232 "articulates a series of specific factors to be considered by the President in exercising his authority." *Ibid.* For these reasons, the Court "s[aw] no looming problem of improper delegation." *Id.* at 560.

Petitioners argue (Pet. 29-36) that the court of appeals' interpretation of Section 232's time limits creates a non-delegation problem that did not exist when this Court decided *Algonquin*. That argument is unsound. When this Court decided *Algonquin*, Section 232 did not include any deadlines at all. See Pet. App. 38-43. The Court's rejection of the non-delegation challenge rested not on any time limits, but on other constraints imposed by the statute: the requirement of a finding that the imports threaten to impair national security, the requirement that the President may take action only to the extent necessary to address that threat, and the list of specific factors that the President must consider when exercising his authority. See p. 3, *supra*. If those constraints sufficed to defeat the non-delegation challenge in *Algonquin*, they suffice to defeat petitioners' challenge here.

Petitioners also argue (Pet. 33) that *Algonquin* "requires reconsideration." Under the doctrine of *stare decisis*, however, petitioners must identify a "special justification" for revisiting the question resolved in *Algonquin*. *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). Petitioners have not shown that *Algonquin* was wrongly decided, let alone identified a "special justification" for overruling it. *Ibid.* (citation omitted).

First, the President's discretion under Section 232 is far more constrained than in other cases in which this Court has rejected nondelegation challenges. The Court has upheld statutes that empowered executive agencies

to regulate in the "public interest," see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (citation omitted); to set prices that are "fair and equitable," see *Yakus* v. *United States*, 321 U.S. 414, 422 (1944); and to establish air-quality standards to "protect the public health," see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472-476 (2001) (citation omitted). Section 232's standards are far more specific than those.

Second, this Court has repeatedly held that, in "authorizing action by the President in respect of subjects affecting foreign relations," Congress may "leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936); see *Clinton* v. *City of New York*, 524 U.S. 417, 445 (1998); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 422 (1935). In particular, Congress may "invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Field* v. *Clark*, 143 U.S. 649, 691 (1892). Because Section 232 empowers the President to act in the fields of foreign affairs and foreign trade, it would be constitutional even if it established "a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324. In fact, as discussed above (see p. 13, *supra*), Section 232 provides standards that are more specific than some of the standards that this Court has sustained in the domestic context.

Third, the line between a permissible grant of discretion to the executive and an impermissible delegation of

legislative power "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J. W. Hampton*, 276 U.S. at 406. If there is any area in which common sense and the inherent necessities of governmental coordination support a grant of discretion to the President, it is the area in which Section 232 operates: "national security." 19 U.S.C. 1862(b) and (c). It would be "unreasonable and impracticable to compel Congress to prescribe detailed rules," beyond those set out in Section 232, to constrain the President's power to adjust imports that threaten to impair the national security. *Algonquin*, 426 U.S. at 560 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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